IN THE EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. NEVHCV 2016/0014

BETWEEN:

ANNE HENDRICKS BASS

Applicant

And

[1] DIRECTOR OF PHYSICAL PLANNNING
[2] DEVELOPMENT ADVISORY COMMITTTEE

Respondents

CARIBBEAN DEVELOPMMENT CONSULTANT LIMITED

Intervening Party

Appearances

Mr. Damien Kelsick and Garth Wilkin for the Applicant
Ms. Jean M. Dyer with Ms. Rhonda Nisbett Browne for the Respondents
Ms. Talibah V. O. Byron for the Intervening Party

2016: November 1, 4, 7
2017: February 2, May 15

Judicial Review – Application for Leave – Planning Permission – Environmental Impact Assessment failing to address marine risks associated with coastal area abutting the property on which development project approved – Whether arguable case that Environment Impact Assessment so flawed that no reasonable decision maker could have relied on it – Delay – Delay of 10 months – Whether unreasonable in the circumstances – Administration and developer taking steps which had effect of preventing an earlier application for leave – Developer ceasing development and engaging applicant in discussions re the sale of the property – Developer withdrawing from sale – works

resuming on project – delay not operating as a bar to the grant of leave as there is an arguable case that it was substantially caused by Administration and the developer – Discretion also grounded in finding that application raises a matter of considerable public interests.

In her application for leave to apply for judicial review in which the applicant presented evidence that she was an enthusiastic bona fide developer and protector of the Nevis Island Environment, and in particular the marine reefs. This evidence showed that the Nevis Island Administration has approved her environmental protection projects. In this context she became aware in 2014 that the respondents was considering the grant of planning permission for a development condominium project not far from her own residence on lands abutting the coastal area. She was concerned about the adverse impact that the project might have on the environment, in particular the coastal and her own project. She immediately engaged the Administration on the matter, and this led to discussions between her and the developers about her buying the subject lands. These discussions were actually triggered by the initiative of the Deputy Premier after she called him to express her concerns about the project and about whether there had been a proper environmental impact assessment. The EIA which had in fact been done did not address the impact that the project would have on the coastal area abutting the land on which the project was being built. Those talks fell through when the developer who had initially seemed keen on selling withdrew from those discussions. On or about April 2015 the applicant learnt that permission had been granted for the project. Again the applicant expressed concerns to the Deputy Premier about the project. At the same time, she gathered a team of experts and lawyers with a view to take legal steps to prevent the project from proceeding. The Deputy Premier shortly thereafter informed the applicant that the developers were keen to sell the property to the applicant, and discussion began between the applicant, the Deputy Premier, his wife a real estate agent for the developers and attorneys for the developers. Works on the project ceased at this time. Those discussions lasted several months and went as far as the exchange of an agreement of sale when again the developer withdrew and stated that they would proceed with the development. About two and half months later the developer resumed works on the project. About 3 weeks later the applicant filed the application for leave. She contended on this application *inter alia* that (a) the EIA was fatally flawed and that no reasonable decision maker could have relied on such an assessment, (b) there had been inadequate public consultations before approval was granted, and (c) that having regards to statements made by officials of the Nevis Island Administration, she had a legitimate expectation that the Administration would have in place policies aimed at protecting the environment, such policies ensuring aimed at ensuring that any planning permission granted would avoid adverse consequences on ongoing projects.

The respondents resisted the application arguing that the statutory provisions governing the EIA did not specify the form of such the required EIA, and accordingly it was open to the respondents to accept and act on the EIA that had been presented. The respondents further argued there had been adequate consultation and provided the court with un-contradicted evidence of such consultations. The respondents and the intervening party

also argued that there had been unreasonable delay in making the application and that the court should exercise its discretion to refuse leave.

Held granting leave:

1. Planning laws which mandate that an Environmental Impact Assessment must be provided and used as the basis of for the grant or refusal of planning permission, without specifying the form and contents of such EIA, impliedly require at its bare minimum, that such an EIA 'must be comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement *that it alerts the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity'.* This implied statutory obligation imports a concept of reasonableness. Regardless, therefore, of whether or not the Nevis Physical Planning and Development Control Ordinance Cap 6.09 contain expressed and specific provisions or regulations which sets out the form and content, any environmental impact assessment required under this Ordinance which falls substantially short of this implied standard is deficient and woefully inadequate for the purposes of which it is required. There is an arguable case that if an EIA fails to address the impact any project would have on the marine zone abutting the land where the development is intended, such an EIA falls short of the standard to the extent that no reasonable decision maker could reasonably act on it.

   Applying: **The Land and Environment Court of NSW v Forestry commission of New South Wales** (1983) 49 LGRA 403 per Cripps J at 417; **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (No. 2)** [2004] UKPC 6

2. The provisions of the Nevis Physical Planning and Control Ordinance do not impose a mandatory duty on the respondents to embark on a consultation process and neither does it impose a mandatory requirement that there ought to a public hearing on any application. The Ordinance does, by section 26 (1) and (2) impose a discretion on the second respondent to decide whether an applicant for planning permission must be required to publicize its applicant and invite members of the public to make representations and comments thereon. It may be that depending on the nature of a project, it might be sensible for such bodies to actually engage section 26(1) and (2) to impose this obligation on the Developer. It may be reasonable to do so when project by its nature and scope may likely have a significant impact on the environment. There may be peculiar qualities of the surrounding environment, such as protected areas, other vulnerable wildlife, or other nearby projects that may give rise to a need to have public feedback. Notwithstanding, in deciding whether to impose the Developer with the obligation, the respondents would also have to consider whether there are other ways to achieve the same objective without imposing unnecessary costs on any proposed project.

3. On the issue of public consultation, there is undisputed evidence which showed that the respondents made the EIA available to the public through display at the public library for a two week period. Notices were aired on most of the major radio stations, and feedback was sought from the Nevis Historical and Conservation Society (NHCS) and the Environmental Health Department. This evidence was undisputed and therefore this court could properly act on it to determine whether an arguable case was made out on this basis. The applicant has not shown any arguable case that the consultation that was done was not reasonable or not adequate. Further, in the circumstances of this case, it is difficult for this court to find that there is an arguable case that the respondents' decision not require that the Developer engage in public consultations was irrational. It may be that another authority similarly placed may have acted quite reasonably in requiring the developer to engage in such consultations, but that by itself does not make this decision arguably unreasonable.

4. It is reasonable to assume that the statements made by the Nevis Administration would give rise to a reasonable and legitimate expectation that the Nevis Island would implement policies aimed at protecting the environment and avoiding adverse consequences on ongoing projects. In any event there are sufficient policies in place to ensure that projects do not harm the environment; the EPA itself represent the cornerstone of such policy. There is therefore no arguable case that there has been a denial of the applicant's legitimate expectation.

5. While there had been substantial delay in this matter there was a valid objective reason for this delay. Both the Nevis Island Administration, through its high ranking officials and the Developer had engaged the applicant in discussions to sell the subject property after she had complained about the project and the deficient EIA. These discussions even went as far as a draft agreement of sale and purchase of the subject land, when the Developer withdrew from the sale. The applicant could hardly be blamed if she relied on these negotiations to not proceed to court earlier on this application for leave. Thus even if there has been delay and there had been some impact on the developer, this delay would not operate in this case as a discretionary bar. The exercise of this discretion has also been grounded in the finding that this application raises matters of considerable public interest, namely that this development project may arguably pose a considerable marine risk in the area where development is taking place. Further, it is in the public interests that in an economy which is substantially dependent on tourism and property development, that the planning department perform its duties related to planning permissions with regard to the proper principles. This would ensure that where an EIA is required it objectively treats in a comprehensive manner with the subject matters so that the Administration and the public could reasonably know what impact such a project would have on the environment.

Applying: **R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile** [2005] EWHC 1872 (Admin) (26 July 2005).

