

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2017/0093

BETWEEN:

NEVIS PARADISE LTD.

Claimant

and

- 1. THE NEVIS ISLAND ADMINISTRATION**
- 2. THE DIRECTOR OF PHYSICAL PLANNING**

Defendants

- 3. PARADISE BEACH HOLDINGS LIMITED**

Intervening Party

Appearances:

Mr. Anthony Gonsalves Q.C., with him, Ms. Liska Hutchinson for the Claimant
Ms. Jean Dyer, Mrs. Rhonda Nisbett-Browne with Ms. Kimberly Hanley-Bello for
the Defendants
Mr. Brian Barnes for the Intervening Party

2019: March 22, 23
(Final submissions received on 24 May 2019)
July 24
August 7

JUDGMENT

- [1] **VENTOSE, J.:** Statute law, regulations, policy and practice govern planning law in many countries. These bind all persons desirous of constructing any development in Saint Christopher and Nevis. The primary objective is to provide for an orderly development of the physical infrastructure of a country whether the purpose is for housing, manufacturing or tourism, among others. This case concerns the proper procedures that should be adhered to by those who administer those planning laws when planning applications are considered and made for the purpose of constructing buildings for tourism related purposes in the Island of Nevis; and where these laws, regulations, policies and practices have not been followed, the consequences that follow therefrom.
- [2] Following leave granted on 26 November 2018, the Claimant filed an application for judicial review on 4 December 2018 seeking the following orders:
- (1) An order of certiorari to quash the decision of the Cabinet of the First-named Defendant, purportedly made pursuant to section 28 of the Nevis Physical Planning and Development Control Ordinance Cap. 6:09 (N) ("the Planning Ordinance") and evidenced in a letter from the Principal Assistant Secretary Ministry of Communication and Works to Joel Williams, Acting Director of Planning, and dated 14th March, 2016 stating that Cabinet had approved the application of Paradise Beach Resort for building 5 beach front villas, (the approval in principle), and further evidenced by the document headed APPLICATION FOR DEVELOPMENT PERMISSION with Planning Approval in Principle stamped thereon and signed the Director of Physical Planning on 24th March 2016, and further, and to the extent that same purported to approve and to direct the Second-named Defendant to approve a proposed building permit application ("the Building Permit Application") of Paradise Beach Holdings LLC ("the Interested Party"), which Building Permit Application was thereafter submitted to the Second-named Defendant, and dated 12th July, 2016 being application No. 116-16.
 - (2) An order of certiorari to quash the decision of the Second-named Defendant granting or indicating the grant of planning approval (pursuant to section 15 of the Planning Ordinance) to the Building Permit Application, said permission evidenced and contained in

the Certification document stamped and signed by the Second Respondent on 5th October, 2016.

- (3) For such other orders and relief as the Court deems just in the circumstances.
- (4) That the costs of and occasioned by this claim be paid by the Defendants.

Background Facts

- [3] The Intervening Party applied on 21 October 2015 for approval in principle for the construction of five (5) beach-front villas on the west coast of the parish of St. Thomas in Nevis (the “**Villas**”); (the “**Approval in Principle Application**”). The Approval in Principle Application was considered by the Development Advisory Committee (the “**DAC**”) on 12 November 2015, which rejected it because the Approval in Principle Application did not meet the 120 feet setback from the vegetation line requirement. In a document entitled “**DEVELOPMENT ADVISORY COMMITTEE**” of the same date, it is stated as follows:

...

7. Planning Consideration/Analysis: The beach setback category in the area is 120 feet (37m) landward of the line of permanent vegetation for this development type, according to Planning for Coastline Change by Dr. Gillian Cambers

...

The area is zoned as Hotel and Tourism. The proposed site is sandy with evidence of crab holes. Forty-four feet (44ft) of vegetation was planted in front of the land area where the proposed five cottages/villas will be located. The proposed erection of the cottages will not be in accordance with the required 120feet coastal setbacks mentioned above for the area.

- [4] On the second page it is stated:

Reference: (Author of Report) T.D, RJ

- [5] This is not a document of the DAC, but a report prepared for the DAC by “T.D.” and “R.J.”. “T.D.” refers to Ms. Tilton Douglas, Senior Physical Planning Officer in the Physical Planning Department. This is confirmed in the affidavit evidence of

Ms. Douglas when she stated that after the first site visit on 11 November 2015, and completion of an internal review, a DAC Brief was prepared for the DAC's consideration. At the meeting of the DAC held on 12 November 2015 where this document was considered, the recommendation was to refer the Approval in Principle Application to Cabinet. In the minutes, Ms. Deora Pemberton from the Public Works Department questioned what is meant by the DAC's referrals to Cabinet. The Chairman of the DAC informed the meeting that "ultimately, the Cabinet had the final authority on all applications. Mr. Karrol [from the Legal Department] referred Ms. Pemberton to section 28 of the [Ordinance]".

- [6] On 17 December 2015, the Intervening Party was informed via letter from the Assistant Secretary of the Department of Physical Planning, Natural Resources & Environment (the "**Department of Physical Planning**") as follows:

We are in receipt of your application for Paradise Beach Resort. Your application of 5 new villas increasing the overall villa units to 13 is being processed.

Your proposal was reviewed based on (sic) Nevis Zoning Ordinance 1991 and Coastal Development setback Guidelines for Nevis. Paradise beach has a restrictive development zone of 120ft from the high water mark. Within this restrictive zone only non-habitable structures such as restaurants and swimming pools are allowed.

Kindly note this is a tourism related project and as such will be forwarded to Cabinet with comments.

Thank you for your submissions and we look forward to working with you.

Yours sincerely

- [7] In an email dated 5 February 2016, Ms. Titlon Douglas wrote to Mr. Peter Tantram, the person who had general oversight of the construction of the Villas, reminding him to provide: (1) setbacks from the high water mark to the proposed villas; (2) setbacks from the high water mark to the boundary; and (3) state or justify the reason(s) for the proposed position of the Villas to the coast. In that email, Ms. Douglas referred to the above-mentioned letter sent to the Intervening Party dated 17 December 2015 from the Department of Physical Planning.

[8] Mr. James Cabourne, the Director of the Intervening Party, wrote the Second Defendant, the Director of Physical Planning (the “DPP”), on 8 February 2016 providing justification for the relaxation of the setback for the Villas stating, among other things, that: (1) the setback to the closest point of the pole house is approximately 90 feet from the high water mark; (2) the setback to the closest point of the villa boundary is approximately 84 feet from the high water mark; (3) each pole house is angled away from the setback line and (1) and (2) refer only to a single corner of each house and every other part of the structure is a further setback.

[9] After receiving the correspondence from Mr. James Cabourne, which provided the justification for the relaxation of the 120 feet setback from the vegetation line, Ms. Douglas discussed the matter internally and then amended the internal brief that she had prepared for consideration by the DAC. The document entitled “**DEVELOPMENT ADVISORY COMMITTEE**” of the 12 November 2015 was amended on 16 February 2016. In it, it is stated that:

...

7. Planning Consideration/Analysis: The beach setback category in the area is 120 feet (37m) landward of the line of permanent vegetation for this development type.

...

The area is zoned as Hotel and Tourism. On site 121 ft was measured from lot boundary to edge of vegetation line. Then from the proposed front of building to High Water Mark (HWM) is 78 feet. From the projected part of existing bar to the HWM is 82 ft.

Forty-four feet (44ft) of vegetation was planted in front of the land area where the proposed five cottages/villas will be located. The proposed erection of the cottages will not be in accordance with the required 120 feet coastal setbacks mentioned above for the area.

(Underlined to show where the amendments were made)

[10] The matter was again discussed at a meeting of the DAC on 26 February 2016 and the DAC’s position remained unchanged. The DAC renewed its previous recommendation that the Approval in Principle Application be denied because of

the Intervening Party's inability to provide in respect of the Villas the required setback of 120 feet from the vegetation line.

- [11] On 1 March 2016, Mr. Troy Liburd, the Junior Minister in the Ministry of Communications, Works, Public Utilities, Posts, Physical Planning, Natural Resources and Environment (the "**Ministry of Communication and Works**") authored Cabinet submission No. 34 of 2016 (the "**Cabinet Submission**") as follows:

Honourable Members of Cabinet

Subject: Paradise Beach Resort

Paradise Beach Resort is Seeking Permission for the addition of five beach front villas on a stretch of land adjacent to the south side of the existing development.

The villas are proposed to be traditional style, two bedroom cottages outfitted to cater to a high end clientele. They are proposed to be wooded Structures elevated off the ground on stilts to allow for high tide and storm surge.

The Proposed Buildings are to be located a distance of 78 ft from the high water mark, this contravenes the Stipulations as set out in the first schedule of The Nevis Zoning ordinance, under Sub section Hotels and Tourism Area:

"No Development shall be nearer than 120 feet from the high water mark"

"No building shall be nearer than 300 feet from the high water mark."

Notwithstanding this, it has been the practice on Nevis to used (sic) 150 feet as the setback for masonry and concrete structures as evidenced at developments such as the Four Seasons Resorts, The Hamilton Condos, along the same stretch of Beach. It has also been the practice to allow wooden Structures leeway to construct closer to the beach. This was normally beach bars such as those in the Pinney's Beach area.

The Ministry believes that considering the Type of Structures being proposed (Wooded Structures on stilts) that consideration could be given toward approval, and therefore seek the input of cabinet on this matter

Honourable Members of Cabinet are asked to consider and advise.

Signed

Honourable U. Troy Liburd

Junior Minister of Communications, Works, Public Utilities, Posts, Physical Planning, Natural Resources and Environment

[12] The Cabinet Minute of 2 March 2016 shows that the subject of the minute to be “Paradise Beach Resort seeking permission for the addition of five beach front villas” and that the decision was recorded as “**Cabinet approved the application**”. The minute also records the following instruction to the Permanent Secretary in the Ministry of Communication and Works: “**Please take action in accordance with the above matter**”.

[13] On 14 March 2016, the Principal Assistant Secretary in the Ministry of Communications and Works wrote to the acting DPP, informing that Cabinet had approved the application by the Intervening Party for the construction of the Villas (the “**Cabinet Approval**”) as follows:

Please be advised that the Cabinet of the Nevis Island Administration has approved the application by Paradise Beach Resort for the erection of five beachfront villas on their site. The copy of the Cabinet Minute attached confirming approval, is for your file.

You may now proceed with the application process as it relates to this application.

Thank you.

Sincerely

[14] The Second Defendant, the DPP, granted the Intervening Party approval in principle on 24 March 2016.

[15] The Intervening Party then submitted a building permit application to the DPP to construct the Villas on 12 July 2016 (the “**Building Permit Application**”). The Building Permit Application was for the approval to build the Vilas on land south of the existing properties owned by the Intervening Party. It stated that the material type of the proposed building was to be in wood, and outlined certain setbacks as follows: front (24 feet), side (295 feet), side (10 feet) and rear (60 feet). The Building Permit Application included a certificate of title for the project, the Coastal Impact Evaluation (the “**CIE**”), a site plan, site utility plan in addition to some

construction drawings. The site plan submitted by the Intervening Party indicates that:

Land situate at Paradise Estate Surveyed in May, 1987

- [16] In the introduction to the CIE, it was noted that the Department of Physical Planning requested the Intervening Party to: (1) provide a Coastal Impact Evaluation and the mitigation measures of the proposed development and to include proposed coastal vegetation to protect the beach; (2) produce a drainage plan to show directional runoff from buildings; (3) indicate setback of buildings from the high water mark; and (4) indicate and reflect on detail plans the sewage system to be used and the capacity of such system. The CIE addressed issues such as: (a) wind vulnerability; (b) storm surge, inundation and flooding; (c) beach erosion; (d) solid waste and litter; and (e) turtle nesting. It then outlines the mitigating measures in respect of these factors. At page 13 of the CIE, under the heading "Compliance with Setback Requirements" it was stated that guidelines for coastal development setbacks were developed as part of a regional project "Planning for Coastal Change" by Dr. Gillian Chambers in 1998 and that implementation of these setback guidelines will create buffer zones between a development and the sea to protect life and property and to minimize beach erosion. It was stated that specific setbacks have been determined for individual beaches in Nevis and that in all cases these are measured landwards from the line of permanent vegetation and apply to all types of development: the only exception being for beach bars.
- [17] The setback for the Pinney's beach where the Villas have been constructed is 120 feet from the line of permanent vegetation. At page 14 of the CIE, it was also noted that:
- Because of the inability to attain the 120-foot setback, a combination of horizontal and vertical setbacks will be used to help prevent coastal erosion and protect life and property from inundation. **The horizontal setback will be sixty feet (60") from the vegetation line** and the buildings will be elevated eight feet (8") from the ground level. Additional planting and maintenance will also mitigate possible erosion at the site. (emphasis added)

- The Department of Physical Planning Natural Resources and Environment will verify the setback line prior to commencement of construction activities.

[18] The Building Permit Application was again considered by the DAC on 23 September 2016 and the DAC recommended planning permission be granted. This approval was subject to the Intervening Party complying with the guidelines as set out in the CIE, in particular, the requirement to comply with the 60 feet setback from the vegetation line.

[19] The Building Permit Application was approved by the Second Defendant, the DPP, on 5 October 2016 (the “**Planning Approval**”). In the Planning Approval, it is stated that the basis for the certification is the 1991 Zoning Ordinance and that the Building Permit Application conforms to the 1991 Zoning Ordinance (dated 4 October 2017). On the face of the Planning Approval, it is stated:

CONDITION OF APPROVAL: Adhere to mitigative (sic) measures in the Coastal Impact Evaluation

[20] Therefore, it was an express condition of the Planning Approval that the Intervening Party comply with a sixty feet (60”) setback from the vegetation line and ensure that the buildings are elevated eight feet (8”) from the ground level.

[21] The Intervening Party commenced construction of the Villas in or about December 2016. The Claimant on 21 June 2017 filed an *ex parte* application with sworn affidavit for leave to apply for judicial review for, among other things: (1) an order of *certiorari* to quash the Cabinet Approval; (2) an order of *certiorari* to quash the Planning Approval; and (3) various injunctive reliefs in relation to the implementation of the Planning Approval and the continuation of construction of the Villas. Williams J. granted an interim injunction restraining the Defendants and any other party from implementing further the Planning Approval (the “**Interim Injunction**”). On 28 June 2017, the then interested party, now Intervening Party, filed an application for leave to intervene as an interested party, which was granted by Williams J. The Intervening Party applied, on 29 June 2017, to discharge the Interim Injunction, which was discharged by Williams J. on 11 July

2017. As mentioned above, the application for leave to apply for judicial review was granted by the court on 26 November 2018.

- [22] The issues that arise for determination are as follows: (1) whether Cabinet had the power or authority to make the Cabinet Approval under section 28(1) or section 18 of the Ordinance; (2) whether the directions purportedly given to the DPP in the two 2007 letters were proper directions issued pursuant to section 28(1) of the Ordinance; (3) whether Cabinet or the DPP acted contrary to the Nevis Zoning Ordinance when they made the Cabinet Approval and the Planning Approval respectively; (4) whether Cabinet acted unlawfully in making the Cabinet Approval without an Environment Impact Assessment as required by section 20 of the Ordinance; (5) whether the DPP acted unlawfully in knowingly relying on a defect in the EIA in making the Planning Approval; (6) whether Cabinet breached the Claimant's legitimate expectation in not adhering to the policy in relation to the 120 feet setback from the vegetation line for Pinney's beach; (7) whether Cabinet and the DPP acted unlawfully in making the Cabinet Approval and Planning Approval, respectively, for the Villas to be constructed on the beach contrary to the provisions of the NCEP Act; (8) can the issue of whether there was unreasonable delay by the Claimant in bringing the application for leave to apply for judicial review be reopened in light of the court's finding in the judicial review leave application; and (9) what remedy should the court grant to the Claimant if it succeeds in the application for judicial review?

1. The power or authority of Cabinet to make the Cabinet Approval

- [23] The issue to be considered is whether Cabinet had the power or authority to make the Cabinet Approval under section 28(1) or section 18 of the Ordinance. This requires an examination of the terms of the Cabinet Approval and the legislative framework governing planning applications and decisions in the island of Nevis. Section 5 of the Nevis Physical Planning and Development Control Ordinance CAP 6.09 (N) of the Revised Laws of Saint Christopher and Nevis (the "**Ordinance**") provides that:

5. Director of Physical Planning.

- (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.

[24] This section makes it clear that the DPP is solely responsible for refusing or granting planning applications as defined in the Third Schedule, which includes “the construction, alteration, extension, renovation or demolition of timber frame buildings/buildings to which the Building Guidelines apply”. Section 15(1) of the Ordinance states that:

Notwithstanding 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.

