

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE  
ANGUILLA CIRCUIT  
(CIVIL)  
A.D. 2010

CLAIM NO. AXA HCV 2008/0015  
BETWEEN:

1. PAUL WEBSTER
2. MARJORIE MCLEAN
3. MARJORIE CONNOR
4. PHILLIPE CHAMPAULT
5. CHRISTINE CHAMPAULT
6. ANNE KELLER
7. LLOYD SINCLAIR
8. NEIL FREEMAN
9. WENDY FREEMAN

Claimants

AND

THE ATTORNEY GENERAL  
(FOR THE GOVERNMENT OF ANGUILLA)

Defendant

AND

DOLPHIN DISCOVERY

Interested Party

Mr. Ryan White and Ms. Tameka Davis, instructed by Webster Dyrud Mitchell for the Claimants  
Mr. Mark Brantley and Mr. Ivor Greene, instructed by the Attorney General's Chambers for the Defendant  
Mr. Dane Hamilton QC, Mrs. Josephine Gumbs-Connor and Ms. Tolulola Agbelusi instructed by JAG  
Gumbs & Associates for the Interested Party

2009: 27, 28, 29, 30 July,  
2010: September 13

JUDGMENT

- [1] SMALL DAVIS J [Ag]: On 19 January 2008 the Interested Party (hereinafter referred to as "Dolphin Discovery") commenced construction of a pier in the seabed off Sandy Point Beach, Blowing Point on the southeast coast of Anguilla. They had in hand an approval letter dated 12 December 2007 from the Land Development Control Committee approving its planning application to construct a dolphin pier, subject to a number of stated conditions, and a letter dated 18 January

2008 advising that the Government's Executive Council had approved the construction of a pier and enclosure and that it may proceed with the portion of the works that will be on the foreshore and seabed. The plan to develop an Open Water Dolphinarium featuring Swim with the Dolphins entertainment ("the Development") was of a large scale, with plans for submerged dolphin pens accessed by boardwalks and a pier, a restaurant, restrooms, swimming pools, an aviary and retail shops. Dolphin Discovery was already a major tourist attraction for Anguilla, with annual visitors to the Dolphinarium averaging 25,000 between 2005 and 2007. It would be a major development for Anguilla and would, undoubtedly, have an economic, social and environmental impact.

- [2] By April 2008 Dolphin Discovery had substantially constructed the pier and dolphin enclosures in the sea at Sandy Point. On 26 April 2008 the Claimants applied for leave to make a claim for judicial review. They sought interim relief by way of an injunction restraining continuation of any construction works. The application was heard inter partes on 5 May 2008 and on that date the learned judge granted leave to the Claimants to make a judicial review claim and interim relief as follows: *"All construction of all piers or structures or any encroachment on the foreshore or floor of the sea in whatever manner at the Sandy Point Beach or in the waters forming the Port of Blowing Point by any persons whether by themselves, their servants or agents, in violation of the requisite licensing provisions of the Beach Control Act and the Ports Harbours and Piers Act cease forthwith until further order."* The Order directed the Government to do all things as may be necessary to ensure compliance with the injunction. Dolphin Discovery was represented at the hearing of the application on a watching brief and took no active part.
- [3] The Government subsequently made an application to discharge the injunction which was dismissed by the judge. The learned judge gave a written judgment, in which she also set out certain findings of fact based on the state of evidence before her at the early stage of these proceedings and the submissions then made.
- [4] In an Agreed Pre Trial Memorandum, the Claimants and the Defendant identified the decisions that are under challenge as:
- (a) The purported decision of the Minister charged for the time being with the administration of Crown lands to grant a lease of Parcel 169 Block 28309 B Registration West ("Parcel 169") to Dolphin Discovery;
  - (b) The decision of the Minister to grant a licence to use the Sandy Point foreshore and beach to Dolphin Discovery;
  - (c) The decision of the Land Development Control Committee ("LDCC") to grant planning permission to Dolphin Discovery; and
  - (d) The decision of the Building Board to grant building permission to Dolphin Discovery.

(“the Decisions”).