Case Considered:

1. *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (No. 2)* [2004] UKPC 6
2. *Blanchifield & Ors v. Attorney General of Trinidad and Tobago & Anor (Trinidad and Tobago) [2002] UKPC1 (22 January, 2002)*
3. *Bow Valley Naturalist Society v Minister of Canadian Heritage [2001] 2 FC 461*
4. *Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell [1990]2 AC 737*
5. *Fisherman and Friends of the Sea v The Environment Management (2005) 66 WIR 358*
6. *Froyland Gilharry Sr. v Transport Board Civil Appeal No. 32 of 2011 (Belize) Court of Appeal (unreported)*
7. *John West v The Labour Commissioner SVGHCV2014/0025 (SVG) High Court, Eastern Caribbean Supreme Court*
8. *Julian v. Winfresh Limited SLUHCV2010/0756 (St. Lucia) High Court, Eastern Caribbean Supreme Court*
9. *Loris James v the Attorney General SKBHCVAP2011/0001 (St. Kitts and Nevis) Court of Appeal, Eastern Caribbean Supreme Court*
10. *Patricia Yvette Harding v The Attorney General of Anguilla [2015] ECSCJ No. 254*
11. *Public Service Commission v Davis (1984) 33 WIR 112*
12. *Quorum Island (BVI) Limited et al v Virgin Islands Environmental Council HCVAP2008/004 (British Virgin Islands) Court of Appeal, Eastern Caribbean Supreme Court*
13. *R v Herrod, ex parte Leeds City District Council [1976] QB 540*
14. *R v Independent Television Commission ex p. T.V.N.I. The Times December 30, 1991*
15. *R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham*
16. *R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile [2005] EWHC 1872 (Admin) (26 July 2005)*
17. *R v North and East Devon Health Authority ex parte Couglan [2011] 1 QB 213;*
18. *R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte Hardy and Maile [2005] EWHC 1872 (Admin) (26 July 2005).*
19. *R v Port of London Authority, Ex parte Kynoch Ltd [1919] 1 KB 176*
20. *R v. Lord President of the Privy Council, Ex Parte Page [1993] AC 682*
21. *Roland Browne v the Public Service Commission HCVAP2010/0023 (St. Lucia) Court of Appeal, Eastern Caribbean Supreme Court*
22. *Sharma v Browne-Antoine and Another (2006) 69 WIR 379*
23. *The Attorney General of Guyana v Claude Jardim Civil Appeal No. 134 of 1998 (Guyana) Court of Appeal*

24. *The Honourable Patrick Manning and 17 others v Chandresh Sharma Privy Council No. 22 of 2008*
25. *The King v. Port of London Authority. Ex parte Kynoch, limited. Nov. 4, 1918*
26. *The Land and Environment Court of NSW v Forestry commission of New South Wales (1983) 49 LGRA 403 at 417*
27. *The Northern Jamaica Conservation Association et al v The Natural Resources Conservation Authority et al Claim No. HCV 3022 OF 2005 (Jamaica)*
28. *Virgin Islands Environmental Council v The Attorney General et al BVIHCV2007/0185 (British Virgin Islands) High Court, Eastern Caribbean Supreme Court*

JUDGMENT

[1] **RAMDHANI J. (Ag.)** This is an application for leave to apply for judicial review which was filed on the 18th January 2016. Originally the application was dismissed on a preliminary point but then restored by the Court of Appeal and set for hearing before this court on the 2nd November 2016. On that day the court heard arguments, and agreed to allow the parties to make further submissions in writing on a narrow point. These further written submissions were filed in court on the 4th and the 7th November and were considered as part of the hearing. A decision was reserved in this matter. On the 2nd February 2017, the Court made an order granting leave to the applicant to apply for judicial review. An indication was given that written reasons for the grant of leave was to follow. This fulfills that indication.

The Parties

[2] The applicant is a citizen of Nevis and owns a home on beachfront property at Liburd Hill, St. James Nevis, which is approximately a quarter a mile away from the HTRIP Candy Development (the Development). She has presented evidence that she is involved in the preservation of the environment and has actually gotten the Nevis Island Administration's permission to undertake a project to protect and sustain the environment.

[3] The first respondent, the Director of Physical Planning (DPP) is a public officer appointed under the Nevis Physical Planning and Development Control Ordinance Cap 6.09 (the Ordinance) and functions of the head of the department of the Nevis Island Administration charged with responsibility for physical planning and development control. Among the various statutory powers enjoyed by the respondent as head of this department, is the power to sign and issue all notices granting or refusing permission for development of land in Nevis. In granting or refusing such permission, this respondent must act in accordance with the decisions of the Development Advisory Committee (the second respondent) established by section 5(1) of the Ordinance.

[4] The second respondent, the Development Advisory committee (the Committee) is that statutory committee established by the Ordinance to perform certain statutory functions including the decisions as to whether or not to grant planning permission for certain development in Nevis. This body is statutory enjoined to refuse to grant permission unless an Environmental Impact Assessment (EIA) is taken into consideration unless such an EIA has been waived by the DPP.

[5] The Interested Party is Caribbean Development Consultant Limited (the Developer) who is the company granted permission to construct the Candy Project.

The Application for Leave

[6] This application for leave to apply for judicial review was filed on the 18th January 2016 pursuant to Part 56 of the Civil Procedure Rules 2000. The applicant seeks leave to apply for judicial review relating to the 'decisions of the 1st respondent and/or the 2nd respondent made in or about April 2015 granting permission to Caribbean Development Consultant Ltd. to construct a 17 building, 51 unit development together with a guard house, restaurant, two parking lots, badminton

courts and a volleyball site on 4.4 acres of coastal and at Liburd Hill, St. James, Nevis,' namely the HTRIP Candy Resort Villa Development.

The challenge, the grounds and the evidential basis in brief for the Application

[7] In deciphering the application, it was revealed that the applicant has challenged the decision on a number of grounds. First, it is contended that the decision was made in excess of jurisdiction as being breach of section 20(3) of the Ordinance. Second it is contended that the decision is irrational and one which no reasonable authority in the place of the respondents would make. Third, it is contended that the decision was made without any or adequate public consultation. Fourth, the decision is also bad as being a clear breach of section 20 of the Environment Protection Act. Fifth, the decision to grant permission was contrary to the legitimate expectation of the applicant.

[8] The application contended that under the Ordinance, the Candy Development was that kind of development for which an application for planning permission was required to be submitted to the Advisory Committee. Where the Advisory Committee and makes a decision, the DPP must then act on that approval and grant planning permission.

[9] It was contended that in consequence of the provisions of the Ordinance, having regards to the size and nature of the proposed development, this Developer was required to seek planning permission. Such application was first to be submitted to the Advisory Committee which body makes a decision which the DPP is required to act on. In seeking such permission a developer was required by section 20(2) of the Ordinance to submit an Environmental Impact Assessment (EIA) unless the DPP 'determines' otherwise. Section 22(3) of the Ordinance states that the DPP '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'.

[10] It was contended that the Developer had submitted development plans of the proposed then proposed Candy Development for approval by the Advisory Committee and the DPP. The Candy Development was then scaled down and revised plans were submitted.

[11] The applicant contends that an EIA was submitted for the project in its original scale. However after the project was revised and scaled down, no new EIA was submitted and that the DPP proceeded to approve the application.

[12] It is contended that the EIA which had been submitted was not a complete and proper EIA as it did not address the impact of the Candy Development on the abutting coastal area. In particular:

(a) The EIA submitted by the Developer itself expressly stated that it was not addressing the marine impact of the Candy Development and such impact would be investigated in a subsequent environmental study, which was never presented;
(b) The fact that the Candy Development is a development in a coastal area requires that any EIA assess its impact on the coastal area;
(c) The EIA did not address the potential impact of the surface water drainage from the Candy Development on the environment, as there is no drainage plans submitted to the DPP in the Revised Plans, including impact to the ghauts which are specifically and specially protected under the National Conservation and Environment Protection Act…;
(d) The EIA did not address the impact arising from the fact that no on-site treatment of waste water is provided for in the plans submitted to the DPP raises serious concerns regarding impacts on the septic

system on the environment particularly the ocean and marine ecology and groundwater, which would also violate section 30 of the National Conservation and Environment Protection Act;

(e) The EIA did not address the impact on the important nesting area for the hawksbill turtle, which is an endangered species protected pursuant to the Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region (the 'Cartegena Convention' an international agreement which St. Kitts and Nevis has ratified);

[13] The applicant further contends that having regards to the above matters, there was no indication on any reason from the DPP for waiving the requirement for the Developer to provide an EIA.

[14] The applicant further contended that the DPP had failed to give any or adequate notice of the planning application for the Candy Development to enable members of the public affected or interested to review the plans and make representations thereto.