[25] Any person seeking to carry out a development of land must first seek the written permission of the DPP. A person may make a formal application in accordance with section 17 of the Ordinance for **permission** to develop land by submitting an application form in triplicate, along with: (1) a map to identify the lands: (2) plans drawn by a professional (engineer, architect or licensed land surveyor) describing the proposed development; (3) statutory consent if necessary; (4) certification of the professional where applicable; and (5) applicable fees.

[26] Section 6(1) of the Ordinance provides that:

(1) A committee called the Development Advisory Committee is hereby established for the purposes of carrying out the functions that are conferred upon it by this Ordinance.

[27] Section 5(1) of the Ordinance provides that except for applications defined in the Third Schedule, the DPP will act in accordance with the decisions of the DAC for all other classes of applications.

[28] Before making the formal application under section 17, a person may apply for **approval in principle** in accordance with section 18 which provides 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.

(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.

[29] The involvement of the Minister and Cabinet in the planning approval process is based solely on section 28 of the Ordinance (as amended). It is necessary to set out the relevant section in full:

28. Referral of application to Cabinet.

(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.

[30] Under section 28(1) of the Ordinance, the Minister may give directions to the DPP 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, whose decision is final (section 28(2)).

[31] In 2011, section 28 of the Ordinance was amended to delete the original subsections (2), (3), (4) and (5). These were as follows:

(2) Any direction given by the Minister to the Director of Physical Planning under this section must be published in the Gazette and in at least one newspaper in general circulation in the Island of Nevis.

(3) When an application is referred to Cabinet pursuant to directions given under this section, the Director of Physical Planning must give notice to the applicant in writing that the application has been referred to Cabinet.

(4) The provisions of section 21(1) apply, with any necessary modifications, to the determination of an application by Cabinet as they apply to the determination of an application by the Director of Physical Planning, and Cabinet must request from the Director of Physical Planning his recommendation as to whether planning permission would have been granted if the application had not been referred to Cabinet under this section.

(5) On the determination of any application referred to Cabinet under this section, the Minister must by notice in writing under the hand of the Permanent Secretary inform the applicant and the Director of Physical Planning of Cabinet's decision and the reasons for that decision.

[32] Section 21 relates to determinations of applications by the DPP as follows:

21. Determination of applications.

(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) Without restricting the generality of subsection (1), conditions may be imposed on the granting of permission to develop land for requiring the removal of any buildings or works, or the discontinuation of any use of land authorized by the expiration of a specified period, and the reinstatement of the land at the expiration of that period, and any permission granted subject to such a condition is referred to as "temporary planning permission".

(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.

[33] In the letter to the Intervening Party dated 17 December 2015, the Assistant Secretary in the Department of Physical Planning informed the Intervening Party that: (1) its proposal was reviewed based on the Nevis Zoning Ordinance 1991 and Coastal Development setback Guidelines for Nevis; (2) Paradise beach area has a restrictive development zone of 120 feet from the high water mark; (3) Within this restrictive zone only non-habitable structures such as restaurants and swimming pools are allowed; and (4) **this is a tourism related project and as such will be forward to Cabinet with comments.**

[34] Approvals in principle are made to the DPP pursuant to section 18(1) of the Ordinance. The Ordinance grants no other body or authority that power. Under the Ordinance, Cabinet only becomes involved in the planning process in respect of applications for planning permission if the Minister has given a direction to the DPP under section 28(1). That direction does not relate to “approvals in principle” but relates specifically to a “determination” by Cabinet in respect of any such application or applications covered by a lawful direction made by the Minister

under section 28(1). The ordinary meaning of the word determination in this context is to bring to an end. An approval in principle is preliminary to a determination. A literal interpretation of the wording of these sections does not suggest that a power by Cabinet to make approvals in principle exists, even so on a purposive interpretation. This is particularly so when section 28(2) provides that decisions of Cabinet are final. Approvals in principle are by definition not final. The power granted to Cabinet under section 28(1) pursuant to a lawful direction does not include applications for approvals in principle.

[35] The Intervening Party submits that there is no evidence anywhere that Cabinet's power of approval is limited to applications that are referred to it on the direction of the Minister. A literal interpretation of section 28(1) is enough to show that Cabinet's only role in respect of planning decisions in the Ordinance is limited to cases where the Minister has given a direction to the DPP under section 28(1). The Intervening Party also submits that: firstly, on a proper reading of section 21(1) of the Ordinance, like Cabinet, the DPP also has very wide powers of approval of applications. Secondly, on a proper reading of section 21(1) of the Ordinance, the DPP may grant permission on condition or unconditionally or may refuse permission. Thirdly, under this provision there is nothing to restrict the DPP from referring a matter to Cabinet to get their view or their position on an application he may be prepared to refuse, attach conditions or grant unconditionally. Fourthly, section 21 does not limit the DPP from seeking assistance anywhere in aid of making his decision. The short answer to these submissions is simply that section 21 relates to the determination by the DPP of planning applications. It says nothing about referrals to Cabinet which is specifically addressed in section 28 of the Ordinance.

[36] The Defendants submit that Cabinet acted in accordance with the directions issued under section 28(1) of the Ordinance. The Defendants do not seek to base the authority of Cabinet to consider or determine any application pursuant to any section of the Ordinance other than pursuant to those directions, which will be examined in greater detail below. This was understandable since there was no statutory basis in the Ordinance, other than pursuant to a lawful direction given by

the Minister to the DPP, for Cabinet to be involved in the process of planning applications. Minister Liburd stated in evidence that it was the First Defendant's well-established policy that any relaxation of the guidelines laid down by Dr. Cambers had to be authorized by Cabinet. Unsurprisingly, Minister Liburd provided no legal basis for this "well-established policy" but proceeded to make reference to the 2007 Direction about which more will be said in the next section.

[37] I agree with the Claimant that the overall scheme of the Ordinance does not permit Cabinet to make approvals in principle. Section 18 makes reference to the DPP not Cabinet; and the overall scheme of section 28 is incompatible with Cabinet having the power thereunder to make determinations on applications for approval in principle.

[38] I conclude, therefore, that Cabinet has no power or authority to consider applications for approvals in principle under section 28(1) or section 18 of the Ordinance.

2. The 2007 Directions and the DPP

[39] The issue to be considered is whether the direction purportedly given to the DPP in the two 2007 letters was a proper and lawful direction issued pursuant to section 28(1) of the Ordinance. Having found that Cabinet did not have the power to consider applications for approval in principle it is strictly unnecessary to consider this issue. However, out of deference to arguments made by counsel on this issue I address it only for completeness. On 25 October 2018, the court ordered the First Defendant to file and serve, among other things, any direction given by the Minister (the order incorrectly records the First Defendant) to the Second Defendant requiring that: (a) either: (i) the application made on 21 October 2015 by the Intervening Party for approval in principle; and (ii) the application made on 12 July 2016 for planning approval; or (b) all applications of a specific class or in respect of any particular area specified in the direction, must be referred to Cabinet for determination pursuant to section 28(1) of the Ordinance.

[40] The First Defendant in compliance with the order filed on 13 November 2018 two documents. The first document is a letter from the Minister of Physical Planning dated 21 May 2007 to the DPP in relevant part as follows:

The Nevis Island Administration (NIA) recognizes that tourism and telecommunication sectors as important pillars in the overall development and economic growth of Nevis. In light of this, **the Cabinet of the NIA is directing the Director of Physical Planning** to refer all projects in the classification of tourism and telecommunications to Cabinet for final determination. (Emphasis added)

[41] The second is a letter from the Minister of Physical Planning dated 25 May 2007 to the DPP in relevant part as follows:

As per your request detailed in your Minute dated 24 May 2007.

1. Applications should be submitted at stage (b) with your recommendations. On receipt of your submission and recommendations and other relevant factors, Cabinet will give further instructions. Please note that you are free to consult the Development Advisory Committee to assist in developing your recommendations for Cabinet.
2. Once Cabinet makes a decision, you in your capacity of (sic) Director of Physical Planning are still obligated to receive detailed drawings and plans, and carry out usual planning activities before the commencement of projects within a given time frame.
3. All Applications should still be sent to the Physical Planning Department.

Please be guided accordingly.

[42] The Claimant submits that it is the Minister that is authorized to give the direction under section 28(1), not Cabinet; in this case, it was Cabinet that purported to give the direction to the DPP. The Claimant further submits that the two letters mentioned above (the “**2007 Direction**”) were only to inform of Cabinet’s directive. The Defendants submit that the power granted to the DPP under section 18 is superseded by any directions given to the DPP under section 28 of the Ordinance requiring him or her to refer an application or all applications of a specific class to Cabinet for determination. However, the Defendants do not provide any argument, let alone a convincing one, to show that the 2007 Direction came from the Minister

and not Cabinet. The first letter in the 2007 Direction is pellucid – it makes it abundantly clear that it was Cabinet directing the DPP, not the Minister.

[43] I do not agree with the Defendants’ argument that because the Minister is a member of Cabinet, this means that the 2007 Direction also came from him. The wording of section 28(1) is clear – it is **the** Minister that must give the appropriate direction. If this argument were to succeed, it would mean that any time the National Assembly gives a Minister the power to do an act in any legislation, that act can also be done by Cabinet contrary to the elementary principle of administrative law that where Parliament has conferred a power on a public authority or body, only that public authority or body can exercise the powers so conferred to the exclusion of any other person except where the legislation either expressly or impliedly allows for that power to be exercised by another person.

[44] Consequently, I hold that the 2007 Direction was not a proper direction issued pursuant to section 28(1) of the Ordinance. This also means that Cabinet could not have lawfully acted pursuant to the 2007 Direction which was the basis on which it made the Cabinet Approval.

3. The Nevis Zoning Ordinance and the Cabinet Approval

[45] It will be remembered that the Assistant Secretary in his letter of 17 October 2015 mentioned that the Intervening Party’s Approval in Principle Application was “reviewed based on [the] Nevis Zoning Ordinance” and that, since this was a tourism related project it would be forwarded to Cabinet with comments. In addition, Minister Liburd in his Cabinet Submission of 1 March 2016 had noted that: (1) the location of the Villas contravenes the requirements as set out in the first schedule of The Nevis Zoning ordinance, under the section dealing with Hotels and Tourism Area; (2) the requirements are that: (a) “No Development shall be nearer than 120 feet from the high water mark” and (b) “No building shall be nearer than 300 feet from the high water mark”.

[46] The Nevis Zoning Ordinance CAP 6.04 of the Revised Laws of Saint Christopher and Nevis (the “**Nevis Zoning Ordinance**”) is “[an ordinance] to enable a Zoning

Plan for the island of Nevis to be promulgated and to provide for related or incidental matters". The existing plan for the island of Nevis is the Nevis Resource Assessment and Zoning Plan 1990, which predates the Nevis Zoning Ordinance of 1991. Section 13(1) of the Nevis Zoning Ordinance provides that:

(1) In interpreting the draft and the Approved Zoning Plan the words set out in the First Schedule to this Ordinance shall bear the meanings set out in that Schedule.

[47] In the First Schedule it is stated as follows:

Hotels and Tourism Area.

Primary Use

Use as hotels and tourist facilities. The number and design of building and their uses will be strictly regulated to maintain so far as possible the unspoilt appearance of the areas. The following additional considerations will be taken into account in considering any planning applications:

- (1) No development shall be nearer than 120 feet from high water mark.
- (2) No building shall be nearer than 300 feet from high water mark.

[48] Section 2 of the Nevis Zoning Ordinance provides that:

"building", "building operations" "development", and "land", shall bear the meanings ascribed to them in section 2 of the Land Development Ordinance, Cap. 4.01 (N)

[49] "Building" and "development" are not defined in section 2 of the Land Development Ordinance CAP 4.01 of the Revised Laws of Saint Christopher and Nevis. They are however defined in section 2 of the Ordinance as follows:

"building" includes any erection or structure of whatever material and in whatever manner constructed or any part of a building, and where the context so permits, includes the land on, in or under which the building is situated;

"development" in relation to any land means the carrying out of building, engineering, mining or other operations in, on, over or under land, the

making of any material change in the use of any land or building, or the subdivision of land;

[50] Section 14 of the Nevis Zoning Ordinance states that:

No person shall carry out development which is contrary to the provisions of the approved Zoning Plan unless he shall be carrying out development pursuant to permission granted by the Minister pursuant to section 3 of the Land Development (Control) Ordinance.

[51] Section 15 of the Nevis Zoning Ordinance provides for variations of the Zoning Plan as follows:

(1) An application to vary a provision of the Approved Zoning Plan may be made to the Minister as if it was an application for permission made pursuant to the provisions of section 3 of the Land Development (Control) Ordinance.

(2) An application to vary a provision of the Approved Zoning Plan shall be deemed to have been made if on consideration by the Building Board of an application under the Building Rules 1946 it appears to the Board that the proposal is inconsistent with the Primary Use of the land as specified in the Approved Zoning Plan. Such a deemed application shall be referred to the Minister and dealt with by him pursuant to the provisions of section 3 of the Land Development (Control) Ordinance.

[52] A question that also arises is whether there was any application pursuant to section 15 of the Nevis Zoning Ordinance made to the Minister? The evidence is that there was no application made by either the DPP or the Intervening Party to the Minister to enable him to exercise his discretion pursuant to section 15(1) to vary the Nevis Zoning Plan in favour of the Intervening Party.

[53] No one may carry out any development contrary to the Nevis Zoning Plan unless permission from the Minister is previously obtained. This is done on application for permission to the Minister made pursuant to section 3 of the Land Development (Control) Ordinance. Only the Minister may approve a variation of the Nevis Zoning Plan pursuant to an application made to him under section 15 of the Nevis Zoning Ordinance. There is no provision in the Nevis Zoning Ordinance enabling Cabinet to vary or modify any of the requirements in the Nevis Zoning Plan. Moreover, no such application to the Minister was placed in evidence before the

court. Since the power is granted only to the Minister on application to vary the Nevis Zoning Plan, Cabinet cannot purport to exercise a discretion or power conferred only on the Minister. Section 14 of the Nevis Zoning Ordinance makes it unlawful for any development to take place contrary to the Nevis Zoning Plan without first obtaining permission from the Minister pursuant to section 3 of the Land Development (Control) Ordinance. I do not agree with the Defendants' submission that section 14 permits development to be carried out which is contrary to the provision of the Nevis Zoning Plan.

[54] Minister Liburd in his Cabinet Submission stated categorically that the proposed buildings are to be located at a distance of 78 feet from the high water mark, and that this **contravenes** the stipulations as set out in the First Schedule of the Nevis Zoning Ordinance. There cannot be any question of whether Minister Liburd and Cabinet were aware that the Villas contravened the Nevis Zoning Ordinance. Minister Liburd explicitly states so in the Cabinet Submission, and Cabinet would subsequently be aware of the contravention at the meeting where the Cabinet Approval was made. Minister Liburd and Cabinet failed properly to appreciate that the Cabinet had no power under the Nevis Zoning Ordinance to vary the Nevis Zoning Plan by accepting or approving any development at a distance of less than 120 feet from the high water mark as stipulated in the Nevis Zoning Ordinance. Cabinet could not, therefore, lawfully approve the Approval in Principle Application which contained a reduced setback of 78 feet from the high water mark in respect of the Villas.

[55] Consequently, I conclude that the Cabinet Approval and the Planning Approval are both unlawful insofar as they purport to vary the Nevis Zoning Plan contrary to sections 14 and 15 of the Nevis Zoning Ordinance.

4. Cabinet, the DPP and the Environmental Impact Assessment

[56] Again, like above, having found that Cabinet did not have the power to consider applications for approval in principle it is strictly unnecessary to consider this issue. However, out of deference to arguments made by counsel on this issue I address it only for completeness. Even if the Defendants were correct that Cabinet

had the power to make the Cabinet Approval, Cabinet failed to consider a material consideration when it made the Cabinet Approval in relation to the relaxation of the 120 feet setback from the vegetation line without any Environment Impact Assessment (the “EIA”) as required by section 20(2) and the Second Schedule, which mandates the production of an EIA in relation to any “Hotels” or “Coastal Zone Developments”. This is particularly so since, on the Defendants’ case, Cabinet in fact approved a setback of 44 feet from the vegetation line, and Cabinet did not, at the time of approval, have before it an EIA, as required by the Ordinance.

[57] Section 20 of the Ordinance provides that:

20. Environment Impact Assessment.

(1) Without limiting the generality of section 19, the Director of Physical Planning may require an Environmental Impact Assessment to be carried out in respect of any application for permission to develop land, including an application for approval in principle, if the proposed development could significantly affect the environment.

(2) Unless the Director of Physical Planning determines otherwise, an Environmental Impact Assessment is required in respect of an application for a development of any kind mentioned in the Second Schedule.

(3) The Director of Physical Planning may not grant permission for the development of land pursuant to an application to which this section applies unless the report on the Environmental Impact Assessment has first been taken into account.