[5] The relief the Claimants seek is:

- (a) An order of Prohibition prohibiting the Defendant from disposing of, or permitting the continuing possession or use of Parcel 169 by any person other than as a public park and or sports complex;
- (b) An order of Prohibition prohibiting the Defendant from disposing of, or permitting the continuing possession or use of Parcel 169 by any person other than under a duly granted disposition pursuant to Section 26 of the Registered Land Act and subject to full and proper consideration in accordance with the requirements set out in Section 12 of the Anguilla Royal Instructions, 1982;
- (c) An order of Certiorari to quash the decision (whether it has been granted or not) permitting Dolphin Discovery to possess or occupy Parcel 169 without a duly granted lease or other disposition pursuant to section 26 of the Registered Land Act and in accordance with the requirements set out in the Anguilla Royal Instructions 1982;
- (d) A declaration that no application for a licence pursuant to the Beach Control Act was made by Dolphin Discovery;
- (e) An order of Certiorari to quash the decision of the Defendant to cause or permit Dolphin Discovery to encroach on or use the foreshore or floor of the sea and to construct or install a pier without a licence duly granted pursuant to section 4 of the Beach Control Act and without the written permission of the Minister with responsibility for ports, harbours and piers and without a licence pursuant to sections 36 and 37 of the Ports, Harbours and Piers Act;
- (f) An order of Prohibition prohibiting the Defendant from causing or permitting or continuing to permit any person from encroaching on or using the foreshore or the floor of the sea, whether by the construction, installation or operation of a pier, or otherwise without full and proper consideration according to law and the rules of natural justice and the observance of any other procedures as may be required by law and without every and any necessary licence;
- (g) An order of Certiorari to quash the decision of the Land Development Control Committee to approve the application for planning permission dated 12 December 2007;
- (h) An order of Certiorari quashing the decision of the Building Board to approve the Building Permit application in respect of Parcel 169;
- (i) A declaration that the draft Environmental Impact Statement dated November 2007 is incomplete, inadequate and deficient and is accordingly fatally flawed.
- (j) An order that all construction or any encroachment on the foreshore or floor of the sea at Sandy Point Beach or in waters forming the Port of Blowing Point by any persons, without such necessary preconditions as may be required by law having been met and without all such

procedures as required by law having been followed, cease forthwith, including the operation of the pier as a dolphin facility.

(k) Costs.

[6] A large volume of affidavits and exhibits were before the court. Detailed reference to the evidence will be set out in the discussion of the particular issues.

[7] The parties agreed and put forward a list of nineteen legal issues to be determined at trial. These issues will be reproduced under the relevant heads so as to ensure that proper consideration is given to the issues which all learned counsel have considered are relevant to the decision that the court has to make.

[8] I gratefully adopt the principal issues in relation to each of the Decisions as identified by Mr. Brantley, counsel for the Defendant as follows:

- (a) Where land is compulsorily acquired for a specific purpose, whether it is open to the Government to use or permit the use of a portion of the said land for an alternative purpose;
- (b) Whether a party may only possess or occupy Crown Land by a lease or "other duly granted disposition";
- (c) Whether it is unlawful for the Government to permit the construction of the pier without a licence under the Beach Control Act, and without written permission from the Minister or a licence under the Ports, Harbours and Piers Act or any other licence that may be required under law.
- (d) Whether the Government gave "full and proper consideration" before permitting the construction, installation or operation of the pier;...
- (e) Whether the Claimants may successfully challenge the decision-making process adopted by the LDCC and the Building Board in granting approval of the Development.

[9] The parties also agreed a list of twenty six factual issues to be determined. These will not be set out seriatim. Rather, my findings of facts as I find them will be stated.

[10] There are some fundamental points and issues of broad spectrum that relate to all the decisions and which will help to put the particular issues relating to each decision in context. I propose to first deal with those general legal issues in the hope that the discussion of the particular ones will be shortened. But first, it is necessary to set out a chronology of at least the uncontroversial and clearly documented facts leading up to the Decisions complained of and which give rise to these proceedings.