[15] Further, the applicant contended that approval of the revised plans which included clear cutting the property and the beach, was a violation of the section 26(a) of the National Conservation and Environment Act, which states that '[n]o person shall remove or assist in the removing of any natural barrier against the sea.

[16] The applicant also contended that the decision to grant permission to the Candy Development was a breach of her legitimate expectation that the Nevis Island Administration and by extension the Ministry of Physical Planning would make efforts by way of policies to ensure that any approved development would not cause any damage to any coral reefs on Nevis or specifically would not threaten the viability of the applicant's approved Coral Reef Nursery and Restoration

Project which was approved on the 9th February 2015 two months prior to the DPP's approval of Candy Development.

[17] This legitimate expectation, the applicant contends arose 'because of statements made by officials of the Nevis Island Administration (i) approving the applicant's proposed Coral Reef Nursery and Restoration Project at Long Haul Bay, St. James, Nevis; (ii) as to the NIA's efforts to restore damaged Coral Reefs here in the Caribbean; and (iii) that the reefs are critical to our island life, our fish stock, our diving, our tourism product, our eco system.'

[18] The affidavit evidence shows that the applicant is recognized as someone who is integrally involved in protecting the environment in Nevis including the natural reefs off the coast of Nevis within the areas are likely to be affected by the project. There is undisputed evidence that she has even been involved in government associated projects to protect and sustain the environment. It appears that on or about April or May 2014 she became aware that a project was being proposed for the coastal land near to her residence. This led to some concern on her part having regards to her own ideas and her own projects regarding the environment. As a result she had a number of discussions with government officials regarding the proposed development. She even retained the services of some experts to lend some assistance to her resistance to any proposed project.

[19] Very early into these discussions, the evidence shows that the government officials themselves were involved in assisting the applicant to purchase the property from the developers. These talks fell through and in April 2015, the applicant discovered that permission had been granted for the project. She again retained experts and also retained a law firm to take steps to seek to stop the developments. Issues relating the environment were the underlying concern for the applicant. The Environmental Impact Assessment was a source of one of her complaints. She again met with a number of government officials and by July

2015, one of these officials again informed the applicant that the Developers were prepared to sell the property to the applicant.

[20] The reality of the challenge faded and the evidence shows that the applicant engaged the Developers with a serious proposal to buy the property. All works which had been ongoing on the development site ceased. Officials from the government of Nevis were centrally positioned in the initial discussions regarding a possible sale. A purchase price was agreed upon, and an agreement was exchanged. Near to the end of September 2015, just before the date could be finalized, by a letter from their attorneys, the Developers withdrew from the sale, indicating that they were no longer interested in selling as they would proceed with their project.

[21] The applicant did nothing, expressing a belief to this court that she believed that the Developers would address the environmental concerns and re-submit a new environmental impact assessment. During December 2015, however, she saw that work had recommenced on the land and this led her to her attorneys to write to the respondents by a letter dated the 11th January 2016 by which she asked for certain assurances to be given by the 13th January 2016. On the 18th January 2016, she filed this application.

[22] The respondents have resisted the application. A preliminary ruling in their favour from the High Court led to a dismissal of the application and an appeal to the Court of Appeal by the applicant restored the application for a full hearing. A hearing was set for the 1st November 2016 by this Court. At about this time, the Interested Party joined the proceedings.

[23] By the affidavits in answers and the submissions both written and oral, the respondents have argued that the decision made to rely on the EIA and to grant planning permission to the Developer was a proper one, lawful and in accordance with the powers given by the Ordinance. They disclosed that they did not waive an

EIA and that this EIA that they received for the original larger project had been considered for the reduced project. This, they contended they were entitled to do. They accepted that there were certain matters not covered by the EIA but this they maintained did not make the EIA inadequate nor did it mean that a decision to rely on such an EIA was irrational.

[24] They have pointed out that there was no mandatory duty to have public consultation but that they did embark on a consultation process and that it was adequately done.

[25] As a primary issue the respondents have argued that the applicant has been guilty of inordinate delay – the decision was taken on the 8th April 2015 and the application for leave was filed on the 18th January 2016 (10 days in excess of nine months) –and that the court should not grant permission to proceed.

The Issues Raised by the Application and the Objections

[26] The applicant's standing to bring this application not being in dispute, there are two main issues which have been raised by the evidence and the arguments.

[27] First, the court has to determine whether this application has met the threshold for the grant of leave.

[28] Second, whether any discretionary bars are relevant to bar the application for leave?

The Test for the Grant of Leave

[29] The courts of this region have accepted that the relevant learning on the test for the grant of leave to apply for judicial review is set out in the case of Sharma v Browne-Antoine and Another (2006) 69 WIR 379. The test is expressed as follows:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review* ***unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy:*** *see R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628 and Fordham, Judicial Review Handbook 4th ed (2004), p 426.* ***But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.***

[30] This court having regard to the evidence presented on this application, must be satisfied that there is a case fit for further investigation properly to be done only at a full *inter parties* hearing of the substantive application for judicial review. It is therefore this Court's task to examine the grounds raised and the evidence to determine whether there is an arguable case with a realistic prospect of success. Having regards to the issues various contentions, the court must ask whether there is an arguable case that:

(i) the respondent or respondents decision to use the EIA as a basis upon which to grant planning permission was either in breach of the Ordinance or so irrational or unreasonable that no reasonable decision maker would have done so;

(ii) the respondent(s) had failed to engage in any or any adequate public consultation before making the decision; and

(iii) a legitimate expectation had arisen that the Nevis Island Administration and by extension the Department of Physical Planning would not grant such planning permission which was likely to have a detrimental impact on the environment as this project may likely have.

[31] This court has chosen to address these questions first to determine the court could make an affirmative that there was an arguable case before going on to ask whether as a discretionary matter, this applicant should be barred from going ahead with a challenge.

Whether there is an arguable case with a realistic prospect of success that the Decision to use the EIA to grant planning permission was so unreasonable that no reasonable Director of Physical Planning could have relied on it to grant permission?

[32] It is not in dispute that the Candy Development is a project which was required to apply for planning permission. It was expected to and it did submit a project proposal on the 13th May 2014, which was considered by the Advisory Committee and the project was approved in principle. It is also not in dispute that under the Ordinance that an EIA was required to be submitted for this project unless one was waived. The respondents have stated clearly that there was no waiver of the requirement to submit an EIA and that they considered the EIA which had been submitted. It is accepted that the EIA which had been submitted was in relation to a much larger project but that after the DPP directed that the project be reduced in its scope, and new reduced project plans were submitted this same EIA was considered.

[33] This revelation led the applicant's attorney to abandon arguments that there had been a waiver and their arguments at the hearing were narrowed to contending that the EIA was inadequate for a project of this nature. It was pointed to the court

that the St. Kitts and Nevis Government had signed on the Cartegena Convention which *inter alia* obligated the Government to 'take all appropriate measures to protect and preserve rare or fragile eco-systems. It was also stressed that government officials has made public statements which committed the administration to protecting the marine environment. Emphasis was also placed on the evidence which showed that the applicant herself was involved in a recently approved project for the protection of the reefs.

[34] In her first affidavit, she states that she, has together with others partnered with the Nevis Government, assisted in 'creating a strategic plan to improve the island's environmental integrity and economy, while creating new public space and restoring part of the island's marine heritage'.

[35] In particular she states that the 'initiatives include a Coral Reef Restoration Project, aimed at restoring two primary coral reefs – one located off the coast of [her] residence and the HTRIP Candy Resort Villa Development on Long Haul Bay, and the second located to the west of the island, off the coast of the Four Seasons and Pinney's Beach.' It has not been contradicted that the Nevis Government's Planning Department approved the Coral Reef Restoration Project on the 9th February 2015.

[36] The applicant's attorneys effectively argued that this was the context within this project was being considered. It was submitted that any Committee or DPP must reasonably be concerned about sustainable development and to ensure that the marine environment is not affected and if there is a risk that risk is addressed. It was then submitted that an EIA which failed to address major concerns such as the projects impact on the coastal area was inadequate and that no reasonable Committee or DPP could have used as a basis to grant approval.