[58] It cannot be questioned that the EIA/CIE was not one of the documents before Cabinet when it made the Cabinet Approval. The Intervening Party submitted the CIE long after the Cabinet Approval was made. The Claimant submits, and I agree, that under section 20(2) of the Ordinance unless the DPP determines otherwise, an EIA is required in respect of an application for a development of any kind mentioned in the Second Schedule. Since I have held that Cabinet has no power to grant approvals in principle, there is no merit in the Defendants’ argument that section 20(2) does not apply to the Cabinet Approval. Section 20(1) makes it clear that an EIA is required for “any application for permission to develop land” and specifically states that this includes “an application for approval in

principle". Section 20(1) applies in all cases where "the proposed development could significantly affect the environment". In my view, the inclusion of applications for approval in principle in "any application for permission to develop land" in section 20(1) is sufficient to cover applications for approval in principle in section 20(2). In section 20(1), the DPP must determine if the proposed development could significantly affect the environment and in section 20(2), the DPP can determine that an EIA is not required for an application for a development of any kind mentioned in the Second Schedule. In both cases, the DPP must exercise the power therein stated for good and sufficient reasons.

[59] While section 20(2) does not make reference to Cabinet; it speaks to "application for a development", which means it covers any application that is determined by Cabinet pursuant to section 28(1) of the Ordinance. The section does not relate to the identity of the decision maker; it relates to the nature of the application. Any application that relates to a development of any kind mentioned in the Second Schedule "is required" to have an EIA unless the DPP otherwise determines. As mentioned earlier, section 20(2) covers both applications for permission to develop land and applications for approval in principle. Even if I am wrong on this point, section 28(1) which relates to determinations by Cabinet clearly falls within the definition of "an application for a development". Therefore, any application for permission to build a hotel or a coastal zone development, including an application for approval in principle to build a hotel or for a coastal zone development, is required to have an EIA unless the DPP determines otherwise. This reasoning is in line with the scheme of section 20 to require any application for approval in principle also to have an EIA pursuant to section 20(2) of the Ordinance.

[60] The requirement for an EIA in this matter is clearly warranted because the Intervening Party submitted an application in respect of "Hotels" or "Coastal Zone Developments". It is not disputed that the Villas can be regarded as falling under either of the two. The DPP in this case did not determine that an EIA was not required. This means that if the Approval in Principle Application was sent to Cabinet pursuant to section 28(1) of the Ordinance, as the Defendants argue, then

an EIA was necessary. If, in the ordinary course of things, an application for the development of a “Hotel” or in respect of a “Coastal Zone Development” is sent to Cabinet for “determination” pursuant to a direction properly given under section 28(1), an EIA will also be required unless the DPP determines otherwise. I have no doubt that an EIA was required to be submitted to Cabinet pursuant to section 20(2) of the Ordinance when Cabinet made the Cabinet Approval. In fact, the Intervening Party later submitted an EIA/CIE in its Building Permit Application on the instructions of the DPP. I agree with the Claimant’s submission that by not having an EIA as statutorily required, Cabinet would have deprived itself of the opportunity to inform itself on other material factors that would have been addressed in a properly completed EIA. Moreover, Cabinet would have acted contrary to an express requirement in section 20(2) of the Ordinance.

- [61] Insofar as Cabinet purported to make the Cabinet Approval without an EIA as required by section 20(2) of the Ordinance, Cabinet failed to consider and comply with a material and mandatory statutory consideration, namely, the EIA. For this reason, also, the Cabinet Approval is unlawful because it is *ultra vires* section 20(2) of the Ordinance.

5. The DPP and reliance on the EIA

- [62] It was an express condition of the approval by the DPP of the Building Permit Application that the Intervening Party must “**Adhere to mitigative (sic) measures in the Coastal Impact Evaluation**” (bold in original). One such measure was that the Villas must have a 60 feet setback from the vegetation line. It will be remembered that the DAC twice rejected the Approval in Principle Application because of the inability of the Intervening Party to achieve the 120 feet setback from the vegetation line in respect of the Villas. There is uncontroverted evidence that the Villas could not accommodate the 60 feet setback from the vegetation line and that the setback of Villa 1 from the vegetation line was 44 feet (see the affidavits of Mr. Joel Williams (at [46]) and Ms. Titlon Douglas (at [6])). This was 16 feet less than the 60 feet setback from the vegetation line to which the Intervening

Party had to comply under the Planning Approval and 76 feet less than the 120 feet setback from the vegetation line, as set out in Dr. Cambers Report.

[63] Therefore, the Planning Approval was granted subject to a condition contained in the EIA/Coastal Impact Evaluation that could not physically be achieved. It cannot be disputed that the EIA was therefore defective. This is a serious defect since the EIA is the report that provides an assessment of the possible negative impact of the proposed development on the environment and contains measures that must be undertaken by a prospective developer to mitigate against any of those negative environmental consequences. The Claimant submits that a fundamental assumption on which the decision to grant the Planning Approval was non-existent, for example, planning permission was based on the express condition that the Intervening Party must comply with the mitigation measures as set out in the EIA/Coastal Impact Evaluation. In other words, the Defendants were imposing a physical development requirement on the Intervening Party that could not be complied with, suggesting that they did not know that it could not be complied with. However, as noted above, the Defendants state in evidence that they were aware that the 60 feet setback could not be complied with and that the correct setback was 44 feet from the vegetation line. It, therefore, begs the question of why Planning Approval was granted by the DPP subject to fulfillment of a condition that the DPP knew was physically impossible to achieve.

[64] There can be no doubt that the Villas would not be in accordance with the 120 feet (landward) setback category for Pinney's beach. Dr. Gillian Cambers recommended this setback in her 1998 Report, "Planning for Coastal Change" which was intended to prepare a set of guidelines for coastal development setbacks in Nevis. Dr. Cambers states that these recommended setbacks have been implemented by the planning authorities in Nevis to facilitate coastal development and reduce beach erosion. A coastal setback is defined (at p. 1) as:

A coastal development setback may be defined as a prescribed distance to a coastal feature, such as the line of permanent vegetation, within which all or certain types of development are prohibited.

[65] According to Dr. Cambers, these setbacks have the following functions: (1) they provide buffer zones between the ocean and coastal infrastructure, within which the beach zone may expand or contract naturally, without the need for seawalls and other structures, which may imperil an entire beach system. Thus in this sense they may actually reduce beach erosion; (2) they reduce damage to beachfront property during high wave events, e.g. hurricanes; (3) they provide improved vistas and access along the beach; and (4) they provide privacy for the occupiers of coastal property and also for persons enjoying the beach as a recreational resource. These guidelines have one exception for beach bars that is defined as “small individual buildings, made of wood and with no concrete foundations, to be used exclusively for the purpose of beach restaurants/bars, on the grounds that their economic viability depends on their proximity to the beach” (Dr. Cambers Report 1998). It is also important to note that Dr. Cambers states that these setbacks apply to all developments: houses, hotels, commercial buildings, airports, roads and swimming pools.

[66] Dr. Cambers (Impact of Climate Change on the Beaches of the Caribbean 2007, at pp 3-4) describes the methodology for the establishment of these setbacks that was first used in Anguilla in 1996 and later in Nevis, as follows:

A methodology was developed whereby development setbacks were determined for each beach based on (1) historical coastline changes; (2) projected changes likely to result from a major hurricane; (3) coastline retreat resulting from sea level rise in the next 30 years; and (4) specific geographical and planning factors. The methodology was based on the assumption that historical erosion rates would continue, and would increase as a result of increased frequency and intensity of hurricanes and accelerated sea level rise. The period of 30 years was selected since it represented the average economic life of a building or structure. The following formula was developed:

$$\text{Coastal Development Setback} = (a + b + c)d$$

Where the setback is measured from the line of permanent vegetation (the tree line or equivalent)

and

a is the projected change in coastline position over the next 30 years based on historical changes determined from beach monitoring data or aerial photograph comparison

b is the projected change in coastline position likely to result from a major hurricane (based on field measurements after the most recent major hurricane)

c is the predicted coastline retreat by 2030 resulting from sea level rise (based on the Bruun Rule)

d represents other factors of an ecological, planning and social consideration (essentially qualitative, but too important to be omitted) specifically:

Coastline shape and wave exposure

Features such as sand spits and bars

Offshore features e.g. coral reefs

Anthropogenic factors such as sand mining and offshore dredging
Planning considerations such as lot size, national park designations

[67] The evidence is that it should have been clear to the Intervening Party, given that a substantial portion of the land on which the Villas were to be built had been lost to the sea, that the Villas would be situated very close to the coastline. This meant that there was a heightened duty on the Intervening Party to ensure that it provided accurate measurements in its Building Permit Application to the Department of Physical Planning. I agree with the Claimant that the letter of Mr. Cabourne dated 8 February 2016 to the DPP shows that the Intervening Party ought to have known that the setbacks could not consistently be applied to all 5 Villas. The measurements related to only Villa 1. It was incumbent upon the Intervening Party to provide accurate and sufficient information to enable the DPP to make an informed decision on its Building Permit Application. The DPP states that this “setback was unfortunately through inadvertence and not otherwise not adjusted on the [Building Permit Application]”. The DPP continued that “[w]e however because of the inconsistency in the setback recorded on the plan and the actual site condition, permitted construction of the buildings to be situated closer to the near boundary”. However, the DPP did not mention this previously in his

evidence at the leave stage; he only stated that the setback was not adjusted. The correctness of this approach will be explored later in this judgment.

[68] Moreover, and importantly, as just stated, the DPP was also aware of the accurate measurements. The DPP states clearly in evidence that the setback from the vegetation line was measured on 11 November 2015 at 44 feet from the vegetation line and 78 feet from the high water mark in front of where the Villas were to be located, and that the measurements were taken from Villa 1. In any event, the DPP ought to have known this, or failed to consider this, when this should have been apparent since the Department of Physical Planning, as stated in the CIE, was to verify the setback prior to the commencement of construction by the Intervening Party. The DPP states in evidence that prior to the start of construction the setback was verified by the Department of Physical Planning and that it “was verified during the initial site visit [on 11 November 2015]”. However, the DPP was careful not to state in his affidavit evidence that the Department of Physical Planning verified the setbacks **after** Planning Approval was granted. During cross-examination, the DPP testified that the measurements that were taken after Planning Approval was granted, and before construction commenced by the Intervening Party, were merely to confirm that the Villas had not moved and that the purpose was not to confirm the correctness of the approved 60 feet setback from the vegetation line to the edge of Villa 1. In the premises, I find that there was no verification of the setbacks of any of the 5 Villas from the vegetation line by the Department of Physical Planning after Planning Approval was granted and before construction of the Villas commenced by the Intervening Party.

[69] I agree with the Claimant that it was unreasonable or irrational for the DPP to know of the defect in the CIE and still rely on the CIE in the planning application process and, further, to impose a condition in respect of the Planning Approval a requirement that he knew could not physically be implemented. The DPP states in evidence that the EIA is called a CIE because it focusses on the development’s impact on the coast and the parameters of the coastal areas which includes the marine environment. A CIE that is defective in a material respect, namely, being

based on a development with a setback that is less than the one which it recommends as a mitigating measure, cannot provide any meaningful information on the impact on the coast and provide the DPP with sufficient and accurate information to understand and evaluate the environmental impact, if any, of a proposed development. The CIE would not be able to do so since it would not be based upon an accurate measurement of the setback from the vegetation line. In other words, a central feature of the Building Permit Application was the fact that the setback to the Villas was less than 120 feet from the vegetation line. The CIE failed properly to address this most critical aspect because it was based on incorrect information.

[70] The Claimant cites in support the decision of Gilbert J. in **R (on the application of Watt) v London Borough of Hackney** [2016] EWHC 1978 (Admin). The brief facts have been helpfully summarized in the digest as follows: the defendant, a local planning authority, decided to grant planning permission for the erection of a three-story building next to a school. The planning officer's report to the committee had concluded that there would be compliance with the relevant development plan policies with respect to receipt of sunlight on the school's outdoor area, which "comfortably met" Building Research Establishment guidance (the guidance) based on a previous assessment. The claimant sought judicial review of that decision but subsequently applied to amend her grounds of review to argue that the defendant had proceeded on an erroneous factual basis.

[71] In **ex parte Watt**, the claimant's principal argument was that there had been an error of fact, essentially, that the reduction in sunlight would be in breach of the guidance. Gilbert J. considered many decisions where planning decisions had been set aside because of errors of fact concluding that error of fact was itself a recognizable basis for judicial review, citing the decision of Carnwath L.J. in **E v Home Secretary** [2004] EWCA Civ 49 [2004] QB 1044. Carnwath L.J. (at [64]) states that:

If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning

authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis. ... It is in the interest of all parties that decisions should be made on the best available information...

[72] Carnwath L.J. (at [66]) explained the applicable legal principles as follows:

In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

[73] The Claimant contends that all of these factors are satisfied here: there was clearly a mistake of fact, namely, the inherent necessary assumption by the DPP that the land could accommodate the proposed 60 feet setback from the vegetation line. The Claimant submits that neither it nor its advisors played any part in this mistake. It is doubted whether there was any operative mistake at all. There can be no inherent necessary assumption by the DPP that the land could accommodate the proposed 60 feet setback from the vegetation line when the DPP states in evidence that he was aware that the setback was less than 60 feet. The DPP made no mistake at all. The evidence shows that at all material times he acted with the full knowledge that the setback was 44 feet (and not 60 feet) from the vegetation line.

[74] The Intervening Party bears most if not all of the responsibility for this error. Although the Intervening Party submitted a plan showing the reduced land size, Mr. Cabourne, in his response to the issue of the proposed setbacks, gave a measurement figure of 90 feet from the high water mark to the closest point of "the pole house", and gave the impression that this would apply to "each pole house". The clear impression given in his letter to the DPP dated 8 February 2016 was that

this setback would be consistent for all of the 5 Villas. A similar impression is given in the site plans submitted by Mrs. Anne Hersch and included in the Building Permit Application which shows a consistent setback of 60 feet from the vegetation line to each of the 5 Villas. In addition, as I have found below, Mr. Peter Tantram, who did not measure the setback of the vegetation line to Villa 1 or any of the Villas, is the one who communicated the incorrect setback of 60 feet from the vegetation line to Villa 1 to both Mrs. Hersch and CANDENCO, INC., the authors of the CIE. The root cause of the error in the CIE rests first with Mr. Tantram and secondly with CANDENCO, INC..

[75] The DPP also bears responsibility for this error as there is no evidence that the Department of Physical Planning took any separate measurements in relation to the distances of the other 4 proposed Villas from the vegetation line or the high water mark. Ms. Douglas states in evidence that the area was not accessible so the distance from where Villas 2-5 would be located could not be measured. It is a startling proposition that this could be the reason for the failure by the Department of Physical Planning properly to carry out its statutory functions. The simple solution would have been to instruct the Intervening Party to de-bush or clear the area so that the work of the Department of Physical Planning could properly be undertaken and completed. During re-examination, the DPP simply stated that the Department of Physical Planning had a general idea where Villas 2-5 would be and that the beach sloped upwards and that all the Villas would have been in that area.

[76] It was the responsibility of the DPP to ensure that the required setback was adhered to and the evidence is clear that the DPP knew that the required setback of 60 feet from the vegetation line was not possible for Villa 1 and that it was only 44 feet from the vegetation line. Since the land on which the Villas are located is angled towards the sea from Villa 1, it stands to reason that the setback from the vegetation line would be reduced accordingly for each subsequent Villa. This too should have been apparent to the DPP and to the Intervening Party. The Defendants accept that "the error in the CIE was known to the decision makers"

but state that the “DPP would have made the same decision in any event as he was well aware of the error in the CIE”. Lord Diplock in **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 stated (at 410-411) that irrationality, derived from Lord Greene M.R. in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** [1948] 1 K.B. 223, meant :

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in *Edwards v. Bairstow* [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

- [77] I have no doubt that the decision of the DPP to make the Planning Approval subject to a condition that he was aware could not physically be achieved is a decision, to quote the words of Lord Diplock, that is so outrageous in its defiance of logic or of accepted moral standards that no sensible DPP who had applied his mind to the question to be decided could have arrived at it. I, therefore, agree with the Claimant that no reasonable DPP would have relied on the CIE to make any decision on the Building Permit Application if it contained such an error of fact and moreover would not make the decision on any such application subject to the condition which relates specifically to the same error of which he was aware and acknowledged. The error was the assumption in the CIE that a 60 feet setback from the vegetation line was possible when it was not in relation to Villa 1 and all the other Villas.
- [78] In addition, the DPP states in evidence that he was present at the third meeting of the DAC when it considered the Approval in Principle Application on 23 September 2016 and that the DAC recommended that planning permission be granted subject

to compliance with the guidelines set out in the CIE being implemented and followed. The DPP then states (at [44] of his affidavit) that:

... We did not expect that the guideline with regard to the proposed 60 [feet] setback to be implemented since we were well aware from the setback measurements taken by our team were less than 60 feet (and as aforementioned Cabinet had relaxed the setback).