#### Undisputed Facts

- [11] Parcel 169 was compulsorily acquired by Government in 1997 for a public purpose and the land was registered as Crown land in August 1998. The Declaration stated that the Government considered that the lands should be acquired to facilitate the development of a public park and sports complex. No development has occurred on Parcel 169 since it has been acquired.
- [12] Dolphin Discovery is in the business of providing entertainment through the antics of dolphins held in captivity and first made their entry into Anguilla in 1999. The operations were previously located in Meads Bay.
- [13] In or about June 2005 Dolphin Discovery sold the land on which they operated the dolphinarium and entered into a lease with the new owner. They agreed to vacate the property by a certain date. They began the search for an alternative location. They identified a site in Sandy Ground and submitted applications for the transfer of the facilities from Meads Bay to Sandy Ground, and for planning permission and building permit in November 2006. The then existing operations housed the dolphins in tanks on land. In the new application, Dolphin Discovery proposed to have an open water facility, with the dolphins in pens in the sea. The applications were supported by blueprints for the project, a water treatment plan, parking lot drawings and accessibility drawings. The LDCC and the Building Board granted planning and building permission to Dolphin Discovery to develop the Sandy Ground site, in the vicinity of the Mariners Hotel, on 22 January 2007 and 26 January 2007 respectively.
- [14] Work commenced in mid May 2007; Dolphin Discovery thought themselves well on their way to constructing their new facility at Sandy Ground. All was not to go well. In a letter dated 22 May 2007, under the signature of Mr. Mervyn Foster Rogers, Permanent Secretary in the Chief Minister's Office, the Government raised disapproval of the construction of the sea aquarium, citing Dolphin Discovery's failure to obtain a Crown Lease for the use of the foreshore and sea bed extending into Sandy Ground Harbour and the failure to apply for an Alien Land Holding Licence to hold the lease interest in the land.
- [15] In late May 2007 there was a meeting between Government and Dolphin Discovery representatives. The Government's decision not to approve the relocation of the dolphinarium from Meads Bay to Sandy Ground was formally communicated to Dolphin Discovery by letter dated 22 June 2007. In that letter, under the Chief Minister's hand, the Government indicated that it was willing to accommodate relocation to any other feasible site "subject to laws, provisions and necessary studies".

- [16] On 7 June 2007 Messrs. Keithley Lake & Associates, representing Dolphin Discovery, addressed a letter to the Chief Minister and Minister of Lands, Physical Planning and Environment, in which reference was made to the Government's oral indication of its decision not to approve relocation of the dolphin operations to Sandy Ground and said *"we are pleased to announce that our Client has identified another location that could house its current operations and hereby request the Government's permission in allowing it to relocate its operations there."* The letter referred to the planned Development, which was intended to include offices, restaurants, shops photo-labs and other back office facilities and the need to utilise a portion of the foreshore and sea. It requested approval to lease Parcel 169, to construct a pier in the sea and such other consents and approvals as are reasonably required.
- [17] An application for planning permission was submitted to the Department of Physical Planning ("the Department") on 12 June 2007. The nature of the proposed Development was expressed to be *"to construct a dolphin pier in the water"*. The proposed new use was set out as "Dolphin facility". Section 4 of the application form, which required the applicant to indicate the number of employees, was not completed. The public was notified of the application by a press release dated 17 June 2007.
- [18] Copies of the Planning Application were circulated to several governmental agencies and the Anguilla National Trust ("ANT") (a nongovernmental organisation) as well as the Anguilla Tourist Board on 19 June 2007. The ANT responded on 25 June 2007 with lengthy comments, which, in the main, were addressed to natural and social environmental issues, and strongly recommended a detailed Environmental Impact Statement ("EIA"). The ANT noted that it had been opposed to the dolphin facilities from its first venture into Anguilla years before. The Anguilla Tourist Board's response was to recommend that there be some form of consultation with the residents of the community and inquired about access plans and the landward development and mentioned the plans to redevelop the Blowing Point Ferry Port. Detailed responses were received from the Environmental Health Unit, The Department of Environment, the Department of Fisheries and Marine Resources. It was generally felt that an EIA was essential.
- [19] The LDCC held a round table meeting with government and non governmental agencies on 2 August 2007 to discuss the application. The decision was taken to hold a public meeting.
- [20] A public meeting was held in Blowing Point on 14 August 2007, which from all accounts, was well attended. After the meeting, a press release was issued by the LDCC informing the public that Dolphin Discovery was being required to submit an EIA and that it would be made available for public scrutiny.