[37] The respondents' attorney resisted this argument. The respondents relied on the affidavit evidence by Mr. Tilton Douglas, a Development Control Officer in the

Planning Department of the Ministry of Communications, Nevis. It was filed on the 1st February 2016. He states that as part of his duties he was part of a planning team which was tasked by the Director of Physical Planning to review the Candy Development plans before it was submitted to the Committee. He says that the plans were approved in principle on the 30th May 2014. The Developer was informed by letter that in order to continue the process for final approval, it was required to submit a Terms of Reference (ToR) for an EIA'.

[38] This deponent states: "The ToR had already been submitted to the Planning Department on the 20th May 2014 when this letter was issued. It was however not reviewed by us at that time. We reviewed it after the project was approved in principle. It was also later reviewed by the Committee. It was approved on the 4th July 2014 with conditions which included that the development density was to be addressed in the EIA."

[39] He goes on: "The EIA was submitted by the Developer on the 28tth July 2014. It was conducted by Lilith Richards who is a former Director of Physical Planning. Ms. Richards has a wealth of experience and knowledge in this field.

[40] An affidavit was also sworn to by Ms. Rene Walters on behalf of the respondents. Ms. Walters is the Assistant Secretary in the Ministry of Communication and at the relevant time was the Director of Physical Planning and in this capacity she also sits on the Advisory Committee.

[41] As regards the EIA, Ms. Walters states that no decision was taken to waive any EIA. She states: "An EIA was submitted to the Planning Department by the Developer on the 28th July 2014. This EIA was undertaken for the initial project which was a larger project, namely 26 villas and 72 units. This larger project was too dense. I accordingly required the Developer to reduce the density of the original project. They acceded to my demand and reduced the size of the Candy Development to 17 villas with 51 units. I didn't require the Developer to conduct a

new EIA because the revised project which was initially classified as a resort was a smaller project. It could no longer be considered a resort because all of the minimal amenities such as restaurants, swimming pool, supermarket and clubhouse had been removed from the plans. As such the EIA which had been undertaken with regards the larger project was sufficient for the purposes of the smaller project, which incidentally was on the same site since the environmental impact of the larger would have been greater than that of the smaller."

[42] Ms. Walters goes on: "I accordingly took the EIA, which was submitted by the Developer in July 2014, into account in determining if planning permission should be granted to the Developer. In the circumstances I deny that the DPP breached section 20(3) of the Ordinance as alleged …."

[43] Ms. Walters states: "Whilst I admit that the EIA did not address the impact of the Candy Development on the coastal area, I deny that this somehow makes the EIA incomplete and improper as the applicant asserts. The Ordinance does not prescribe the scope of the EIA."

[44] Both of these deponents set out a number of steps which were taken to receive public feedback on the project and on the EIA prior to the decisions. (More on this in the discussions related to consultations).

[45] Ms. Walters even goes as far as explaining that after the applicant's attorney wrote on the 11th January 2016 (a letter received on the 13th January 2016) threatening legal action and requiring she took certain steps to address the complaints. She stated that: "…my team and I met with the Developer on the 27th January 2016 with a view of ameliorating the concerns raised by the applicant. The Developer has agreed to engage an expert to determine the impact, if any (i) the Candy Development will have on the coastal area; (ii) of the surface water drainage from the Candy Development on the environment. The addendum to the EIA will also address the waste disposal/sewage tank issues raised by Mr. Nicholas Brisbane at

paragraphs 4 to 6 of his first affidavit. We anticipate that this addendum to the EIA will be submitted to the Planning before the end of February 2016."

[46] In written arguments repeated orally at the hearing, Ms. Dyer learned counsel for the respondents accepted that the first named respondent was under a mandatory obligation to take any EIA required by her into consideration in deciding whether or not to grant permission. Learned counsel, however, argued that the Ordinance did not prescribe the 'form and contents' of any EIA submitted. It was pointed out that the Ordinance provided by subsection 4 gives the Minister a power to make detailed regulations which would include providing for the minimum requirements of any EIA.

[47] Learned counsel argued that 'the statutory scheme in Nevis therefore envisages that the Minister and not the court (or even the applicant) will resolve the policy laden question of the form and content of the EIAs. The Minister has not yet resolved this question; the form and contents of the EIA has not been prescribed by him. It is telling that the applicant does not assert otherwise. Accordingly, in the absence of statutory criteria, given the discretion provided by the Ordinance to the respondents and the ensuing practice of the respondents, the determination of the scope and extent of the EIA by the respondents is proper until such time as the Minister prescribes same.'

[48] Learned counsel for the respondents relied on the Privy Council decision in **Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and Another (No. 2)**. In that case the government of Belize decided to grant approval for the building of a dam for the purpose of generating hydro-electricity in an area designated for preservation as national environmental resources on account of the plants and animals found there (which included jaguars, pumas, ocelots, morelet's crocodile, tapirs and scarlet macaws). Lord Hoffman giving the majority judgment described the area as 'having a unique vegetation which makes it one of the most biologically rich and diverse regions

remaining in central America.' It was noted that '[d]espite these potential losses the Government decided to proceed with the project.'

[49] The government's decision was met with a host of opposition from environmental organization and gave rise to judicial review proceedings in Belize. It was contended that the decision to build the dam was unlawful. In particular it was argued that the Department of Environment which had approved the construction of the dam did not comply with the procedures required by law, and further was inadequate and therefore not within the meaning of the Act, or alternatively given the deficiencies of the EIA, it was unreasonable or irrational for the DoE to treat it as an adequate basis for approving the project.

[50] Learned counsel drew on the decision to properly make the point that the sole concern of the court on a matter such as this, was in compliance with the law and not with government's policy. The point was made that in the Privy Council, Lord Hoffman in giving the majority decision with respect to the Government's decision to proceed with the project despite potential environmental losses said at paragraph 9:

> *"That is a decision which the government is entitled to make. Belize is a sovereign state, having gained its independence from the United Kingdom in 1981. It has a constitution which safeguards democracy and human rights. But the question of whether or not a dam should be built raises no issue of human rights. It is a matter of national policy which a democratically elected government can decide."*

[51] Leaned counsel pointed the court to the following dictum of Federal Justice of Appeal Linden in **Bow Valley Naturalist Society v Minister of Canadian Heritage** [2001] 2 FC 461 where it was said:

> *"While the Courts must ensure that the steps in the Act are followed, it must defer to the responsible authorities in their substantive determination as to the scope of the project, the extent of the screening and the assessment of the cumulative effect in the light of the mitigating factors proposed. It is not for the judges to decide what projects are to be authorized but for the responsible authorities provided the follow the statutory process."*

[52] The respondents have also relied on Lord Hoffman's statement in the **Belize Alliance** case that where there is a challenge to the adequacy of the EIA, the court must be concerned with whether the 'law require certain matters to be cleared up as part of the EIA. In asserting that where the law in Nevis was silent on what matters should be 'cleared up' there were no stated matters which was required for the EIA to address. Learned counsel therefore asserted that in the absence of such specific provisions or regulations, 'it is the first named respondent who is charged with taking the EIA into consideration that will determine the form and contents of the EIA'. The argument of the respondents therefore was that the EIA in this case could not be regarded as deficient or inadequate.

[53] The respondents also presented an alternative argument. Through learned counsel they also addressed whether the first named respondent decision to treat the EIA as adequate for approving the Candy Development project was within the range of reasonable responses open to her.' It was argued that even if the court were to find that there was an arguable case that the EIA was deficient, it did not follow that the first named respondent's decision to rely on the EIA was irrational. Learned counsel again turned to the Belize Alliance case where the Privy Council held that:

> *(i) Although the EIA contained a statement that the bed of the river was granite and there was substantial doubt whether or not this was accurate, even if the bed of the river should prove to be sandstone it cast no doubt on the suitability as a site for a dam. The geological error did not prevent the EIA from satisfying the legislation or from forming a proper basis for an approval by the Department of Environment; and*
>
> *(ii) The decision whether the EIA complied with the Act and the Regulations made under it was primarily entrusted to the DoE and its decision to accept the EIA could not be set aside except on established principles of administrative law, namely on the ground of irrationality or that the DoE had acted so as to frustrate the purposes which an EIA was intended to serve.'*

[54] Learned Counsel made the point that the first respondent was not subjected to a standard of perfection in exercising her judgment in whether to rely on an EIA in making her decision. Counsel argued that it was not necessary for the EIA to

pursue investigations to resolve every issue. Learned counsel argued that the fact that the EIA had supposedly not covered every topic and explored every avenue advocated by the applicant's experts ought not invalidate it and relied for these arguments on observations of Cripps J in **The Land and Environment Court of NSW v Forestry commission of New South Wales** (1983) 49 LGRA 403 at 417 which was adopted by the Privy Council in **Belize Alliance** at paragraphs 69 and 70 where it was said:

> ***'I do not think the [statute] … imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation****. I do not think the legislature directed determining authorities to ignore such matters as money, time, manpower etc. In my opinion, there must be imported into the statutory obligation a concept of reasonableness … [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations.* ***The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations."***

The emphasis to this passage were supplied by learned counsel for the respondents in this case to make her case.