[79] What makes this even more concerning is that the CIE recommended a setback of 60 feet from the vegetation line, which was subsequently recommended by the DAC, and formed a critical mandatory condition of the Planning Approval. The DPP in cross-examination stated that the Planning Approval was “for a relaxed setback for the entire project”. I reject this statement as it is contrary to the express terms of the Planning Approval which was never subsequently modified after it was issued to the Intervening Party by the DPP. It stipulates an approved setback of only 60 feet from the vegetation line and nothing less. The DPP gave evidence that Cabinet had approved whatever shorter setback that actually existed. I also reject this, first, because Cabinet did not so approve and, second, if it did, for reasons already stated any such approval was unlawful.

[80] It was surprising that the CIE did not provide any justification as to why the 60 feet setback from the vegetation line was recommended. In light of the nature of the Building Permit Application, some detailed explanation as to why the 60 feet setback from the vegetation line was the agreed setback included in the CIE was necessary. Since it is one of the mitigating measures, a cogent explanation was needed to show why this recommendation was made particularly in light of the existing policy of a 120 feet setback from the vegetation line for Pinney’s beach. At the hearing of the application for judicial review, Mr. Peter Tantram gave evidence that he was the one who “came up” with the 60 feet setback from the vegetation line, and that it was he who communicated this to both Ms. Anne Hersch, an architect and a planning consultant to Mr. Peter Tantram, and to CADENCO, INC., the authors of the CIE. It is now understandable why the authors of the CIE provided no explanation as to why they opted for a 60 feet setback rather than, for example, an 80 or 100 feet setback. They seemingly simply rubberstamped the

incorrect measurement given to them by Mr. Peter Tantram. I agree with the Claimant that the CIE could have been of no value as written in assisting the DPP in determining the suitability of a 60 feet setback, much less a 44 feet setback, and that Cabinet did not have before it the CIE at all since it was authored long after the Cabinet Approval.

- [81] Consequently, I conclude that the DPP acted unreasonably and, therefore, unlawfully in knowingly relying on the defective EIA in granting the Planning Approval.

6. Legitimate Expectations and the 120 feet setback policy

- [82] As mentioned above, the requirement for a setback of 120 feet from the vegetation line for Pinney's beach originated in Dr. Cambers report in 1998. The Claimant contends that: (a) the affidavit evidence discloses a long adopted and express coastal construction setback policy by the Defendants and that the CIE submitted by the Intervening Party acknowledged the existence of the national established setback of 120 feet from the vegetation line for Pinney's beach; (b) it is a party to whom that setback policy would apply and who was entitled to rely on this policy as an adjacent coastal land owner and potential developer; (c) there is no evidence of any justification for the dis-application by the Defendants of the 120 feet setback from the vegetation line; and (d) the non-application of the 120 feet setback from the vegetation line without a clear and proper reason, amounts to a breach of the Claimant's substantive legitimate expectation.

- [83] The Claimant submits that the guidelines developed for coastal development setbacks were established to create buffer zones between a development and the sea to protect life and property and to help minimize beach erosion. The Claimant further submits that for Pinney's beach the setback was 120 feet landwards from the line of permanent vegetation and this applied to all types of development, the only exception being beach bars. The Claimant submits that it had a legitimate expectation that this 120 feet setback from the vegetation line, created by policy which had been consistently applied by the Government of Nevis and the Department of Physical Planning for 19 years, would have been applied, and

would only have been dis-applied for good and sufficient reasons. The Claimant further submits that a clear representation by a public body as to how it will act in the future, or a consistent practice by a public body in the past, is capable of generating a duty on the public body to act in a particular way in relation to the recipient of the representation or the beneficiary of the practice.

[84] The Claimant contends that the establishment of setbacks by the First Defendant though the activities of the Second Defendant amounted to a pressing and focused assurance, directed specifically at beach side property owners and potential purchasers, builders and developers of beach side lands and who would be particularly affected by the establishment of and any failure to confirm with, such setbacks. The Claimant contends that, in the alternative, it had a substantive legitimate expectation that planning permission for any development at Pinney's beach would not be granted in violation of the established setbacks. The Claimant submits that in making the Cabinet Approval and in directing the Second Defendant to make the Planning Approval, the First Defendant breached the Claimant's substantive legitimate expectation. The Claimant also submits that there was no overriding, adequate justification, or powerful supervening factor, in the circumstances, that the Cabinet considered that entitled it to resile from the legitimate expectation engendered.

[85] The Defendants submit that the starting point on the issue of legitimate expectation is to ask: what in the circumstances could the member of the public legitimately expect? The Defendants answer that the Claimant's legitimate expectation is limited to an expectation that whatever policy is in force at the time will be applied. The Defendants contend that coastal setbacks are implemented in Nevis as a matter of policy and not law as alleged by the Claimant. The Defendants further contend that the guidelines contained in Dr. Cambers Report have not been enacted into law, but Cabinet has created exceptions to these guidelines. The Defendants submit that the Claimant's arguments raise the question of whether the Claimant ought to have had a reasonable expectation that the 120 feet setback would not be relaxed. The Claimant submits that the only

exception to the 120 feet setback policy is for beach bars and that what the Defendants state are “exceptions” are mere relaxations of the existing 120 feet setback policy.

- [86] In **United Policyholders Group v Attorney General of Trinidad and Tobago** [2016] WLR 3383, [2016] UKPC 17, Lord Carnwath provided a useful summary of the state of the law on legitimate expectations in public law, stating that:

121. In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated. Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification”, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind. By that test, for the reasons given by Lord Neuberger, the present appeal must fail.

- [87] It is clear that this summary relates to substantive legitimate expectations that can only arise where there is an *express promise* by a public authority to a person or group of persons in the circumstances described by Lord Carnwath. What then of a policy adopted and applied over a period of time by a public authority? Laws LJ in **R (Bhatt Murphy) v The Independent Assessor** [2008] EWCA Civ 755 opined as follows:

50 A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). **If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to**

rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power. (Emphasis added)

[88] Having regard to the facts and all the circumstances of this case, the Claimant cannot genuinely claim that the Defendants had *expressly promised* to preserve the existing policy in respect of the 120 feet setback from the vegetation line for Pinney's beach specifically for the Claimant (or even others) who would be substantially affected by any change. In my view, there is no substantive expectation that was engendered in favour of the Claimant in respect of the 120 feet setback from the vegetation line. However, in this case, there is at least a secondary case of procedural protection. There is no question that the Defendants, without any promise, has established a policy of having a 120 feet setback from the vegetation line for Pinney's beach that distinctly and substantially affects a specific person or group (coastal developers, among others) who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change. However, the Defendants did not change the policy. The policy remains intact. What it has done is to "relax" the policy in certain circumstances. This does not mean that the principles mentioned above are not thereby engaged.

[89] In **R v Newham London Borough Council, ex parte Bibi** [2002] 1 WLR 237, Schiemann L.J. stated (at [19]) that:

In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.

[90] The evidence is that the First and Second Defendants have committed themselves to apply consistently the policy of having 120 feet setback from the vegetation line for Pinney's beach, the only exception being for beach bars. There was in existence a policy in relation to the setback of 120 feet from the vegetation line for Pinney's beach as outlined in Dr. Cambers Report. This was accepted as such by the DAC when it twice rejected the Approval in Principle Application because the

Villas could not meet the setback as stated in that established policy. I agree with the Claimant that the evidence is such that the setbacks are not mere guidelines but that they amounted to an established code with which persons had to comply in respect of any coastal development in Nevis.

- [91] In a document entitled, “Wise Practices for Coping with Beach Erosion, Nevis”, published by the Department of Physical Planning, it is stated that:

Plan for existing and future coastline change by positioning all new development (large and small) a ‘safe’ distance landward of the vegetation line (consult the Department of Physical Planning, Natural Resources and Environment for information on ‘safe’ distances).

- [92] No doubt that the “safe” distances refer to Dr. Cambers Report where setbacks were established for the various beaches in Nevis. Any relaxation of the 120 feet setback from the vegetation line for Pinney’s beach must be for good and sufficient reason. The CIE submitted by the Intervening Party provided no justification for the stated recommended setback of 60 feet from the vegetation line. As mentioned below, this was not surprising because it was Mr. Peter Tantram who provided Mrs. Anne Hersch, a planning consultant and architect, and authors of the CIE, with the measurement of 60 feet as the setback to the Villas from the vegetation line. The origin of the 60 feet setback will be examined in more detail below. To the extent that CANDENCO, INC., the authors of the CIE, provided no substantive basis for the recommended 60 feet setback from the vegetation line, and seemingly relied on the measurement provided to them by Mr. Tantram, they contributed to, and were also mainly responsible for, the error in the CIE as I have earlier found. The setbacks are not simply measurements that can be disappplied by Cabinet at its whim. As stated above, the DAC twice rejected the Approval in Principle Application on the basis that the Intervening Party could not achieve the 120 feet setback. Any departure from this setback policy must be properly justified and there must be sufficient scientific basis that any such reduced setback, together with any other mitigating measures, will ensure beach stability and prevent erosion.

[93] Even though the Minister may, on application made to him under section 15 of the Nevis Zoning Ordinance, relax any of the setbacks stated therein, there must be a sound rationale for doing so. It cannot be the case that the Minister or Cabinet may relax the setback in every case where a developer wishes to build a development on the coast (and near the beach) within the 120 feet setback from the vegetation line. In such a case, the policy would become meaningless and of no use to anyone. Good public administration requires adequate reasons to be provided by a public authority where it proposes to act in a way that will frustrate any legitimate expectation engendered by either a promise or a policy. Laws L.J. in **R v Secretary of State for the Home Department, ex parte Nadarajah** [2005] EWCA Civ 1363 stated that good administration also requires public bodies “to deal straightforwardly and consistently with the public” (at [67]). While I accept that **R v Aylesbury Vale District Council, ex parte Chaplin** [1998] 76 P&CR 207 is authority for the proposition that there is no general duty to provide reasons in relation to substantive decisions in planning cases, in my view where an expectation is engendered in respect of an established policy, particularly one relating to the protection of the marine environment, the common law imposes a duty to provide reasons in these specific circumstances. That duty arises because of the expectation created by the existence of a policy which guides the actions of the public authority.

[94] The only document before Cabinet that purports to provide a justification for the relaxation of the 120 feet setback from the vegetation line is the letter to the DPP from Mr. James Cabourne dated 8 February 2016. In that letter, Mr. Cabourne outlines, among other things, the following: (1) in order to maintain the future security of the resort and the employment it provides, the Intervening Party needs to expand its offering of Villas; (2) the Intervening Party has no two bedroom or less offerings and there are constant requests for such accommodation from both agents and direct inquiries; (3) the business of the Intervening Party is running at high operational loss because of this imbalance of rooms to service provision; (4) the economic viability of the resort and the proposed expansion of staff required to provide the high standards to which the Intervening Party is committed; (5) there is

no restaurant on the resort generating a balanced income. It may be that Cabinet was moved by these explanations for the relaxation of the 120 feet setback from the vegetation line. It is not for the court to second guess these considerations. However, this does not mean that any such approval was bound to be given at any or all costs to the environment. This is why section 20(2) of the Ordinance requires the submission of a CIE in respect of hotels and coastal zone developments. The reasons need to be focused, pressing and objectively justified. It will be remembered that the DAC, at its second meeting, had before it the letter from Mr. James Cabourne but it nonetheless rejected the Approval in Principle Application on the basis that the Villas would not be in accordance with the 120 feet setback from the vegetation line for Pinney's beach.

- [95] Given the nature of the Villas laying as "close to shore line", as Mr. Cabourne admits, any approval without any scientific basis is unlawful for reasons explored above. "Building too close to the beach interferes with the natural sand movement and may impede beach recovery after a serious storm of hurricane" (Wise Practices for coping with Beach Erosion Nevis (Nevis Historical and Conservation Society and Department of Physical Planning, Natural Resources and Environment, Fisheries Division, University of Puerto Rico, Sea Grant College Program; Caribbean Development Bank, UNESCO Environment and Development in Coastal Regions and in Small Islands)).
- [96] Minister Liburd states that Cabinet took into account the exceptions that have been made over the years for this type of development, and that Cabinet has had to find innovative and competitive ways to develop the island's tourism product. Minister Liburd continues that: (1) these exceptions were created because the tourism industry is the mainstay of the economy in Nevis and is still very much beach oriented; (2) developers wish to position their properties as close as possible to the water; (3) coastal setbacks are said to leave a lot of valuable land tied up and unavailable for development; (4) Cabinet is charged with balancing the different and perhaps competing interests across Nevis and was of the view that there was a need for further development in the coastal zone in the interest of the

economic well being of Nevis; (5) it was for these reasons that the setback policies were somewhat revisited, through the creation of exceptions, to ensure that new coastal developments are viable and sustainable; and (6) the setback guidelines for coastal development were intended to provide a flexible framework within which the planning authorities can work to ensure that coastal development is sustainable and beach erosion is reduced. The policy of having established setbacks will be a thing writ in water if these setbacks can so easily be set aside at the altar of tourism development. The First Defendant did not tender in evidence the deliberations of Cabinet to provide corroboration for the affidavit evidence of Minister Liburd. In addition, none of the issues that Minister Liburd now raises in his affidavit evidence were included in his Cabinet Submission. Cabinet submissions are usually more detailed, and they would normally contain the arguments made for Cabinet acceptance of the submission being put forward. And, in any event, the issues raised by Minister Liburd are not now relevant in so far as Cabinet did not have before it a CIE in respect of the matter it there considered, and Cabinet did not have the power or authority under the Ordinance to consider applications for approval in principle.

- [97] The failure by both Cabinet and the DPP properly to justify or to provide adequate explanation or reasons for such a significant departure from the 120 feet setback from the vegetation line is unlawful and contrary to the Claimant's legitimate expectation. The Claimant's secondary case of procedural expectation was thereby contravened by the DPP and Cabinet.

7. The Cabinet Approval, the Planning Approval and the Public Beach

- [98] The issue to be considered is whether the Villas were built on the public beach as defined in the National Conservation and Environment Protection Act CAP 11.03 of the Revised Laws of Saint Christopher and Nevis (the "**NCEP Act**"). The beach is defined in section 2 of the NCEP Act as follows:

... the sloping area of unconsolidated material typically sand, that extends landward from the mean high water mark to the area where there is a marked change in material or natural physiographic form or where there is no such marked change in the material or natural physiographic form,

the beach shall be deemed to extend to a distance of twenty meters landward from the mean high water mark or such lesser area as may be determined by the Minister in consultation with the Conservation Commission and in all cases shall include the primary sand dune.

- [99] The Claimant contends that, firstly, by section 28 of the NCEP Act all rights in and over the beach are vested in the Crown and the public shall have the right of access and the right to use or enjoy the beach for recreational purposes and activities; secondly, by section 30(a) no person shall remove or assist in the removal of any natural barrier against the sea; and thirdly, under section 30(c) no person shall remove or assist in removing any vegetation from the beach. The Claimant further contends that the DPP is by virtue of section 106 of the Constitution of Saint Christopher and Nevis exclusively responsible for certain matters within the island of Nevis and that environmental matters is not one of them. The Claimant submits that to the extent that the DPP permitted development, construction and occupation of the public beach, he acted unlawfully and in breach of the NCEP Act. In the Claimant's view, firstly, section 28 does not admit of any exceptions. Secondly, the beach is vested in the Crown, which for this purpose is the Federal Government, not the Nevis Island Administration. The Claimant concludes that if it were at all possible to grant permission to encroach on the beach, that permission would have to originate from the Federal Government and not from the Nevis Island Administration.
- [100] The Defendants submit that there was no permission granted to the Intervening Party to build the Villas on the beach and that, based on the statutory definition of beach, the beginning of the vegetation line going landward marks the end of the public beach. The DPP provided evidence that he is familiar with Pinney's beach and that, after the construction of the Villas, there was a distinct natural marked change in the material or natural physiographic form of Pinney's beach which is defined by the vegetation line.
- [101] The court on 6 December 2018, on application by the Claimant, granted the Parties and the Intervening Party permission to file expert reports in respect of the following:

2. Each expert witness shall submit a written report based on a review and examination of the site on which the 5 Villas of the Intervenor have been constructed for the purpose of determining:

- i. Whether the beach, as that term is defined in the National Conservation and Environmental Protection Act CAP 11:03, extends up to or beyond 78 feet from the mean high-water mark into the site where the 5 Villas have been constructed by the Intervenor at Paradise Estate, Pinney's Beach;
- ii. Whether the beach, as that term is defined in the National Conservation and Environmental Protection Act CAP 11:03, extends up to or beyond 60 feet from the vegetation line at June 2016 into the site where the 5 Villas have been constructed by the Intervenor at Paradise Estate, Pinney's Beach;
- iii. Whether the said Villas or any of them have been constructed upon the beach as that term is defined in the National Conservation and Environmental Protection Act CAP 11:03.