- [21] The Planning Application was gazetted on 28 September 2007 in which reference was made to section 4 of the Beach Control Act. The public was informed that objections to the proposals should be made in writing within one month of publication.
- [22] On 2 November 2007, by an order of the Court in different proceedings, Dolphin Discovery was given 90 days to vacate the Meads Bay site.
- [23] On 22 November 2007 the LDCC issued a press release notifying the public that the EIA for the development of a dolphin pier at Sandy Point was available for inspection at the Department of Physical Planning and the Anguilla Public Library. On the same date, the Director of Physical Planning and Chief Planning Officer, Mr. Vincent Proctor sent copies of the EIA and its appendices to several stakeholders and asked for their observations and comments "as soon as possible". He notified them of a round table meeting of internal governmental advisors scheduled for the following day. There were complaints that the time stipulated for comments was too short. The LDCC extended the deadline for comments until 4 December 2007 and postponed the round table meeting. Comments were received from the Anguilla Tourist Board, Disaster Management, the Department of Fisheries and Marine Resources and the ANT, the last two of which provided very detailed comments. The ANT had some reservations, but expressed support for the relocation to Sandy Point.
- [24] A second round table meeting with government and non governmental agencies was held on 4 December 2007.
- [25] The LDCC convened a meeting to determine the application. On 12 December 2007 permission to construct a dolphin pier at Sandy Point was granted to Dolphin Discovery by the LDCC. The permission was subject to a number of conditions, most of which appeared to mandate mitigating actions in favour of the social and natural environment. The approval letter also stated "*This permission does not in any way constitute a waiver of the need to obtain building permission for this proposed development and any other necessary Government licenses (sic) and permits that may be required. The Applicant is responsible for obtaining all necessary licenses that may be required.*"
- [26] On 14 December 2007 Dolphin Discovery applied by letter to the Chief Minister, in his capacity as Minister of Lands, for permission to use Crown land and the seabed for the development of the facility.
- [27] Permission was granted for Dolphin Discovery to mobilise equipment on 8 January 2008.

- [28] A number of letters from private persons, most of them dated 9 January 2008, some before and a few others after that date, were sent to the Chief Minister, protesting against any approval being granted to Dolphin Discovery to continue and or relocate its operations. All of the Claimants wrote letters; some were sent to all of Anguilla's elected representatives as well as the LDCC.
- [29] On 18 January 2008 permission was granted to Dolphin Discovery to construct "the portion of the project that will be on the foreshore and the seabed". The letter from the Ministry of Immigration, Labour, Lands, Physical Planning, Environment, Human Rights, Gender Affairs & Information, stipulated certain conditions and stated that "Executive Council ...have agreed for Dolphin Discovery to construct a dolphin enclosure, and pier at Sandy Point, Blowing Point, Anguilla." Construction began the next day.
- [30] On 22 January 2008 the LDCC issued a press release notifying the public of its approval of the application to construct a dolphin pier at Sandy Point
- [31] On 29 January 2008 the Anguilla Hotel and Tourist Association wrote to the Chief Minister and recorded its opposition to the relocation of the dolphinarium to Sandy Point.
- [32] On 9 June 2008, Dolphin Discovery wrote to the Minister responsible for ports, harbours and piers requesting grant of permission for the construction of a dolphin pier. On 27 August 2008 the Ministry's Permanent Secretary advised of grant of permission to construct the pier.