[55] The Court respectfully does not agree with the respondents. There has been no contest in this case that the EIA did not address the environmental impact of the project of the abutting coastal area.

[56] The respondents appeared to have themselves accepted that these deficiencies exist and have even gone as far as indicating an addendum to the EIA was required and one would have been presented at the end of February 2016. The court notes that at even at the date of the hearing, there is no evidence that one was ever done to address the deficiencies of the EIA.

[57] I agree that a report is not required touch on every aspect of investigation that may be available. I can hardly make the point more clearly than the passage above. I do note the emphasis placed by learned counsel for the respondent, but this very passage makes the important point that (and I will repeat for emphasis) when Cripps J stated:

> *"In my opinion, there must be imported into the statutory obligation a concept of reasonableness … [P]rovided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public … to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations."*

[58] The concept of reasonableness goes to the core of this EIA or any EIA which is required for planning permission by any legislation. Legislation which mandates that an environmental impact assessment must be provided and used as the basis of for the grant or refusal of permission, impliedly require at its bare minimum that such an EIA must meet such standards as to be able to alert the decision maker and members of the public to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out the activity'. In this regard the EIS must be comprehensive in its treatment of the subject matter and be objective in its approach. Regardless, therefore, of whether or not there are expressed and specific provisions or regulations which sets out the form and content, any environmental impact assessment which falls substantially short of this implied standard is deficient and woefully inadequate for the purposes of which it is required.

[59] This EIA only spoke to the land based impact of the project. It did not address the impact that this project would have on the marine aspect of area. To my mind there is strong arguable case that is a startling omission that ought to tell any reasonable decision maker standing in the shoes of the respondents and considering whether to grant planning permission that this EIA is not what it says it is. How can an environmental impact assessment be adequate when it excludes a

substantial portion of the environment which is likely to be affected? In fact most of the impact of any project which abuts the sea would be to the coast and marine life in that area. This environmental impact assessment omits that. This case is very different to the Belize case in which questions were raised as to whether the EIA accurately portrayed the river bed as being comprised of sandstone or whether it was in fact granite. To my mind it would have been a different thing entirely in that case **if nothing was ever said in that EIA of the river**. This is more the case here. To put it one way, the EIA has ignored more than half the environment.

[60] The applicant therefore will be granted leave to proceed to judicially review the decision on the ground that the decision of the respondents was unlawful and unreasonable in that there is a real arguable case with a real likelihood of success that the respondents relied on an EIA which fell short of an EIA as contemplated by section 20 of the Ordinance.

Whether there is an arguable case with a realistic prospect of success that the respondent(s) had failed to engage in any or any adequate public consultation before making the decision

[61] The applicant has contended in the grounds of the application for leave that the DPP also failed to give any or adequate notice of the planning application for the Candy Development so as to enable persons affected or interested to review the plans and make representations in relation thereto.

[62] By this ground the applicant is raising the issue of public consultation. She asserts that, [h]aving regards to the nature of the Candy Development, its possible impact on the environment and given the objects set out in section 3 of the Ordinance, failure to give the public any or adequate notice of planning permission was so unreasonable that no decision maker could have made it.'

[63] This point was not made part of the written submissions neither was it pursued vigorously at the hearing but it was the subject of some evidence from both sides. Whilst the applicant asserts that she was not given notice, she herself states that she became aware of the project in April or early May of 2014[1]. She goes on, however to say that she had received no notice of a public hearing on the application, nor was she canvassed as a neighbor, regarding the application.

[64] The respondents evidence in answer to these contentions present certain crucial matters which were now responded to by the applicant and were therefore left un-contradicted.

[65] Mr. Tilton deposed that: "The EIA was made available to the public through display at the public library in Charlestown from the 29th July to 13th August 2014. A notice regarding the availability of the EIA was emailed to VON Radio, Nevis pages, Nevis Newscast and Choice FM radio so that they could alert the public. A copy of the EIA was also sent to the Nevis Historical and Conservation Society (NHCS). We received feedback from the NHCS on the 20th August 2014. Some of these comments were considered by the committee and also by Ms. Walters. Additionally, a representative from NHCS sits on the Committee. We also forwarded a copy of the EIA to the Environmental Health Department on the 7th August 2014 for consideration. The EIA was approved on the 3rd September 2014."

[66] He states that: "The Developer submitted its detailed drawings for the Candy Development on the 25th October 2014. These drawings went through the usual internal review process. They were also sent to the Environmental Health Department. Approval was eventually granted on the 8th April 2015."

[67] The DPP, Ms. Rene Walters in her affidavit denied that the consultations were not adequate. She states that there was 'an element of public consultation via the EIA

[1] Paragraph 20 of the first affidavit.

process'. She states that: "The EIA was exhibited at the public library in Charlestown from the 29th July 2014 to the 13th August 2014.... I also emailed the Media Houses VON Radio, Nevis Pages, Nevis Newscast and Choice FM Radio on the same day and asked them to alert the public that the EIA was on display at the public library and that a box had been placed there for their feedback. I heard this notice from time to time.'

[68] She goes on to say: "My staff checked the comments box at the public library after the deadline and there were no comments. A copy of the EIA was also sent to the Nevis Historical and Conservation Society (NHCS)… the NHCS submitted its comments to the Department on the 20th August 2014. Some of these comments were taken into consideration. The NHCS also has a representative on the Committee. There was therefore public consultation although it is not mandated by the Ordinance. I therefore went beyond my statutory duty.

[69] The first question therefore for this court is whether there is an arguable case that the respondents' decision in this case, to not require the Developer to engage in public consultations was irrational and so unreasonable that no reasonable decision maker would have made it? The second question is whether having embarked on 'some element of public consultation' such consultations were adequate?

[70] The Ordinance itself does not impose a mandatory duty on the respondents to embark on a consultation process and neither does it impose a mandatory requirement that there ought to a public hearing on any application. Section 26(1) and (2) of the Ordinance imposes a discretion on the second respondent on whether an applicant for planning permission must be required to publicize its applicant and invite members of the public to make representations and comments thereon.

[71] It may be that depending on the nature of a project, it might be sensible for such bodies to actually engage section 26(1) and (2) to impose this obligation on the Developer. This may be sensible where it is obvious that the project, by its nature and scope may likely have a significant impact on the environment. There may be peculiar qualities of the surrounding environment, such as protected areas, other vulnerable wildlife, or other nearby projects that may give rise to a need to have public feedback.

[72] This being so, in deciding whether to impose the Developer with the obligation, the respondents would also have to consider whether there are other ways to achieve the same objective without imposing unnecessary costs on any proposed project. To my mind in the circumstances of this case, it is difficult for this court to find that there is an arguable case that the respondents' decision not require that the Developer engage in public consultations was irrational. It may be that another authority similarly placed may have acted quite reasonably in requiring the developer to engage in such consultations, but that by itself does not make this decision arguably unreasonable.

[73] In this case, the respondents did engage in public consultation. The law as this court understands it, is that even where there is no expressed obligation on a body such as this to have consultations, where it chooses to have consultations, such consultations must be adequate and if any feedback is provided, they must be considered. **R v North and East Devon Health Authority ex parte Couglan** [2011] 1 QB 213;

[74] In this case, the court is also not satisfied that there is an arguable case, that having embarked on a consultative process, the respondents failed to take adequate steps to engage in those consultations. I can hardly see how this applicant can make out a case that she was not given any opportunity to have a say in this process when from as early as April 2014 (one year before the decision was taken) she was aware of the project and was engaging government with her

concerns. She had employed experts and was raising her own concerns about the project. To my mind, the applicant has fallen short is showing that there was not adequate public consultation in this process.