[102] Dr. David AY Smith, a professional Coastal Engineer with over 30 years' experience, filed an expert report on the instructions of the Defendants stating that, first, the beach (as defined in the NCEP Act) does not extend up to or beyond 78 feet from the mean high-water mark into the site where the 5 Villas have been constructed by the Intervening Party at Paradise Estate, Pinney's beach. Second, he does not have sufficient background information relating to the beach movements in 2016 to answer the second question. Third, the Villas as presently built are not within the beach as defined in the NCEP Act. Dr. Smith continued that, while the substrate material remains the same across the entire area surveyed, the Villas are however located landward of a marked change in the natural physiographic form that occurs at the +2.0m contour. This change in form marks the landward edge of the beach as referred to in the NCEP Act.

[103] Dr. Taneisha Edwards, who filed an expert report on the instructions of the Intervening Party, was of the opinion that, first, the beach in question, as defined in the NCEP Act, does not extend up to or beyond 78 feet from the mean high-water mark, into the site where the 5 Villas have been constructed by the Intervening Party at Paradise Estate, Pinney's beach. Second, the beach did not extend up to or beyond 60 feet from the vegetation line at June 2016 into the site where the 5 Villas have been constructed. Third, the 5 Villas have not been

constructed upon the beach as that term is defined in the NCEP Act, although sand is around and above the substrate at the site of the Villas behind the vegetation line.

[104] Mr. Ellis Hazel, who filed an expert report on the instructions of the Claimant, concluded that, first, based on an examination of the June 2016 Google earth imagery with the high water mark overlay indicative setback of 78 feet indicates that the site where the 5 Villas have been constructed would have formed part of the vegetated dune and not the primary beach (foreshore). Second, based on an examination of the June 2016 Google earth imagery with the high water mark overlay indicative setback of 60 feet indicates that the site where the 5 Villas have been constructed would have formed part of the back beach and vegetated dune and not the primary beach (foreshore). Third, considering the present physiographic characteristics of the area, the buildings are positioned on the beach as that term is defined in the NCEP Act.

[105] Each expert answered the first question in the negative, namely, that the beach as defined in the NCEP Act does not extend up to or beyond 78 feet from the mean high-water mark into the site where the 5 Villas have been constructed by the Intervening Party. In relation to the second question, namely, whether the beach as defined in the NCEP Act extends up to or beyond 60 feet from the vegetation line at June 2016 into the site where the 5 Villas have been constructed by the Intervening Party: (a) Dr. Smith stated that he did not have sufficient information to make that determination; (b) Dr. Edwards stated that it did not so extend; and (c) Mr. Hazel stated that it would have formed part of the back beach and vegetated dune and not the primary beach (foreshore). In answering the third question, namely, whether the Villas have been constructed upon the beach as that term is defined in the NCEP Act, Dr. Smith and Dr. Edwards answered in the negative while Mr. Hazel answered in the affirmative.

[106] In response to the questions posed by the Claimant to Dr. Edwards on her report and during cross-examination, it became evident that the Intervening Party and its associates were improperly and significantly involved in the work of Dr. Edwards.

Having regard to Dr. Edwards' answers to the questions posed to her by the Claimant and her responses during cross-examination, I am of the opinion that Dr. Edwards was not an impartial expert as required by CPR 32.3(1), which provides that it is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise; and that this duty overrides any obligation to the person by whom he or she is instructed or paid (CPR 32.3(2)). I therefore accept the Claimant's objection to her report and place no reliance on Dr. Edwards' report as part of the discussion of the issues to be determined in this section.

- [107] One important question is whether the beach as defined in the NCEP Act extends up to or beyond 60 feet from the vegetation line at June 2016 into the site where the 5 Villas have been constructed by the Intervening Party. The timing would be approximate to the time when Planning Approval would have been granted to the Intervening Party. Having read the reports of Dr. Smith and Mr. Hazel, I am of the view that a determination of that question would require a more comprehensive examination of the state of the coastline at the material time and the use of google earth images by Mr. Hazel seem fraught with difficulties. I agree with Dr. Smith that the evidence, such as it is, is not sufficient to enable a proper determination of this issue. It was speculative in its formation, and only if accurate and reliable information could be found can that evidence support a conclusion on this issue. In my view, the evidence on which Mr. Hazel formed his opinion remains questionable and is not therefore conclusive of the second question. The Defendants submit, and I agree, that Mr. Hazel relied heavily on two google images which he represented were 2016 google earth images in arriving at his conclusions in his expert report but at the hearing it became clear that the google image he used was in fact a 2015 google earth image and that there were no images available for 2016. In any event, Mr. Hazel prefaced his answer to the second question, as with the other answers, by stating that he is unable to make a precise determination for various reasons. In all the circumstances, I do not form any concluded view on the correctness or otherwise of the answers to the second question posed to the experts.

[108] In relation to the third question, the main difference between Dr. Smith and Mr. Hazel was what would satisfy as a change in the physiographic form. Mr. Hazel saw no such change, while Dr. Smith was of the opinion that there was a marked change in the physiographic form that occurs at the +2.0m contour. In Dr. Smith's view, this change in form marks the landward edge of the beach as referred to in the NCEP Act. The Claimant was of the opinion that Dr. Smith's approach would define the beach as the area where the slope stopped, and the land levelled off. However, the Claimant counters that this would inherently limit the definition of the beach to the traditional definition of the beach between the low tide and high tide, which is marked by the "berm", which is not in the definition of beach in the NCEP Act.

[109] The NCEP Act defines the beach as: (1) the sloping area of unconsolidated material typically sand, that extends landward from the mean high water mark to the area where there is a marked change in material or natural physiographic form (the "**First Definition**"); or (2) where there is no such marked change in the material or natural physiographic form, the beach shall be deemed to extend to a distance of twenty meters landward from the mean high water mark or such lesser area as may be determined by the Minister in consultation with the Conservation Commission (the "**Alternative Definition**"); and (3) in all cases shall include the primary sand dune (the "**Universal Definition**"). In Dr. Cambers Report, it is noted (at p. 3) that:

This definition of beach is slightly different to that which pertains in many Caribbean islands in that it defines a specific distance for the landward limit of the beach when there is no physiographic change in form or material and it specifies that the primary [sand] dune is part of the beach.

[110] One important aspect is the last part of the definition of the beach in section 2 of the NCEP Act, which states that "**and in all cases [the beach] shall include the primary sand dune**". The question now arises as to whether the Villas were nonetheless built on the "primary sand dune". The First Definition is the primary definition of the beach, and the Alternative Definition applies "where there is no such marked change in the material or natural physiographic form". The Universal

Definition applies irrespective of whether the beach is defined in accordance with the First Definition or the Alternative Definition. In other words, the beach “**shall** include the primary sand dune” (emphasis added).

- [111] In **The Biology of Coastal Sand Dunes** (Oxford University Press, 2009), Professor M. Anwar Maun defines (at p. 12) a sand dune as:

A sand dune is a mound or a hill of sand that rises to a single summit (Bagnold 1960). The fundamental dune shape is dictated by the life form of colonizing plant species and their inherent ability to grow vertically and horizontally in response to burial by sand. Dunes are windblown deposits of sand that have been fixed by vegetation beyond the farthest inland reach of waves. They may range from convex dune ridges to relatively flat terraces. Several types of sand dunes have been recognized.

- [112] The report of Dr. Smith begins by focusing exclusively on the First Definition of the beach. As mentioned above, he notes that there is a “marked change in the natural physiographic form that occurs at the +2.0m contour”. This means that there was no need for Dr. Smith to examine the Alternative Definition. However, Dr. Smith fails to examine the Universal Definition which applies “in all cases”. The report of Dr. Smith does not assist in the determination of whether the Villas were constructed on the primary sand dune.

- [113] Mr. Hazel defined a sand dune as “a mount, hill or ride of sand the lies behind the part of the beach affected by ties. They are formed over many years when blown sand is trapped by beach grass and other vegetation” (at p. 4). Mr. Hazel also notes that, first, the “beach at Paradise Beach Estate have migrated inland over time”; second, the “dune vegetation that forms part of the beach system has been cleared over time”; and, third, the “area where the buildings have been constructed; prior to construction would have formed part of the back beach and the vegetated dune” (at p. 10). Mr. Hazel addresses directly the question of whether the Villas were built on the “primary sand dune” and his answer is yes.

- [114] In Dr. Cambers Report, it is stated (at p. 11) that:

Some beaches are backed by sand dunes. Sand dunes are reservoirs of sand which supply the beach with sand during tropical storms and hurricanes, thus they are temporary features. New development should

always be placed behind (landward of) the primary dune, see Figure 2. **In Nevis, there are only two beaches backed by sand dunes: White Bay and Indian Castle**, setbacks at these beaches have been designed to preserve the primary dune ... (Emphasis added)

[115] Dr. Cambers did not name Pinney's beach as one of those which are backed by sand dunes. In cross-examination, Mr. Hazel did not suggest that Dr. Cambers was wrong in not including Pinney's beach as one of those beaches in Nevis that are backed by a primary sand dune. It may be that Dr. Cambers meant that the beaches in White Bay and Indian Castle are the ones in Nevis that are backed by extensive sand dunes. What is clear, however, is that Dr. Edwards accepted in cross-examination that a sand dune can be as low as one foot and that the existence of vegetation on a sand dune does not preclude it from being a sand dune but that the type of vegetation will characterize the type of sand dune. Dr. Edwards accepted that there are different types of sand dunes and they may have different types of vegetation. A sand dune does not have to be extensive to be characterized as such and that there can be sand dunes of all shapes and, importantly, sizes.

[116] Having regard to the totality of the evidence presented at the hearing, the expert report of Mr. Hazel, with which I agree on this point, and having visited the locus on 24 July 2019 and observed the area: (a) where the Villas are constructed; and (b) south of Villa 5, I am of the opinion that the Villas were constructed on what is described in section 2 of the NCEP Act as the "primary sand dune".

[117] I therefore conclude that the Villas were constructed on the beach as that term is defined in section 2 of the NCEP Act.

8. Unreasonable Delay and the Judicial Review Claim

[118] The CPR makes it clear that an application for leave to apply for judicial review must be made promptly. In addition, and importantly, the CPR also grants the court a discretion to refuse to grant relief in the substantive application for judicial review. Delay is relevant to both the application for leave to apply for judicial review stage and whether to grant relief in the substantive judicial review application. The need for these rules is to allow for finality and certainty,

particularly in relation to decisions such as the ones under consideration which concerns planning applications. Members of the public should be able to order their lives on the basis that decisions of public authorities made ostensibly in the public interest are valid and that they will not be subject to challenge many years later by a person who has slept on his or her rights. This is implicitly recognized in CPR 56.5 as follows:

56.5 (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers 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 substantially prejudice the rights of any person.

[119] The Defendants submit that the Claimant took 15 months and 8 months respectively in which to bring its application seeking leave to apply for judicial review of: (1) Cabinet's decision to grant approval in principle made on 14 March 2016; and (2) the decision of the Director of Physical Planning to grant full planning permission which was made on 5 October 2016. The Defendants also submit that the Claimant has not fully explained its delay in making its application and that the court should refuse to grant the Claimant the relief that it seeks. The Defendants contend, in addition, that any such relief is likely to cause substantial hardship to the Intervening Party which has completed construction of all the 5 Villas.

[120] The Claimant submits that, unlike in England and Wales, in Saint Christopher and Nevis there is no set time frame within which judicial review leave applications are to be brought, continuing that the absence of any rigid timeline for invoking the court's supervisory jurisdiction is regarded as being salutary, subject of course to the court's insistence on reasonable promptness in all the circumstances of each particular case, and the rejection of stale claims. The Claimant contends that: first,

it would not have been readily apparent to the Claimant on a search of the planning file where the Villas were to be situated on the land in question and how that might have infringed the 60 feet setback from the vegetation line, as that would become more apparent on construction; and second, under section 47 of the Ordinance, the DPP was required to maintain a register recording the particulars therein set out. The Claimant states that section 47(1) (iv) refers to the date and effect of any decision made on the application and that it would expect to see the reasons for any conditions imposed included there but there were none. The Claimant also states that it was entitled to obtain legal advice from its advisors and was correct in not issuing legal proceedings until it had some basis for saying that what had happened was a proper foundation for a judicial review challenge. The Claimant submits that it was entitled to seek a sensible solution that avoided litigation, such as requesting the DPP to investigate and issue a stop notice; and that judicial review is in principle a remedy of last resort. The Claimant also submits that when a potential claimant for judicial review expeditiously seeks a reasonable way of resolving an issue without litigation, the court will lean against penalizing him for the passage of time, citing **R v Hammersmith and Fulham London Borough Council, ex parte Burkett** [2001] Env LR 6849.

- [121] It is correct that under CPR 56.5 (2), in considering any issue of delay, the court must consider whether the granting of relief would be detrimental to good administration; or cause substantial hardship to or substantially prejudice the rights of any person. This is factual and requires evidence. Mr. Oral Martin, the sole Director of the Claimant, gave evidence that: (1) in January 2017, he noticed some activities taking place on the Claimant's lands; (2) he made various inquiries between January and April 2017 about the activities and the trespass on the lands belonging to the Claimant; (3) between April and the end of May 2017, he observed two buildings being constructed on the "beach"; (4) in early May 2017, he visited the Department of Physical Planning to gain further information about the construction of the Villas; (5) he obtained on 15 May 2017 an injunction in relation to the trespass on the Claimant's lands; (6) he filed the application for leave to apply for judicial review and interim relief on 21 June 2017; and (7) he

filed the application for judicial review on 4 December 2018 following the grant of leave on 26 November 2018.

[122] The Claimant submits that the court found that there was no unreasonable delay at the leave stage, but the court reserved on the issue of the effect on third parties, which is a separate issue from delay. The Claimant further submits that, although the court at the substantive hearing has the power to reopen the question of whether the claim form was filed promptly, the Court of Appeal in England and Wales in **R (Lichfield Securities Limited) v Lichfield District Council et al** [2001] EWCA Civ 304, [2001] PLR 33 suggested that it should not do so unless: (i) the judge hearing the application for permission has expressly indicated that the question of promptness can be reopened at the substantive hearing; (ii) new and relevant material is introduced at the substantive hearing; (iii) exceptionally, the issues as they have developed at the substantive hearing put the question of promptness in a different light; and (iv) the first judge has plainly overlooked some relevant matter or has reached a decision per incuriam.

[123] The Defendants submit that at the leave stage the court adjourned the issue of delay to the substantive hearing. In the Defendants' view, the court therefore still retains a discretion to refuse to grant the Claimant the relief that it seeks in its judicial review application on the ground 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. I agree with the Claimant on this point. In the order of 26 November 2018 granting leave to the Claimant to apply for judicial review, the court noted that:

AND UPON NOTING that the grant of leave is a discretionary remedy that the court will grant after taking into account all the circumstances of the case. All the parties are agreed on this. The Applicant's delay cannot be regarded as unreasonable; it is measured in months not years as in the cases cited by the Intervenor. With the exception of **[Grenada Building and Loan Association v. The Planning and Development Authority]** (Claim No. GDAHCV2009/0142 dated 5 June 2009)] where Michel J described the delay as "considerable" "unreasonable" and "overwhelming", the cases cited by the Intervenor are cases where the

issue of delay was considered in the context of the application for judicial review, not at the leave stage or permissions stage as in England and Wales. In **[Browne v Public Service Commission (HCVAP 2010/023 dated 15 December 2010)]**, the Court of Appeal stated that “Even if the court accepts that the defendant has acted unlawfully, **there is no unqualified right to any of the remedies claimed.**” It continued, “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”;

...