[75] On an application for leave the court is not to embark on a fact finding mission. Where however, there is undisputed evidence, the court is entitled to use such evidence to decide whether the applicant has made out a case fit to proceed to a substantive hearing. Therefore from all of the un-contradicted evidence, it would seem to me that the respondents acted quite properly in this regard.

Whether there is an arguable case with a realistic prospect of success that a legitimate expectation had arisen that the Nevis Island Administration and by extension the Department of Physical Planning would not grant such planning permission which was likely to have a detrimental impact on the environment as this project may likely have.

[76] The applicant contended that statements made by officials of the Nevis Island Administration gave rise to a legitimate expectation that the Nevis Island Administration and by extension the Ministry of Physical Planning would make efforts, by way of policies, to ensure that any approved development would not cause damage to any coral reefs on Nevis or specifically would not threaten the viability of the applicant's Coral Reef Nursery and Restoration Project, which was approved on the 9th February 2015, two months prior to the DPP's approval of the Candy Development.

[77] It was sought to be grounded in a number of statements attributable to officials of the Nevis Island Administration (i) approving the applicant's proposed Coral Reef Nursery and Restoration Project at Long Haul Bay, St. James, Nevis; (ii) as to the NIA's efforts to restore damaged Coral Reefs here in the Caribbean; and (iii) that the reefs are critical to our island life, our fish stock, our diving, our tourism product, our eco system.

[78] At paragraph 27 of her first affidavit, the applicant stated: "In September and October 2014, Dr. Deborah Brosnan, a marine biologist and environmental consultant whose services I engaged began conversations with Honourable Deputy Premier Mark Brantley about the Government support for the Coral Reef Restoration Project. Honourable Deputy Premier Mark Brantley expressed his support of the project in principle and the importance of reefs, stating, 'The reefs are critical to our island life, our fish stock, our diving, our tourism product, our eco system. I am therefore keen to work with you on doing what we can to arrest concerns properly identified.'"

[79] The respondents did not address this issue to any extent neither was it extensively addressed by either side at the hearing. The court nonetheless gave due regard to it.

[80] Our Court of Appeal in **Patricia Yvette Harding v The Attorney General of Anguilla** [2015] ECSCJ No. 254 has recently reaffirmed that:

> *'In all legitimate expectation cases, whether substantive or procedural three practical questions arise: firstly, to what has the public authority, whether by practice or by promise, committed itself; secondly, whether the authority has acted or proposes to act unlawfully in relation to its commitment; and thirdly what should the court do."*

[81] The question in this case having regards to the applicant's case, is whether those statements made by the official amounted to a promise that the Nevis Island Administration and by extension the Ministry of Physical Planning would make efforts, by way of policies, to ensure that any approved development would not cause damage to any coral reefs on Nevis or specifically would not threaten the viability of the applicant's Coral Reef Nursery and Restoration Project?

[82] No doubt, it is reasonable to assume that the statements referred to here may give rise to a reasonable expectation that the Nevis Island Administration would

implement policies aimed at protecting the environment and avoiding adverse consequences on ongoing projects. That being so, this Court is of the view that there are sufficient policies in place to ensure that projects do not harm the environment; the EPA itself represent the cornerstone of such policy. Put another way, there is no arguable case that this legitimate expectation is not met.

[83] If it was that the applicant was contending the statements made by Nevis Island Administration officials led her to an expectation that no projects would be approved which may in turn harm the environment that cannot be reasonably arrived at. I am reminded of the Belize Alliance case cited and discussed. There the Privy Council was making it clear that even where expressed legislation demanded in Belize that an adequate EIA should be required for certain projects, (representative of the Government's policy to protect the environment) it was still open to the government to grant permission to a project which might have detrimental impact on the environment. Government policy is what it is, policy. It is not written in stone and it is always open to government to balance and weigh competing interests when it comes to development and protecting the environment. The public of course will be well alerted that a government has chosen to grant permission to a project which might have adverse effects on the environment but that is a matter for government and their relationship with the public.

[84] For these reasons, I cannot find that there could be a legitimate expectation that the Nevis Island Administration would not approve projects harmful to the environment. That would have to be a matter ultimately left to government. All one could expect was that from the statements made, the Nevis Island Administration was interested in protecting the environment and would have policies in place to vet projects which are likely to adversely affect the environment or other ongoing projects. This Court cannot find a promise that a policy would be put in place that nothing would be done to damage the coral reefs or threaten the viability of the restoration project. At best, it would be a material consideration for any arm of the

Nevis Island Administration to take into consideration when deciding whether and on what terms planning permission is to be granted.

[85] In these circumstances I do not find that the applicant has presented an arguable case on the issue of legitimate expectation.

Discretion Bars – the Issue of Delay

[86] The question of a discretionary has arisen in this case for consideration. The decision was made on the 7th April 2015 and it was not until the 18th January 2016 – some 9 months and 10 days later – that the application for judicial review was filed.

[87] Part 56 of the Civil Procedure Rules 2000 has been brought sharply into focus on this application. CPR 56.5 reads as follows:

> *(1) In addition to any time limit imposed by any enactment the judge may refuse to grant leave or to grant relief in any case in which the judge considers that there has been unreasonably delay before making the application.*
>
> *(2) When considering whether to refuse leave or to grant leave 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.*

[88] The respondent had earlier relied on section 2(1)(a) of the Public Authorities Protection Act as providing a six-months' time limit within which such application as the present were to be made. The Court of Appeal has ruled that that the provisions of that Act do not apply to Judicial Review proceedings. The respondents nonetheless have relied on CPR 56.5 and the general learning on this issue of delay to urge the court that this application should not be granted.

[89] They submitted promptitude was essential to an application for leave and even where a time period was generally allowed, an applicant for leave might still be shut out if he unreasonably delayed within that period. They referred the court to **R v Herrod, ex parte Leeds City District Council** [1976] QB 540 where Lord Denning MR speaking of the English six months period within which an application was to be brought, stated at page 557:

> *"The time limit of six months is not an entitlement. It is a maximum rarely to be exceeded. Short of six months, there is the overriding rule that the remedy of certiorari is discretionary. If a person comes the High Court seeking certiorari to quash the decision of the Crown Court – or any other inferior tribunal for that matter – he should act promptly and before the other party has taken any step on the faith of that decision. Else he may find that the High Court may refuse him a remedy. If he has been guilty of any delay at all, it is for him to get over it and not for the other side."*

[90] The respondents further submitted that to allow such an application to proceed after this length of time would be detrimental to good administration. The Interested Party, the Developer, through its Attorney, asked the court to consider the impact that the grant of permission would have on the Developer.[2]

[91] Both the respondents and the Interested Party asked the court to consider carefully the impact the grant of leave would have on this Developer who had already expended considerable sums relying on the grant of permission. They submitted that: "The courts have stressed the importance of prompt applications for leave, particularly where, as in this case, third parties might be affected by the outcome of the judicial review application: **R v Independent Television Commission ex p. T.V.N.I.** The Times December 30, 1991. The respondents also relied on **Fisherman and Friends of the Sea v The Environment Management** (2005) 66 WIR 358.

[92] There is no fixed statutory time limit imposed on this applicant to make an application for leave to apply for judicial review. That being said, CPR 56.5 gives

[2] The Intervening party did accept that the Developer had on its own decided to downsize the project and not to build any other buildings except which had already been on the ground.

the court a discretion to refuse to grant leave where there has been unreasonable delay. It is accepted in the case that the mere delay it not enough to trigger this discretion, it must be delay which is first unreasonable. Many of the cases show that such application should normally be brought in as short a time as possible, and generally within a three months period. See **Fishermen and Friends of the Sea v The Environment Management (**2006) 2 LRC 384.

[93] Notwithstanding, there are cases in which delays over a year or more has not operated to bar an application for leave or even relief at the substantive stage. In **The Honourable Patrick Manning and 17 others v Chandresh Sharma** Privy Council No. 22 of 2008, the respondent's application for leave to apply for judicial review related to the Part II of the Freedom of Information Act 1999 and was brought nearly four years after the Act came into force. The Privy Council agreed with the Court of Appeal that the trial judge was wrong to refuse to grant leave.

[94] In **Roland Browne v The Public Service Commission** Civil Appeal No. 23 of 2010 the Court allowed an against the decision of the learned judge striking out the applicant's claim for judicial review for reasons which included unreasonable delay in applying for leave to file the claim. In this case he had filed his application for leave some eleven months after he first became aware of the decision. In this case the court of Appeal cited **Urban Dolor v The Board of Governors, Sir Arthur Lewis Community College,** No. 30 of 2009, (unreported) a case in which seven months had elapsed when application for leave was made and granted.

[95] As a matter of principle therefore, whether an applicant has been guilty of undue or unreasonable delay will depend on the circumstances of the particular case. As such decisions of the courts merely serve as guidance. I agree that this must be the approach of the court. The question must therefore be answered by an examination of the circumstances of the case.

[96] In this case, this applicant was actively involved on several initiatives on the preservation of the environment.

[97] In her affidavit evidence the applicant states that she is intimately involved governmentally recognised programmes (one in partnership with the Nevis Government) aimed at improving Nevis' environmental integrity – protecting and maintaining the island's marine heritage.

[98] She states that she, has together with others partnered with the Nevis Government, assisted in 'creating a strategic plan to improve the island's environmental integrity and economy, while creating new public space and restoring part of the island's marine heritage'.

[99] In particular she states that the 'initiatives include a Coral Reef Restoration Project, aimed at restoring two primary coral reefs – one located off the coast of [her] residence and the HTRIP Candy Resort Villa Development on Long Haul Bay, and the second located to the west of the island, off the coast of the Four Seasons and Pinney's Beach.' It has not been contradicted that the Nevis Government's Planning Department approved the Coral Reef Restoration Project on the 9th February 2015.

[100] The applicant has further deposed that in April or early May 2014, there was some clearing of the vegetation at the beach where the HTRIP Candy Resort Development is now located. At the time she had had no notice for the reason of this clearing, but in August 2014, she became aware of the proposed project. She then set out a number of steps which were then taken leading up to her application for leave. This court has considered that even things which had happened before the decision was made are relevant in determining whether the applicant had been guilty of undue and unreasonable delay. In her third affidavit she states the following:

a. After learning of the proposed Candy Development, on August 14, 2014, I emailed Deputy Premier Mark Brantley regarding my concerns about environmental impact from the Candy Development and asking if he would meet with me and other concerned residents of Nevis to discuss these concerns.

b. On August 17, 2014, pursuant to my invitation to discuss these issues, Mr. Brantley met with me at my house on Long Haul Bay to discuss my concerns regarding the environment impacts from the proposed development and the need for careful planning on Nevis that best considers both the short term and long-term interests of all Nevisians. Mr. Brantley then asked me if I would be interested in purchasing the 4.4 acres on which the Candy Development was being proposed if the Developer wanted to sell the land. I said that I would be interested.

c. On August 20, 2014, I emailed Mr. Brantley photographs showing the dramatic changes in the shoreline since the property had been clear cut for the Candy Development. Mr. Brantley respondent and acknowledged that '[t]his is sad'.

d. On August 21, 2014, Mr. Brantley emailed me and said that he met with the Chinese owners of the property and they are clients of Sharon Brantley, his wife and the developer's real estate broker. Mr. Brantley said that the Chinese owners were prepared to sell the Property, they wanted the sale to happen quickly, and I should communicate with Mrs. Brantley about the sale.

e. On August 22, 2014, I emailed Mrs. Brantley to enquire about the purchase price. She responded and stated that her clients had not decided on an asking price, but she would prompt them to make a decision soon.

f. On September 2, 2014, I received an email from Mrs. Brantley stating that her clients were close to deciding on an asking price.

g. On September 8, 2014, I emailed Mrs. Brantley and confirmed that if a mutually agreed upon price could be reached, I could pay cash and close immediately. I acknowledged that the restoration of the Property due the clear cutting that had already occurred would be costly, as there would be considerable loss of land in only a few months as a result of the clear cutting. Mrs. Brantley responded that same day, and with regard to her client's asking price stated, 'I am sure that they will be getting back to me soon on the asking price'.

h. After not hearing further from Mrs. Brantley, I emailed her on October 28, 2014 and requested an update on the owners' interest in selling the property. Mrs. Brantley responded that same day and said that the owners were no longer interested in selling their land, but 'they have modified their plans to build a smaller and more high end project'.

i. DPP approved the Candy Development proposal that was submitted in September 2014 on April 7, 2015, and ground breaking took place on April 18, 2015.

j. On June 13, 2015, I met with Mr. Brantley to discuss the environmental impacts of the project and concerns regarding the approval of the project including the incomplete EIA.

k. In June 2015, I began to assemble a team of attorneys and experts to assist with assessing the significant legal shortcomings of the Candy Development and its adverse environmental impacts.

l. On June 22, 2015, I emailed Mr. Brantley notifying him that I was preparing a letter setting forth the environmental and legal issues regarding the Candy Development that would be forthcoming.

m. Mr. Attorney, Charles Wilkin Q.C. drafted a summary of the legal shortcomings and concern regarding the Candy Development which I emailed to Mr. Brantley on June 26, 2015.

n. On June 29, 2015, Mr. Brantley emailed me stating that the manager for the Candy Development asked if I was still interested in purchasing the Property. He said that he would be in Nevis in July and he wanted to meet with me.

o. On July 22, 2015, Mrs. Brantley emailed me and said that the Chinese owners of the land were willing to sell the land to me for $2.5 million with me being responsible for the transactional fees including transfer taxes, realtor fees, and legal fees.

p. In lieu of asserting my legal claims against the approval of the Candy Development at the time, I proceeded with the purchasing the Property in response to the developer's offer to sell, as communicated to me through Mr. and Mrs. Brantley. Indeed, I specifically discussed with my attorney that I was pursuing negotiations for the Property in response to the developer's offer sell in lieu of filing a lawsuit at that time. [email to MR. Wilkin Q.C. attached]

q. Via email communications between Mrs. Brantley, broker for the developer, and Julien Lethbridge, my partner, on my behalf, the developer and I agreed upon a purchase price of $2 million plus the 10% transfer tax.

r. Subsequently in August 2015, my attorney, Larkland Richards proceeded to work with the attorneys at the law firm of Daniel, Brantley & Associates, as the attorneys for the developer, and Mrs. Brantley, as the real estate broker for the developer, to complete the sale of the Property. [Documents attached showing the 'finalization of the terms of the sale']

s. I transferred $2.25 million on August 10, 2015 to complete the sale.

t. The terms of the Purchase and Sale agreement (PSA) were finalized.

u. Attorney Dia Forrester of Daniel, Brantley & Associates, on behalf of the Developer, emailed Attorney Richards on September 2, 2015 and stated that she sent the finalized PSA to her client for execution.

v. On September 10, 2015, Attorney Forrester emailed Attorney Richards and advised him that her client 'has indicated that the executed PSA will be sent to us this week'.

w. That same day, Attorney Richards advised Attorney Forrester that my executed copy of the PSA was in place.

x. Not having received the executed copy of the PSA from the developer, Attorney Richards emailed Attorney Forrester on September 22, 2015 to enquire about when it would be received. Attorney Forrester responded on September 29 2015 and stated that her client will not be proceeding with the sale of its property at Liburd Hill because 'the property is an approved development for economic citizenship and several of CDCL's existing and reserved clients wish for the company to proceed with the development.'

[101] At this stage nothing was being done on the property. The applicant then states that she became aware in mid-December 2015 that work had begun on the project.

[102] The applicant states in her paragraph 10 of the third affidavit that: "After it was made clear to me that CDCL were not going to sell me the property, despite leading me to believe that they would, and after the construction of the buildings started in mid-December 2015, I quickly assembled a team of attorneys and experts to assist with filing this lawsuit."

[103] It is for the applicant to show that the delay was not undue or unreasonable. The respondents have urged this court that the evidence clearly shows that the applicant did nothing for almost four months after she was informed that the sale would be aborted.

[104] The respondents submit: "She now seems to blame the developer for her unreasonable delay in that she submits at paragraphs 46(d) and (e) of her written submission that –

> *"The Developer took no steps as far as the evidence shows between September 2015 and mid-December 2015 when it began construction…As soon as the Applicant became aware that the Developer had begun construction, she moved as swiftly as possible.'*

[105] The respondents developed this argument by submitting: "Firstly, the Developer was not required to commence construction immediately as its planning only lapsed under section 31(1) of the Ordinance if it did not commence construction with 12 months from the date on which it was granted. Secondly, on the authority of **R v Herrod, ex parte Leeds City District Council** she was required to 'act promptly and before the other party has taken any step on the faith of the decision.' She failed to do so."