AND UPON the reiterating that based on all of the circumstances of this case that are arguable grounds for judicial review having realistic prospects of success **AND** the application is not subject to a discretionary bar such as delay;

- [124] The paragraph cited makes a clear finding that the time period within which the Claimant brought the application for leave to apply for judicial review: (1) cannot be regarded as unreasonable delay; and (2) is measured in months not years as in the cases cited by the Intervening Party. And, importantly, the court also found that the application for leave to apply for judicial review **was not subject to a discretionary bar such as delay**. In the order of 26 November 2018, the court also stated that:

AND UPON NOTING that the court does not need to make a positive finding under that rule to exercise its discretionary power whether to grant relief independent of whether there is delay. The Court is cognizant of the need for certainty and finality in administrative decision-making, particularly in relation to planning decisions. However, there is a wider context of the manner in which planning decisions are made in Nevis and its impact on third parties like the Intervenor. The court will therefore allow the application for leave to apply for judicial review reserving the power it undoubtedly has to revisit the effect on third parties at the hearing of the substantive application for judicial review;

- [125] None of the situations outlined in **ex parte Lichfield Securities Limited** applies to allow the court to reopen the question of whether the application for leave to apply for judicial review was filed promptly. Although the impact on third parties is relevant to delay as CPR 56.5(2) clearly contemplates, there is the general discretion that is vested in the court to refuse relief to a successful claimant in light of all the circumstances of a case, including the impact on third parties. It is this

latter point that the court reserved for its consideration at the substantive hearing as the Claimant's rightfully note.

- [126] And, in any event, if I am wrong on this point and the question of delay is properly open for re-consideration at the substantive hearing, having regard to the facts and all the circumstances, I again find that there was no unreasonable delay on the Claimant's part to invoke the rule in CPR 56.5(1) to prevent the granting of any of the reliefs claimed by the Claimant in the application for judicial review.

9. Judicial Review Remedies

- [127] It is by now evident that the Claimant has succeeded on all the grounds of judicial review which it argued. The question that now arises is whether the Claimant is entitled to the prerogative remedy of *certiorari* to quash the decisions of the Cabinet and the DPP. The Claimant submits that both the DPP and the Intervening Party knew that construction could not be undertaken in the manner proposed by the Intervening Party, and that as a fact it was not actually being undertaken in conformity with the Cabinet Approval or the Planning Approval but the construction of the Villas commenced. The Claimant further submits that the Intervening Party submitted a setback in its Building Permit Application it knew it could not adhere to; and once it received Planning Approval with a condition that that setback be adhered to, the Intervening Party proceeded to construct the Villas with a further reduced and unauthorized setback of no more than 44 feet from the line of permanent vegetation.

- [128] The Claimant contends that: (a) it is no answer to state that the DPP granted the Planning Approval as he (the DPP) had to comply with the DAC's mandate in respect of the 60 feet setback from the vegetation line; (b) this is a clear case of a total and manifest disrespect for the rule of law and the planning legislation; (c) it is detrimental to good administration to permit such actions to remain unaddressed, because if it comes down to an argument that "well it is finished, let's just leave it", it will then always will be a race to the finish; once a developer has completed the unauthorized development, the developer gets a free pass and so does the DPP. That makes a complete mockery of the planning system; (d) the Intervening Party

is not an innocent party and cannot seek to distance itself from its professional advisers who submitted the various applications, the CIE and other support documents in its Building Permit Application; (e) the Intervening Party had a non-delegable duty to submit correct and accurate documents and to provide correct and accurate information to the DPP in its Building Permit Application; (f) having provided incorrect information, the Intervening Party cannot use its resultant hardship/potential loss as a reason for the court's refusal to grant *certiorari*; and (g) the Intervening Party submitted a Building Permit Application that was premised on a 60 feet setback from the vegetation line that it had no intention of instituting as it was impossible to do so and yet it submitted the Building Permit Application.

- [129] The Claimant contends that the Intervening Party must have, therefore, proceeded at its own risk and must stand or fall with the contents of its Building Permit Application and must take full responsibility. The Claimant concludes that it would therefore be incorrect to consider in the normal manner any substantial prejudice or hardship that the Intervening Party would experience. The Claimant cites the decision of the Supreme Court of the United Kingdom in **Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government** [2011] 2 AC 304. In that decision, the applicant applied for and obtained planning permission to build a hay barn, which he never intended to build, but constructed a dwelling house that was disguised as a barn. In respect of whether the applicant who had lived in the dwelling house for four years could benefit from the planning legislation that allowed a four year limitation in respect of enforcement action by the local authority, Lord Mance stated that "once a planning authority has allowed a four year period for enforcement against the building to pass, principles of fairness and good governance, could in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless" (at [17]).

[130] The Council in that case was concerned with the public policy of preventing the obtaining of planning permissions as a result of the deceptive planning applications (at [41]). Lord Mance stated that:

43. ... The real gravamen of the council's case is to be found in the deception involved in the obtaining of false planning permissions which Mr Beesley never intended to implement, but which were designed to and did mislead the council into thinking that the building was a genuine hay bar and so into taking no enforcement step for over four years. This was deception in the planning process and directly intended to undermine its regular operation.

[131] The United Kingdom Supreme Court held in summary that, first, the applicant intended to deceive the Council from the outset by his statements in the planning application; second, this was a positive deception in matters integral to the planning process and directly intended to undermine that process; third, it would in fact frustrate the policy of the section if the time limit for enforcement was to apply on the facts of the case; fourth, it would also damage the public's confidence in planning law: any law-abiding citizen would be astonished to suppose that the applicant's dishonest scheme, once discovered, would not be enforced against but rather crowned with success; and fifth, it was unthinkable that Parliament intended such an outcome.

[132] In this case, the Intervening Party submitted the Building Permit Application for the construction of the Villas that could not comply with the 60 feet setback from the vegetation line. In light of the as built plan authored by Dwight C. Francis dated 17 April 2013 (the "**2013 As-built Plan**"), there can be no doubt that the Intervening Party ought to have known that there might have been a serious issue with the setback from the vegetation line taking into consideration the size of the land on which the Villas were to be constructed. In the 2013 As-built Plan, there is a substantial portion of what was previously part of the parcel of land that is described as "NOW SHORE AND UNDER WATER". There is also an indication of where the high water mark was located. The existence of this document and its submission as part of the Approval in Principle Application suggests strongly that the Intervening Party should have accurately verified the distance of the Villas

from the vegetation line, since it ought to have been fully aware (in light of the letter to the DPP from Mr. James Cabourne dated 2 February 2016) that this was a serious hurdle to overcome. The site plans authored by Mrs. Anne Hersch found in the Building Permit Application do not contain a similar notation. The inclusion by the Intervening Party of a 60 feet setback from the vegetation line in its Building Permit Application and in the CIE amounts to a clear representation by the Intervening Party that: (1) it was possible for the Villas to be situated at a distance of at least 60 feet from the vegetation line and; (2) that this distance was verified as correct by its professional advisers. As will be explained later, this was not at all the case as Mr. Tantram was well aware.

[133] In **Welwyn Hatfield Borough Council**, but for the deception of the applicant, the Council would not have granted planning approval. The Intervening Party submitted a Building Permit Application mentioning a 60 feet setback three times: first, on the face of the application itself, second, in the site plans authored by Mrs. Anne Hersch, and third in the CIE. In my view, this inaccurate information was included in the Building Permit Application in circumstances where there was overwhelming evidence that the setback might have been less than 60 feet from the vegetation line and that this needed to be verified by competent professionals before the Building Permit Application was submitted to the Department of Physical Planning. Moreover, as will be examined in more detail later, Mr. Peter Tantram, who was solely responsible for this inaccurate information being included three times in the Building Permit Application, did not actually measure the setback of Villa 1 from the vegetation line as he stated in evidence at trial. This conduct was intended by the Intervening Party to undermine the regular operation of the planning process.

[134] The Court of Appeal of England and Wales in **Thornton Hall Hotel Ltd, R (On the Application Of) v Wirral Metropolitan Borough Council** [2019] EWCA Civ 737 stated that:

21. The approach the court should take when considering whether a claim for judicial review of a planning permission has been issued too late is well

established. Some broad principles can be drawn from the relevant case law:

(3) Developers are generally entitled to rely on a grant of planning permission as valid and lawful unless a court has decided otherwise (see Sales L.J. in *Gerber*, at paragraph 55). A developer is not generally required “to monitor the lawfulness of the steps taken by a local planning authority at each stage of its consideration of a planning application”. Such an obligation is “not warranted by the legislative scheme, which places the relevant responsibilities on the local planning authority”, and “it would give rise to practical difficulties if applicants were required at each stage to check on the authority’s discharge of its responsibilities”. Applicants for planning permission are “entitled to rely on the local planning authority to discharge the responsibilities placed upon it”, and “should not be held accountable for the authority’s failure to comply with relevant requirements, at least where ... they cannot be said to have caused or contributed to that failure by their own conduct” (see Richards J. in *R. (on the application of Gavin) v Haringey London Borough Council* [2004] 2 P. & C.R. 13, at paragraph 69).

[135] In that decision, the trial judge quashed the planning permission granted to the applicant six (6) years earlier to erect three marquees at sites within Thornton manor Estate. The Court of Appeal summarized the findings of the trial judge as follows:

22. Kerr J. was satisfied that the extension of time for bringing the challenge should be granted. The delay had been “long”, and he accepted it was “unusual, particularly in the planning context, to allow a claim to be brought so late”, but Thornton Holdings bore “considerable responsibility for the lateness of the claim because [they] knew of the error and chose to remain silent about it” (paragraph 47). The “extreme lateness of the challenge” was not “as prejudicial to the planning process as lateness usually is ...”. The presence of the marquees was “not contrary to the intended scope of the planning permission and contrary to [the council’s] decision until December 2016”. It “only became malign, if at all, in late 2016, not in 2011” (paragraph 48). The council’s error had been “discovered late”. Had the claim been decided before the “five year time limit” expired, there would have been “negligible prejudice to [Thornton Holdings] or the public”, and if Thornton Holdings “had not substantially contributed to the lateness of the discovery”, he “might well have refused to grant the extension of time sought” (paragraph 49). On the facts, however, he found that “justice requires that the extension of time be granted so that the interest of the public in the integrity of the planning process is not excluded from consideration by this court”, and that “[the]

public interest lies in the court having power to rectify the error” (paragraph 50). He therefore granted the extension of time, and, because he was “easily satisfied” that the claim was “properly arguable”, gave permission for it to proceed (paragraph 51).

23. As for the substance of the claim, the judge accepted that “any legal flaw arising from the omission of the intended conditions, including the five year time limit, did not prevent the planning permission from having legal effect, unless and until quashed by this court” (paragraph 52). The presence of the three marquees on the site had not been unlawful before 19 December 2016, “when the five year time limit expired or would have expired”. However, the court had to decide “whether [it] should now grant relief which would alter that position for the future” (paragraph 55).

24. Kerr J. was in no doubt that it should. He referred to the “public interest” in correcting the council’s error, which was, he said, “more important than the commercial interests of [Thornton Holdings] ...” (paragraph 62). He was “not impressed” by the argument that Thornton Holdings would be prejudiced if relief were given. Their decision to accept bookings at a time when the marquees’ presence on the site was “legally precarious” was made at their “own risk and peril” (paragraph 66). There would be “no detriment to good administration in rectifying the error”. On the contrary, it was “detrimental to good administration that the marquees are still there” (paragraph 68). The fact that Thornton Holdings had entered into the section 106 agreement “embodying the omitted conditions, including the five year time limit”, but had acted in the proceedings as if they were not bound by it, only compounded the “unconscionability” of their position (paragraph 70). The marquees “should not be there unless permitted to remain under a fresh and lawfully granted planning permission ...” (paragraph 71). The claim therefore succeeded. The judge added that “neither [the council] nor [Thornton Holdings] emerges with much credit” (paragraph 72).

- [136] The trial judge was of the opinion that the applicant was aware of the local planning authority’s error in granting planning permission without any conditions contrary to its own stipulated conditions, including, critically, the condition that “[the] permission shall be for a limited period of five years only expiring five years from the date of issue of the decision notice.” In other words, the planning permission should have been subject to a condition decided upon by the local planning authority, but this was omitted in error from the document granting planning permission to the third-party developer in that case. The trial judge quashed the incorrect planning permission for the following reasons which are necessary to state in full:

59. The first and most obvious reason is that the error was made. The planning permission that was issued is not as it should be. The authority delegated to officer level to issue the permission, plainly was not intended to include authority to undo the committee's decision that the permission should be conditional. That would fly in the face of the committee's decision to accept the recommendations in the report to the committee.

60. The second reason is that unconditional and permanent planning permission to erect the three marquees and keep them there would not have been granted and would not have been considered as being in the public interest. The permanent presence of the three marquees was inappropriate development in the Green Belt; their presence was only regarded as acceptable because of the difficult financial position, the threat to the condition of the gardens which were in decline, and by reason of the limited duration of the permission, which preserved the power of the LPA to review the position from time to time.

61. The third reason is that if I do not grant the relief sought, the marquees need not be removed, ever. Unless the LPA decides otherwise, they should be removed. Their presence at Thornton Manor ought to have ceased in December 2016 unless a fresh permission had been granted, application for which was deliberately not made. If the marquees are now allowed to stay permanently, the proper operation of the planning process will have been subverted.

62. Fourth, that would be contrary to the public interest. I asked Mr Lockhart-Mummery QC at the hearing whether he wanted to make any observation about the public interest in this case. His answer was to the effect that it must give way and that it was inevitable in cases of this kind that this must be so. I respectfully disagree. I think it is more important than the commercial interests of the interested party, at least on the facts of this case.

63. Fifth, among my reasons for taking that view is that the interested party was aware of the error. If it had not been, it would have said so in its evidence. Mr Landor with commendable candour admitted that as long ago as 22 December 2011 he was aware of the inconsistency between the permission as issued and the permission as envisaged by the planning committee. It is safe to infer that he raised the issue with his client, the interested party, and that the latter chose to remain silent about the inconsistency.

64. Sixth, it follows that the interested party ran its commercial operation at Thornton Manor from 22 December 2011 knowing that the presence of the marquees after 19 December 2016 would be, at the very least, a matter of possible controversy and possible legal challenge. It was not, in my judgment, realistic to rely on expiry of the three month

limitation period without also bringing the issue into the open, which the interested party decided not to do.

65. Given the failure of the interested party to draw the LPA's attention to the apparent error, it is unattractive then to assert that the claimant and the LPA bear responsibility for the delay in the matter coming to light. I accept Mr Crean's submission that the claimant had no reason to suppose that the LPA would issue an unconditional planning permission, having decided to issue a conditional one.

66. Seventh, it follows that I am not impressed by the argument that the interested party would be prejudiced by the grant of relief, because it accepted bookings in good faith, up to the year 2020, on the strength of the unconditional planning permission of which it had the benefit. It was only able to enjoy that benefit by keeping silent about the obvious error that had been made. Its decision to accept bookings at a time when the presence of the marquees would be legally precarious, was one made at its own risk and peril.

67. I asked Mr Lockhart-Mummery QC whether there was evidence as to when those bookings were accepted and whether acceptance of bookings continued after the error became known to the LPA (in March 2017) or after the claim was brought in August 2017. The evidence is silent on this point save that Ms Steel's statement that bookings are "increasing month by month" suggests the interested party undaunted by the claim and continues to accept bookings.

68. Eighth, it is said by the interested party that it would be detrimental to good administration if the marquees have to be removed. Normally, detriment to good administration in public law cases relates to the undesirability of interfering with the provision of public services rather than commercial interests. I see no detriment to good administration in rectifying the error. I think it is detrimental to good administration that the marquees are still there. Good administration includes correct implementation of planning decisions.

69. I do have great sympathy with any persons who have made bookings with the interested party for a wedding or other function, whose function may be placed in jeopardy as a result of this judgment. They may have reason to complain about the interested party's conduct if they were not warned about possible legal difficulty, but that is not a matter for me. I do not think the existence of these bookings, about which I do not have detailed evidence, should override the public interest in the integrity of the planning process.

70. Ninth, the interested party signed the section 106 agreement embodying the omitted conditions including the five year time limit. Yet, it proceeds in this litigation as if it were not bound by the terms of that agreement. That seems to me only to compound the unconscionability of

its position. It undertook in private law the same obligations as it denies in public law.

- [137] In light of all the circumstances, it is not difficult to come to the conclusion that the Intervening Party was aware of the error (that the setback line was not 60 feet) but deliberately included that setback in its Building Permit Application. As stated above, the actions of the Intervening Party leave the unmistakable impression that it intended to undermine the regular operation of the planning process of the Department of Physical Planning. However, the DPP and the Department of Physical Planning state in evidence that they were aware of the error and did nothing. The decision of the Court of Appeal of England and Wales in **ex parte Thornton Hall Hotel Ltd** is distinguishable on that basis alone, namely, that the DPP and the Department of Physical Planning in this case knew that the setback was 44 feet and not 60 feet as stated in the Building Permit Application. However, the principles stated in that decision are still of general application and can be applied in this case. In **ex parte Thornton Hall Hotel Ltd**, the Court of Appeal of England and Wales had to consider whether to set aside the decision of a trial judge to quash almost six years later a defective planning decision in circumstances where the third-party developer was aware of the defective decision but said nothing. The Court of Appeal dismissed the appeal, stating that the opposite conclusion would not meet the justice of that particular case.
- [138] Applying those principles mentioned above, the Intervening Party in this case did not adhere to the 60 feet setback stated in the Planning Approval. It continued to construct the Villas and subsequently made bookings and entered into commercial arrangements when it knew the Villas were subject to a judicial review challenge and therefore be legally precarious. The Intervening Party, therefore, made those decisions at its own risk. I agree that, normally, detriment to good administration in public law cases relates to the undesirability of interfering with the provision of public services rather than commercial interests. However, good administration also includes correct implementation of planning decisions. The financial losses that the Intervening Party is likely to suffer should not override the public interest in the integrity of the planning process.

[139] As stated above, the Building Permit Application was considered by the DAC on 23 September 2016 and the DAC recommended planning permission be granted, subject to the Intervening Party complying with the guidelines as set out in the CIE, namely, the requirement that the Villas must adhere to a 60 feet setback from the vegetation line. It is interesting to note that Ms. Douglas gave evidence that the DAC recommended approval of the Building Permit Application because: (i) Cabinet had already given approval of the concept for the development; and (ii) the CIE met the requirements. The DPP in cross-examination accepted that any difference in the setback of Villas 2-5 from the vegetation line would not have had any effect on the deliberations of the DAC at its meeting held on 23 September 2016 where the DAC recommended planning permission be granted to the Intervening Party subject to compliance by the Intervening Party with the guidelines as set out in the CIE, in particular, the requirement to comply with the 60 feet setback from the vegetation line.

[140] The Defendants submit that the DPP sits on the DAC, and that the DAC was therefore well aware that the setback was less than 60 feet, which was requested by the Intervening Party, and that it follows that the error in the CIE was known to the decision makers. Two points are worthy of note. First, if the DAC was aware of the error and still recommended a 60 feet setback from the vegetation line, it would have fallen into error as well. Second, it is more likely than not that the DAC was not informed by the DPP or any other person that the 60 feet setback from the vegetation line was impossible. The DPP did not provide any evidence that the DAC was aware that a 60 feet setback was impossible or explain if the DAC was so aware why it still stipulated that there should be compliance by the Intervening Party with the 60 feet setback from the vegetation line. If the DAC was: (1) aware and still approved the 60 feet setback; or (2) not informed by the DPP of the impossibility of compliance by the Intervening Party with the 60 feet setback, it would have stipulated a requirement that could not be performed. In both cases, the DAC would have acted unlawfully (even though in one case inadvertently) for failing properly to consider a material consideration.

- [141] The DPP failed to ensure that the Intervening Party implemented the 60 feet setback from the vegetation line which was recommended by the DAC and was a condition on which Planning Approval was granted. I agree with the Claimant that if the CIE was taken into account by the DPP or any functionary then reliance on any implication that a 60 feet setback stated therein was acceptable when combined with the elevation of the Villas off the ground was simply wrong as there was in fact no 60 feet setback, but at most a 44 feet setback. The DPP cannot respond lawfully to this by stating that he was aware that a 60 feet setback was not possible but that the setback was at most 44 feet. The Claimant is correct in stating that there was no CIE relating to the suitability and appropriateness of a 44 feet setback on which the DPP could rely in making the Planning Approval. If the Cabinet Approval had purportedly approved a reduced setback to 78 feet to the high water mark and 44 feet from the vegetation line, one may well ask what purpose did the CIE submitted by the Intervening Party serve?
- [142] The Defendants submit that the DPP would have made the same decision in any event as he was well aware of the error in the CIE. The DPP had no authority under the Ordinance or otherwise to accept from the Intervening Party anything less than a 60 feet setback of the Villas from the vegetation line. The DPP gave evidence at trial that approval was given by Cabinet for a relaxed setback for the entire Villa project. I do not accept this evidence. Approval could only be given in respect of the setback as stipulated by the CIE and (since it was the same) as set out in the Building Permit Application. In doing so, the DPP acted contrary to section 5(1) of the Ordinance which provides that “[f]or all other classes of applications, the [DPP] will act in accordance with the decisions of the [DAC]”. The DPP, by not requiring the Intervening Party to adhere to the decision of the DAC as found in the Planning Approval, and by knowingly acting contrary to the express instructions of the DAC, acted *ultra vires* section 5(1) of the Ordinance.
- [143] Quite apart from the fact that the DPP was aware that the setback was 44 feet from the vegetation line, which is less than the stipulation of the DAC and the requirement found in the CIE, there is another important aspect that must also be

considered, namely, the actions of the Intervening Party before and after Planning Approval was granted. In all the circumstances, I find that the Intervening Party, first, knew, or at least should have known, that the setback was less than 60 feet from the vegetation line; and, second, knowingly submitted incorrect information in its Building Permit Application without first ensuring that this information was verified by competent professionals. The fact that the DPP states that he was aware that the setback was less than 60 feet from the vegetation line does not affect the culpability of the Intervening Party in knowingly including incorrect information in its Building Permit Application.

- [144] The Planning Approval was made specifically subject to compliance with the mitigating measures in the CIE which clearly stipulated that there should be a 60 feet setback from the vegetation line. It was then incumbent upon the Intervening Party to comply with that express condition before construction commenced on the Villas. The Intervening Party had to ensure that it complied with the condition found in the Planning Approval. It failed to do so and has provided no reason, let alone a good reason, for not complying with that express condition. It is not sufficient for the Intervening Party simply to state that “its Architect, Ms. Anne Hersch whose expertise it has full confidence in, prepared the [Intervening Party’s] building permit application and on applying, by implication confirmed that a 60 feet setback was possible”. As was mentioned above, at trial Mr. Peter Tantram testified that it was he who “came up” with the 60 feet setback from the vegetation line, and that it was he who communicated this information to both Mrs. Anne Hersch, an architect and a planning consultant to Mr. Peter Tantram, and to CADENCO, INC., the authors of the CIE. This evidence of Mr. Tantram must be understood in light of the finding below that he did not actually measure the distance of the setback of Villa 1 from the vegetation line. The Intervening Party cannot distance itself from its Building Permit Application which contained incorrect information. Consequently, the Intervening Party must shoulder the responsibility of those whom it employed to submit on its behalf the Building Permit Application.

[145] It is also worth noting that Mr. James Cabourne states in evidence, as mentioned above, that he relied on the expertise of Mrs. Anne Hersch, his architect, that in effect by implication confirmed that the 60 feet setback from the vegetation line was possible. If Mrs. Hersch did not independently verify the setback and relied on the information provided to her by Mr. Tantram, then the statement concerning Mrs. Hersch does not assist the Intervening Party at all. In one of the site plans authored by Mrs. Hersch found in the Building Permit Application, the setback for each of the 5 Villas is shown to be 60 feet from the vegetation line. This gives the distinct impression that it was possible to have a setback of 60 feet for each of the 5 Villas, contrary to the reality that the setback was 44 feet from Villa 1 and was decreasingly so for each subsequent Villa. If there was any doubt that Mrs. Hersch did not independently verify the setbacks from the vegetation line for each Villa, then this evidence provides it. If the correct setback from the vegetation line to Villa 1 is 44 feet (and not 60 feet) and knowing that the land on which the Villas are constructed is angled towards the sea from Villa 1, it is physically impossible for each subsequent Villa also to have the same setback of 60 feet from the vegetation line. Moreover, if the Intervening Party had actually measured the setback to Villa 1 from the vegetation line, it would not have to rely on any implication derived from the plans authored by Mrs. Anne Hersch that a 60 feet setback from the vegetation line was possible. The Intervening Party would have simply stated so in the many affidavits filed on its behalf in this matter.

[146] The experts on whom the Intervening Party relied had an obligation to ensure that the correct setback from the vegetation line was measured and then included in the Building Permit Application particularly because it was less (and significantly so) than the established setback from the vegetation line for Pinney's beach, namely, 120 feet. The Intervening Party claims (at [31] of the first affidavit of Mr. James Cabourne) that it:

... secured experienced experts to provide technical guidance and management of the permit process. Further the [Intervening Party] secured professionals to attend to the actual construction of [the Villas] in accordance with the permission it obtained. There is no basis for the Claimant's assertion that the [Intervening Party] knew or ought to have

known that the referenced setback [in the Building Permit Application] was not possible and no particulars for that assertion is advanced. The [Intervening Party] relied on the skills and expertise of persons it employed.

[147] I wish to reiterate that it is no answer to the fact that there was non-compliance with an express condition of the Planning Approval for the Intervening Party to state repeatedly that it relied on the skills and expertise of persons it employed. Apart from the obligation to provide the DPP with accurate information in the Building Permit Application, the Intervening Party had an obligation prior to commencing construction of the Villas to ensure that the required setback of 60 feet from the vegetation line was possible, and if it was not, to not commence construction until planning approval was granted for the construction of the Villas with a setback of less than 60 feet from the vegetation line. The Intervening Party repeats in evidence many times that the construction was carried out in accordance with the Planning Approval. There cannot be any dispute that the Villas were constructed in circumstances where there was no compliance with the 60 feet setback because this was not possible. The Villas were constructed and the setback of Villa 1 which was farthest from the seaward side is 44 feet from the vegetation line. None of these are in dispute. Nonetheless, the Intervening Party repeatedly insists in evidence that it complied with the Planning Approval.

[148] The Intervening Party did not provide any evidence that it specifically measured the distance of the setback of at least Villa 1 from the vegetation line at any time before construction commenced. It merely relied on an implication to be derived from the plans authored by Mrs. Anne Hersch whom I have earlier found did not actually carry out any measurements of the setback of any of the Villas from the vegetation line. The Intervening Party merely states (again) (at [54] of the affidavit of Mr. James Cabourne) in reply that:

... the preparation of both [the Application for Approval in Principle and the Building Permit Application] were delegated to local professionals retained by the [Intervening Party], who have experience with planning matters in the island of Nevis. Both of those Applications were prepared by local professional in accordance with local practice, regulations, and requirements of the Planning Department of Nevis. The [Intervening Party]

trusted and relied on those professionals as highly skilled persons of integrity with impeccable reputations. Any assertion that the [Intervening Party] misled the 1st Defendant and or 2nd Defendant on any of its Applications is incorrect as the [Intervening Party] retained as a prudent company, trained and fully qualified individuals to conduct that process.

[149] This does not explain at all why there is no evidence in the affidavits of the Intervening Party that any skilled and competent professional employed by the Intervening Party actually measured the distance of the setback of at least Villa 1 from the vegetation line. I agree with the Claimant's submission that the Building Permit Application was that of the Intervening Party and not that of the professionals employed by the Intervening Party to prosecute its Building Permit Application to the planning authorities.

[150] However, the Building Permit Application contains the measurement of 60 feet setback from the vegetation line. The site plans found in the Building Permit Application also show a setback line of 60 feet from the vegetation line for each of the 5 Villas. The 60 feet was also found in the CIE as a mitigating measure. During cross examination, Mr. Peter Tantram, a Civil Engineer by profession and the person who had general control and oversight of the construction of the Villas, testified that he did not know who proposed the mitigating measures to CADENCO, INC. which formed part of the CIE. He testified that he only provided designs and drawings to CADENCO, INC. and that those drawings are the site plans submitted with the Approval in Principle Application. These were the same as the 2013 As-built Plan to which reference was made earlier. Mr. Tantram testified that those drawings were also given to Mrs. Hersch. Mr. Tantram at first stated that he "believed" CADENCO, INC. was provided with the drawings but later testified that he "was sure" that he provided CADENCO, INC. with a copy of the drawings. It was put to Mr. Tantram by Counsel for the Claimant that both Mrs. Hersch and CADENCO, INC. prepared the site plans and the CIE, respectively, that included a 60 feet setback from the vegetation line when in fact it had been established that a 60 feet setback was not possible. Mr. Tantram replied that he provided the drawings to both of them which showed the 60 feet setback, but he does not accept that a 60 feet setback was not possible. I do not accept Mr.

Tantram as a credible witness. He hesitated in his responses and changed some of his responses when pressed by Counsel for the Claimant. Moreover, he did not appear able to provide credible responses to questions posed to him on cross-examination. I was left with the distinct impression during his oral evidence that Mr. Peter Tantram was not being truthful in his evidence to the court.

[151] It is clear that the drawings, namely, the 2013 As-built Plan, do not make reference to any 60 feet setback and that it is impossible for both Mrs. Hersch and CADENCO, INC. to have derived a 60 feet setback from the 2013 As-built Plan that Mr. Peter Tantram gave to them. When asked by Counsel for the Claimant how would Mrs. Hersch have been able to conclude that a 60 feet setback was possible, to have included it in the plans she authored, Mr. Tantram, for the first time, replied that he had measured a 60 feet setback to be possible and that he could not remember the specific instance where he would have informed Mrs. Hersch but that was what would have happened. The difficulty here is that Mr. Tantram at first testified that he gave the drawings to Mrs. Anne Hersch and CANDENCO, INC, and that the drawings showed a 60 feet setback. However, nothing in the 2013 As-built Plan shows a setback of 60 feet.

[152] Mr. Tantram then testified that it was he who provided to Ms. Anne Hersch, an architect and a planning consultant to Mr. Peter Tantram, and CADENCO, INC., the authors of the CIE, the 60 feet setback from the vegetation line. Mr. Tantram later explained, in re-examination, that his measurement was based on where he estimated the vegetation line to be and he then measured 60 feet to where he believed the Villas would be constructed. I do not believe the evidence of Mr. Tantram that he measured the setback and found it to be a distance of 60 feet. This was inconsistent with the statement that he made immediately before, namely, that he gave Mrs. Anne Hersch and CANDENCO, INC. the 2013 As-built Plan which showed a 60 feet setback from the vegetation line. This new evidence did not feature in any of the many affidavits filed by Mr. Tantram in this matter. An important aspect of this case is the setbacks – the setback policy of 120 feet from the vegetation line in relation to Pinney's beach; the 44 feet setback measured by

the Department of Physical Planning; and the 60 feet setback that is found in the: (i) Building Permit Application; (ii) the site plans authored by Mrs. Hersch; (iii) the CIE authored by CADENCO, INC.; (iv) the recommendation by the DAC for compliance by the Intervening Party; and (v) a condition of Planning Approval prior to construction of the Villas by the Intervening Party.

[153] When it was put to Mr. Tantram by Counsel for the Claimant that this case has been to a great extent about measurements and that the issue of the 60 feet setback has featured prominently, he merely replied that he disagrees and that this issue has only featured recently in this case. It is implausible that this would have escaped the attention of Mr. Tantram who, as construction manager of the Villas, had control and oversight of the Villa project. Mr. Peter Tantram was the person who engaged and instructed the experts in relation to prosecuting the Intervening Party's Building Permit Application at the Department of Physical Planning. Mr. Tantram did not include this important piece of evidence in any of the affidavits he filed in the matter. Mr. Peter Tantram is indeed a stranger to the truth. I believe that his evidence is a fabrication in an attempt to put in evidence before the court that the Intervening Party actually measured the setback to Villa 1 and found it to be 60 feet from the vegetation line. Mr. Tantram does not explain why his setback measurement of 60 feet differs so significantly from the measurement of 44 feet found by the Department of Physical Planning. I agree with Counsel for the Claimant who put it to Mr. Tantram, who merely stated that he disagreed, that his evidence is a total fabrication and that he was now providing this evidence to demonstrate to the court that a 60 feet setback was possible because he, Mr. Tantram, measured it. In all the circumstances, there is no evidence before this court to show that any skilled and competent professional employed by the Intervening Party actually measured the setback of Villa 1, or any of the Villas, from the vegetation line. I reiterate that I find as a fact that Mr. Peter Tantram did not carry out any measurements in relation to the setback of Villa 1, or any of the other Villas, from the vegetation line.

[154] Even if Mr. Tantram's evidence on this point were to be believed, which I do not, there are two problems with it. First, Mr. Tantram did not determine where the vegetation line was; it was based on *his estimation* of where it was. Second, he measured 60 feet to where *he believed* the Villas would be constructed. This method of measurement might be sufficient to provide a broad estimate of the distance of the Villas from the vegetation line, but it is certainly not reliable. As a civil engineer, Mr. Tantram should have known that the 60 feet he allegedly measured was not an accurate measurement of the distance of the setback from the vegetation line to the Villas. Mr. Tantram further testified, on re-examination, that he did not work as a surveyor before or during the construction of the Villas and that his training as a surveyor ended in the 1970s. This lends even stronger support for the view that Mr. Tantram was uniquely unqualified, if he did, to determine the measurement of the distance of the setback of the Villas from the vegetation line for it to have been subsequently included in the Building Permit Application and also in the CIE. Moreover, even if this measurement was used as a guide for making some early (internal) decisions as to the feasibility of the Villa project, it was surely an unreliable measure of the distance of the setback of the Villas from the vegetation line for it to be included in the Building Permit Application. If this did in fact occur, it most certainly should not have formed the basis of a mitigating measure in the CIE without accurate verification by a skilled and competent professional.