[106] I respectfully do not agree with the respondents. There is a temptation to think of this case as simply a delay of over '9 long months' as the respondents have urged.

In some cases, all the court has is the passage of time between the decision and the application for leave and so a mere examination of the date of the decision and the date of the application may lead to conclusive finding that the applicant has been guilty of unreasonable delay. The circumstances of this case, however, outlined above present a rather unusual state of affairs leading me to conclude that the actions of the Nevis Island Administration and the Interested Party, the Developer has affected any mathematical computation of the time which elapsed between the decision and the application for leave. This is not a case in which it would be proper to ignore all of these events and its likely effect on this applicant.

[107] This applicant has presented considerable evidence of her own motivation and her role in the preservation of the environment. This evidence has not been contradicted at all. What it tell this court is that she is clearly no busy body, or someone who was trying to buy real estate for her own personal motives. The evidence if believed, shows that she was clearly motivated to ensure that the Development did not harm the environment and threaten the viability of her Coral Reef Restoration Project.

[108] This sale fell through when the Developer indicated in October 2014 that they were no longer interested in selling and that **they have modified their plans to build a smaller and more high end project'.**

[109] There is an arguable case that it is entirely reasonable to assume that the applicant would have been led to believe that not only the Administration may have caused some changes to take place in the original project but that her concerns of adverse impacts to the environment were being addressed.

[110] She then became aware that the decision to grant planning permission was granted on the 7th April 2015, and that ground breaking had taken place on the 18th April 2015. Less than 2 months later she began to assemble a team of attorneys and experts and in June she again engaged the Deputy Premier with her

concerns. (I have noted the credentials of the some of these persons; it appears that they may be suitable persons to be considered experts.) She emailed him about her concerns and forwarded a letter from her attorney to the Deputy Premier. Three days later, the Deputy Premier wrote her asking if she were still interested in purchasing the property, and saying that he wanted to meet with her in July when he would be in Nevis.

[111] At this stage it is difficult to see that she would have been guilty of undue or unreasonable delay if she had filed her challenge in June 2015. It is difficult to conclude that this applicant who had earlier expressed a real desire to buy the property, should have ignored the Deputy Premier's indication and proceeded to court. She presents cogent evidence that she took a deliberate decision to stay the court proceedings and engage the developers through the agency of the Deputy Premier and his wife the real estate broker.

[112] Arguments were made at the hearing that the applicant was lulled into a sense of comfort that if the Developer were going to proceed with the project, either they or the Administration would have taken steps to address the environmental concerns and the inadequacies of the EIA. Hence the surprise of the Applicant in mid-December 2015 when they saw work commence on the Property.

[113] In the exercise of my discretion on this matter I am enjoined to have regard the grant of leave would (a) *be detrimental to good administration and or* (b) *cause substantial hardship to or substantially prejudice the rights of any person.*

[114] In this regard I have considered all of the circumstances. I have looked at the evidence is that the applicant engaged the Government of Nevis, speaking to no less than the Deputy Premier Mark Brantley at least a year before the challenged decision was made. She was making her environmental concerns clear to the Government as to what result if a particular project was allowed to proceed.

[115] There is evidence that the unusual happened. The Deputy Premier and his wife began to speak for the Developers who had submitted an application for planning permission. Talks of a sale of the property began. The evidence shows that the applicant expressed her readiness to buy the Property. To my mind, this is relevant to the issue of good administration and any prejudice which may have been caused the developer. Here there is evidence that when a complaint was made to the Government about a flawed development, the official's response was to inform the complainant that the developer were considering selling the property.

[116] In this case, the Administration took steps on several occasions which operated effectively to prevent the applicant from moving the court earlier. There is cogent evidence that the third party, the developer itself engaged the applicant in lengthy discussions relating to the sale of the property – meaning that the project would not proceed. There is clearly some prejudice caused to the developer, but the developer was the one who caused the applicant to file such a delayed application. In these circumstances, even in the face of some prejudice that might be caused to the Developer having regards to the Developer's own conduct, it would be unfair for this Court to exercise any discretion to refuse to grant leave. In the circumstances, the delay as exists in this matter will not bar the grant of leave.

[117] The exercise of this discretion was also affected by the view that this is a matter of considerable public importance. In this regard I have had regard to the arguments of the Intervening Party filed on the 4th November 2016 and the arguments filed by the applicant on the 7th November, 2016. These submissions sought to address a point which had been raised by learned counsel for the applicant during the hearing to the effect even where there was shown there had been delay, a court may nonetheless grant leave where the matter is of considerable public importance.

[118] Both the applicant and the Intervening Party relied on **R v Pembrokeshire Country Council and Pembrokeshire Coast National Park Authority, ex parte**

Hardy and Maile [2005] EWHC 1872 (Admin) (26 July 2005). In this case, the grant of planning permissions and consents authorised the construction of two very large Liquified Natural Gas (LNG) terminals at Milford Haven in the United Kingdom.

[119] The applicants sought permission to apply for judicial review and the question of the application had been made promptly arise for the court's consideration. Addressing the relevant principles, Sullivan J stated at paragraph 24:

> *"In R v Secretary of State for Trade & Industry ex parte Greenpeace Ltd. [2000Kay J (as he then was), having decided that the application for permission to apply for judicial review had not been made promptly or within the three month period, considered whether permission to apply for judicial review should be refused on the ground of delay by reference to three questions that had been posed by Laws J (as he then was) in a previous challenge by Greenpeace (Greenpeace 1). Those three questions were:*
>
> > *"(i) In there a reasonable objective excuse for applying late?*
> > *(ii) What, if any, is the damage, in terms of hardship or prejudice to third party rights and detriment to good administration, which could be occasioned if permission is now granted?*
> > *(iii) In any event, does the public interest require that the application should be permitted to proceed?*

[120] Sullivan J accepted that 'the importance of an issue may justify the grant of permission to apply for judicial review even though there has been delay'[3].

[121] Through learned counsel, the Intervening Party agreed that the principle of public interest is not in doubt but argued that even in **Maile**, where the court 'considered the question of public interest, the learned judge nonetheless refused the grant of leave because any public interests still could not outweigh any hardship or prejudice to the interested party. This is even where, in that case, Sullivan J., expressed that he had no doubt that the issues raised in the claim are of considerable local importance', neither did the learned judge question 'the genuineness of the claimants' concerns'.

[3] Paragraph 77 of the judgment.

[122] Learned counsel for the applicant in turn submitted that the facts in **Maile** were substantially different from the present case and that each matter would turn on its own facts. I agree. Sullivan J in **Maile** itself makes that point.[4] In **Maile**, questions related to the failures or inadequacies of the EIA were not related to the hazardous risks of the project but more to the grant of permission. Further initial questions which had been raised in **Maile** resulted in answers being provided regarding the safety of LNG. What was most significant was that in **Maile** further delay to the project would not only affect the developer but also affect the supply of natural gas to the whole of the United Kingdom.

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

[4] Paragraph 79 of the judgment.

interests that these matters be fully examined at a substantive hearing notwithstanding the delay.

[124] In all the circumstances leave is granted. The Order of the Court which was made on the 30th January 2017 is repeated now in this judgment:

> Leave is hereby granted to the Applicant to apply for judicial review, in particular to obtain an Order of Certiorari to remove into the High Court and to quash the decisions of the 1st Respondent and/or 2nd Respondent made in or about the 8th April, 2015 granting permission to Caribbean Development Consultant Ltd to construct a 17 building, 51 unit development, together with a guard house, restaurant, two parking lots, badminton courts, and volleyball site on 4.4 acres of coastal land at Liburd Hill, St. James, Nevis which is referred to as the HTRIP Candy Resort Villa Development on the following grounds, namely that the said decision is unreasonable and exceeds the powers of the decision maker or makers.

[125] Finally, I wish to thank all Counsel for their obvious industry at the trial and in the preparation of their closing arguments that did provide the court with assistance.

Darshan Ramdhani
High Court Judge (Ag.)

By the Court

Registrar