[155] Mr. Tantram admitted providing this information to Mrs. Hersch and the authors of the CIE. This is believable since there is no other way for both Mrs. Hersch and CADENCO, INC. to have included a 60 feet setback from the vegetation line in the site plans and CIE, respectively, if this was not communicated to them directly by Mr. Tantram. One can reasonably conclude that neither Ms. Hersch nor the authors of the CIE independently took their own measurements of the distance of the setback of the Villas from the vegetation line. Evidence of this was seen in the site plans (authored by Mrs. Hersch) submitted in the Building Permit Application which shows a 60 feet setback from each of the 5 Villas. For reasons already explained, this was physically impossible. The blame for this error rests with the

persons the Intervening Party trusted with the prosecution of its Building Permit Application, namely, Mr. Tantram, Mrs. Hersch and CANDENCO, INC.. The authors of the CIE had a responsibility to ensure that something as important as a mitigating measure was in fact possible to achieve the purpose for which it was included in the CIE, namely, mitigating against risks of beach erosion and preservation because of the existence of the Villas and their proximity to the coastline.

[156] In any event, this does not explain why, when provided with the Planning Approval, which contained a requirement strictly to comply with a setback of 60 feet from the vegetation line, the Intervening Party did not ensure that it complied with that requirement before it commenced construction of the Villas. It is noteworthy that the Intervening Party has not provided any explanation in any of the affidavits filed in this matter or during oral evidence at trial as to why it did not comply with the requirement to ensure that the Villas were constructed with a 60 feet setback from the vegetation line. This was not merely directory; it was a mandatory requirement that was not adhered to by the Intervening Party without any explanation. In the document entitled "Wise practices for coping with beach erosion" co-authored by the Department of Physical Planning, it is stated that "[p]lanning new development so that it is safe distance behind the beach will reduce the need for expensive sea defence measured in the future". More importantly, the established setback of 120 feet from the vegetation line is clearly intended to protect the coastline by reducing beach erosion, facilitating an orderly coastal development and preserving the beach for the people of the Federation of Saint Christopher and Nevis as stated in Dr. Cambers Report. Any relaxation of these setback requirements must be for good reason and must also be properly justified.

[157] Of course, developments are permitted and exceptions allowed but what is not allowed is, first, the disregard by the DPP of the planning policies, processes and decision that required a 60 feet setback of the Villas from the vegetation line to be adhered to by the Intervening Party before construction commenced; and, second,

the indifference of the Intervening Party to an express condition of the Planning Approval to which it was bound and should have been implemented before construction commenced on the Villas. The Intervening Party did not provide any evidence that it measured the setback after it received Planning Approval and realized it was less than the 60 feet approved setback. There was also no evidence that the Intervening Party expressly sought the approval of the DPP for a further relaxation of the 60 feet setback to 44 feet. I note with some concern that the DPP now states in evidence that he was aware that the setback was only 44 feet ("We however because of the inconsistency in the setback recorded on the plan and actual site condition") and that he "permitted construction of the buildings to be situated closer to the rear boundary". Apart from this bald statement, there is no corroborating evidence that the DPP had any discussions with the Intervening Party in respect of this, or that the Intervening Party specifically informed the DPP that the 60 feet setback was not possible and that the DPP then "permitted" construction of the Villas to proceed. Based on the evidence presented, no such permission was granted by the DPP to the Intervening Party.

- [158] More importantly, I fail properly to appreciate the statement of the DPP that the "setback [of 44 feet] was unfortunately through in advertence not adjusted on the [Building Permit Application]". This seems to be entirely improper. The Building Permit Application contains a statement that the Villas will have a 60 feet setback from the vegetation line and this 60 feet setback is the basis on which the CIE is premised. I do not understand why a material consideration found in the Building Permit Application and which forms the cornerstone of the CIE and the mitigating measures would be treated in such a cavalier manner by the DPP. If a developer applying for planning approval submits an application with incorrect information, it is improper for the DPP or anyone in the Department of Physical Planning unilaterally to amend the application. The developer must be informed in writing of the error and if anything is specifically based upon that error, for example, a CIE, as is the case here, the DPP must request the developer to amend and resubmit the application and to submit a new CIE based on the accurate information. The

approach or practice of the DPP and the Department of Physical Planning is improper, incorrect and must cease immediately.

[159] Moreover, there is no documentary or other evidence that this permission allegedly granted by the DPP to the Intervening Party was ever granted. I do not accept that aspect of the evidence of the DPP. It seems to be contrived. In addition, it is more likely than not that if the Intervening Party had actually measured the distance between Villa 1 and the vegetation line and found that it was 44 feet (or at least less than 60 feet) and had informed the DPP who then gave the Intervening Party express (or even implied) permission to commence construction of the Villas, I have no doubt that this would have featured prominently in the Intervening Party's affidavits opposing leave to apply for judicial review and in the substantive application for judicial review with which I am now concerned. The DPP did not provide any direct evidence that it informed the Intervening Party that the Villas could not comply with the 60 feet setback from the vegetation line; and the Intervening Party adduced no evidence that it measured the setback of the Villas from the vegetation line to ensure that it complied with an express condition of the Planning Approval. The surprising attempt by the DPP to provide affidavit evidence that he granted "permission" to the Intervening Party to act contrary to an express condition in the Planning Approval is rejected. I do not believe this evidence and, in any event, the DPP would have had to seek the approval of the DAC to grant any modification of the required setback in the CIE and the Planning Approval.

[160] The responsibility to comply with the Planning Approval rested solely with the Intervening Party. It failed to comply and has provided no justification for this non-compliance. The Intervening Party is therefore solely responsible for its actions in constructing the Villas contrary to the Planning Approval. If the Intervening Party had, subsequent to Planning Approval, measured the distance of the setback of Villa 1 from the vegetation line and found that it was less than the required 60 feet, as it was, it could have challenged the condition on the ground that it was unreasonable because it was impossible to perform. Having not done so, that is, to

comply with the 60 feet setback from the vegetation line, the Intervening Party breached that Planning Approval condition.

[161] The Intervening Party submits that: (1) dismantling the Villas will require removal of barriers providing beach reinforcement and defence would be necessary if the Villas are removed; (2) removal of the Villas will be a large operation; (3) dismantling the Villas will equate to the destruction of the Villas both the part above ground and below the ground. The Intervening Party states in evidence that if it were to remove the Villas, it will lose substantial income and revenue from: (i) loss of existing leases for two of the Villas; (ii) reduced occupancy; and (iii) services provided with rentals including but not limited to laundry, bar, restaurant, room services, service charge, tours and rents. The Intervening Party states that the estimated loss of income if the Villas are removed is US\$3,400,000.00 annually, which is approximately US\$9,315.00 per day. It also states that the collective loss of income and expenditure is likely to cause the Intervening Party to go bankrupt and that there will be damage to its reputation and goodwill.

[162] I agree with the submission of the Claimant that it is detrimental to good administration to permit such actions to remain unaddressed. I associate myself closely with the views of Sykes J. in **The Northern Jamaican Conservation Association et al v The Natural Resources Conservation Authority et al** (HCV 2005/3022 dated 16 May 2006) where he considered the following: the impact on third parties, the impact on administration, whether granting reliefs sought would serve any useful purpose and, importantly, the rule of law. In that case, the third party did not deceive the planning authorities and neither did the Intervening Party in this case. Third parties are entitled to act pursuant to planning permission, which is valid until it is set aside by the court. In this case, the Intervening Party was not innocent as it stated repeatedly in evidence. Without providing any justification or explanation, it did not comply with the requirement to construct the Villas at least 60 feet from the vegetation line. Unlike the third party in **Northern Jamaican Conservation Association**, the Intervening Party has provided direct and affirmative evidence of the hardship it would suffer if the Planning Approval is

quashed. I have taken into consideration all the evidence in this regard that was put before the court by the Intervening Party and the arguments made by the Intervening Party in respect of the removal of the Villas that were built contrary to the Planning Approval.

[163] I have no doubt that the Intervening Party would suffer some financial loss if the Villas are removed but I am convinced, based on the evidence before the court, that, first, the Intervening Party is not an innocent party. Second, the Intervening Party failed to carry out any measurements of the setback of the Villas from the vegetation line at any time before or after the grant of Planning Approval. Third, the setback of Villa 1 from the vegetation line was not actually measured by Mr. Peter Tantram but that he “came up” with a 60 feet setback. Fourth, the Intervening Party provided no evidence that the setback was actually measured before the Building Permit Application was submitted to the Department of Physical Planning. Fifth, the evidence of Mr. Peter Tantram was that it was he who provided the 60 feet setback to Ms. Anne Hersch and the authors of the CIE. Sixth, by doing so, Mr. Tantram provided inaccurate information to the authors of the CIE and Mrs. Anne Hersch both of whom, in turn, did not carry out their own measurements to verify that setback of 60 feet. Seventh, the CIE was an integral part of the planning application process since the DAC had twice refused to approve the construction of the Villas because the required 120 feet setback from the vegetation line could not be achieved. Eighth, the importance of the setbacks must have been known to the Intervening Party because the Department of Physical Planning specifically requested the Intervening Party to justify the relaxation of the 120 feet setback from the vegetation line for the Villas. Ninth, the inaccurate 60 feet setback formed part of the Building Permit Application and formed a critical part of the CIE. Tenth, the Intervening Party did not verify whether any or all of the Villas complied with the 60 feet setback from the vegetation line after Planning Approval was granted and prior to construction of the Villas. Eleventh, the Intervening Party constructed the Villas contrary to the express condition of the Planning Approval. Twelfth, the actions of the Intervening Party

were intended to undermine the regular operation of the planning process of the Department of Physical Planning.

- [164] While I have taken into account the loss that the Intervening Party will inevitably suffer as a result of any order to remove the Villas I may make, this must be balanced with the view that the planning law must be obeyed (**Northern Jamaican Conservation Association** (at [113])). In **Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Belize Electric Company Limited** [2004] UKPC 6, Lord Walker (with whom Lord Steyn agreed), dissenting, stated that:

120. In eloquent supplementary submissions made to the Board on behalf of the DoE the Attorney-General drew attention to what he called the economic and demographic realities of the case. Belize is a small country (its total population is about 250,000) and it has very limited economic resources. It needs foreign direct investment, and delay in the Chalillo dam project might, the Attorney-General said, mean that the project never went ahead. Its loss would be a grave blow to the country. He submitted that even if the EIA had identified the bedrock as sandstone, the design of the dam would not necessarily have been different. The Attorney-General also mentioned Mr Fabro's affidavit of 3 December 2003 and conceded that it might be inconsistent with the terms of his exchange of correspondence (letters of 30 May and 10 June 2003) with Mr Garel of BACONGO.

121. The Attorney-General's submissions call for respectful attention but they do not alter my view of what should be the outcome of the appeal. Belize has enacted comprehensive legislation for environmental protection and direct foreign investment, if it has serious environmental implications, must comply with that legislation. **The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment).** It is no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design before the project is approved and before work continues with its construction. (Emphasis added)

- [165] The Defendants submit, essentially on behalf of the Intervening Party, that the invalidation of the Planning Approval granted to the Intervening Party would therefore have disastrous consequences in that the Intervening Party would not

only lose its significant financial investment made in connection with the Villas but also substantial revenues to be made from it. I have no doubt that there will be losses incurred by the Intervening Party, but I agree with Lord Walker in **Belize Alliance** that the rule of law must not be sacrificed to foreign (or tourism) investment, however desirable that might be in monetary terms.

Conclusion and Disposition

- [166] The long title of the Ordinance states that it is an ordinance to make provision for the preparation of physical plans for Nevis, for the control of the development of land, including building operations and the subdivision of land, for the assessment of the environmental impacts of development, for the preservation of the natural and cultural heritage, and for related matters. Section 3(1) of the Ordinance provides that the objects of the Ordinance are to: (a) ensure that appropriate and sustainable use is made of all publicly owned and privately-owned land in Nevis in the public interest; (b) maintain and improve the quality of the physical environment in Nevis, including its amenities; (c) provide for the orderly subdivision of land and the provision of infrastructure and services in relation thereto; (d) maintain and improve the standard of building construction so as to enhance human health and safety; (e) provide for physical planning and development control processes that are fair, open, accessible, timely and efficient; and (f) protect and conserve the natural and built heritage of Nevis. Section 3(2) provides that the Ordinance must receive such purposive and liberal construction and interpretation as will best ensure the attainment of its objects.
- [167] The Minister (section 4), the DPP (section 5), the DAC (section 6) and Cabinet (section 28) are the guardians of the public interest in ensuring that the purposes and objects of the Ordinance are not undermined and that their actions further the objectives for which the Ordinance was enacted by the National Assembly. The Minister failed to ensure that Cabinet had before it the correct information prior to making any decision. Cabinet failed to determine first whether it had the authority to decide anything in respect of the Villas; and, second, to consider a material consideration mandated by the Ordinance, namely, the CIE. The DPP not only

failed to ensure compliance by the Intervening Party with the requirement of the 60 feet setback from the vegetation line as set out in the Planning Approval but acted (by his inaction) contrary to the express terms of the Planning Approval and the decision of the DAC. In almost every respect those responsible for ensuring an orderly application of the planning laws of Nevis have failed to protect and conserve the natural and built heritage of Nevis. Rather than administer the Ordinance in the public interest of the people of Nevis, it seems that the public authorities in this case, particularly, the DPP and Cabinet, were concerned mainly with the private interest of the Intervening Party.

- [168] The facts of this case show a startling indifference to the objectives of the Ordinance by those whose responsibility it is to enforce the Ordinance, particularly, Cabinet and the DPP. The DPP has failed in his duty to ensure compliance with the Ordinance and the Planning Approval. Cabinet failed to comply with the Nevis Zoning Ordinance and the 120 feet setback policy for Pinney's beach. When these happen, the only persons who lose are the people of Nevis who have entrusted those public authorities with the responsibility of facilitating an orderly coastal development which does not contribute to beach erosion thereby preserving the coastline for the next generation of Nevisians. There was little or no regard paid to one of the important objectives of the Ordinance, namely, the protection and conservation of the natural and built heritage of Nevis. This much was appreciated by the author of Dr. Cambers report when she stated (at p. 2) that:

The vista of long white sand beaches, sand dunes, palm trees and clear blue waters is essential for the tourism industry and is part of the natural heritage of the people of St. Kitts and Nevis. Forward planning through the use of coastal development setbacks can assist in ensuring that such vistas are not replaced by ugly rock revetments, groynes and narrow beach strips.

- [169] No doubt that the actions of the public authorities in this case have undermined public confidence in the decision-making process in respect of planning applications particularly for tourism related developments. The public interest is not served when this happens. I agree with Sykes J. that citizens and non-

nationals have a vested interest in seeing that public authorities act according to law and where they fail to do so they will be held accountable. Citizens and non-nationals who fail to comply with planning laws and planning decisions will also be held accountable. This is not a case where only the public authorities have acted unlawfully – the Intervening Party is not an innocent party and must also be held accountable for its actions.

[170] Mr. James Cabourne in cross examination agreed that he is aware that one of the range of remedies available to the court was that the Villas be removed. Mr. Cabourne also testified that the Intervening Party continued to build the Villas despite the risk of destruction because of the impending hurricane season and was nonetheless aware that the court could order destruction of the properties. I agree with Counsel for the Claimant that the Defendants and the Intervening Party have acted in a total and manifest disrespect for the rule of law and the planning legislation and planning decisions and both must be held accountable.

[171] Those with responsibility to guard against uncontrolled development and to steer the planning ship in the right direction at all times have failed in their duties and it is the duty and function of the court to say so. It sets a rather poor example for citizens and non-nationals who may feel that they too may disregard planning laws and planning decisions with impunity as is clearly evidenced in this case by the actions of the Intervening Party. For these reasons and as more fully explained above, I make the following orders:

- (1) An order of *certiorari* is granted to quash the Cabinet Approval.
- (2) An order of *certiorari* is granted to quash the Planning Approval.
- (3) An order is granted mandating the Intervening Party to demolish any and all of the development known as the Villas for which Planning Approval was given and to restore the beach to its natural state before any construction commenced within 30 days of today's date.
- (4) That if you, the within named Paradise Beach Holdings Limited or any of your directors, do not comply with paragraph 3 of this order, you may be held in contempt of court and you may be imprisoned (where applicable)

and or fined the sum of US\$20,000.00 for each and every day there is noncompliance with this order.

- (5) Costs to be paid by the Defendants and the Intervening Party to the Claimant fit for two counsel, to be assessed if not agreed within 21 days of today's date.

[172] I wish to thank Counsel for all the Parties and the Intervening Party for the way in which this hearing was presented and argued.

Eddy D. Ventose
High Court Judge

By the Court

Registrar