#### The Grounds for Judicial Review

- [33] Judicial review is the means by which judicial control of administrative action is exercised. It is used to control what would otherwise be unfettered executive action whether by central or local government.
- [34] In mounting this challenge to the Decisions, the Claimants assert that certain fundamental duties and obligations were not observed and applied in the decision making process
- (a) to act fairly and reasonably,
  - (b) not to predetermine the issue before it;
  - (c) to take into account all proper matters/not taking into account improper matters;
  - (d) to adopt a fair and reasonable procedure, which encompasses the availability of opportunity to make representations and procedural fairness;
  - (e) full and fair disclosure,
  - (f) to act rationally
- [35] The broad heads of the grounds upon which there may be a review of administrative actions and decisions have been set out by Lord Diplock in *Council of Civil Service Union v Minister for the*



*Civil Service*<sup>1</sup>, thus making it a case which it is virtually compulsory reading in any discussion of judicial review.

"One can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality', I mean what can now be succinctly referred to as "Wednesbury unreasonableness". 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 the decision falls within this category is a question that judges by their training and experience should be well equipped to answer....

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

- [36] Judicial review is not an appeal from a decision; it is a review of the manner in which the decision was made. I remind myself that it is not the court's function to determine whether a particular policy or decision taken in fulfilment of that policy is fair. I am only concerned with the manner in which those decisions have been taken. The court's intervention is not to override a decision, but rather to see whether the authority has contravened the law by acting in excess of the powers which the legislature has confided in it. As aptly put by Lord Brightman in *Chief Constable of the North Wales Police v Evans*<sup>2</sup>:

<sup>1</sup> [1985] 1 A.C. 374

<sup>2</sup> [1982] 1 W.L.R. 1155

‘Judicial review is concerned not with the decision but the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.’

- [37] In considering the application and the Claimants’ arguments, I am also mindful of the fact that it is for those who assert that the local authority or minister has contravened the law to establish that proposition. The presumption is that responsible bodies will not exceed their powers and the burden of proving the contrary lies upon the party alleging otherwise. The Court does not substitute itself for the authority but looks at the process to see whether the Claimants’ propositional challenge is made good. In *Attorney General v KC Confectionery*<sup>3</sup> Bernard JA expressed the principle that the presumption of regularity can only be discharged by proof of mala fides, whether express or implied from the overt acts of the officials.

#### General Complaints

- [38] The Claimants make the following general complaints about Government’s approval of the Development:
- (a) Their legitimate expectation to be consulted was not honoured;
  - (b) The Government was biased in favour of the Development and had predetermined the applications;
  - (c) The Decisions are irrational.

#### Legitimate Expectation

- [39] Put in its simplest terms, legitimate expectation arises where a decision maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage. This includes procedural rights such as consultation (See *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators’ Association*<sup>4</sup>) as well as substantive benefits (*R v North and East Devon ex parte Coughlan*<sup>5</sup>).

#### Consultation

- [40] Mrs. McLean attended the public meeting at the Maranatha Methodist Church on 14 August 2007 and maintains that she was led to believe that there would be further public consultation. I noted that in an exhibited email to the Chief Minister Mrs. McLean only refers to a hope that there would be a further public meeting<sup>6</sup>. At the public meeting Dolphin Discovery presented a two hour exposé

<sup>3</sup> 34 W.L.R. 387 at page 417

<sup>4</sup> [1972] 2 All ER 588

<sup>5</sup> [2001] QB 213

<sup>6</sup> See her email to the Chief Minister dated 9 January 2008, Tab 75 Core Bundle

which was stated to include a detailed overview of the plans. Following the Public Meeting, Mrs. McLean wrote a long letter to the Chief Minister detailing her objections which were broadly stated to be (a) Anguilla is an up market destination and the Dolphin Project is a mass tourism program (b) environmental hazards to the welfare of the dolphins in the nature of oil spills from the nearby ferries, inadequate protection from the elements, the proposed site being on the windward side of the sand bar and the impact from the noise of the ferries. She related that Dr. Lenzi and others had visited her to address some of her concerns.

[41] The Sixth and Seventh Claimants also wrote to the Chief Minister objecting to the development'. Their objections were primarily based on the danger of privatising the beach and their opposition to keeping dolphins in captivity. Pollution of the beaches from the dolphins' waste and the impact on their vacation rental opportunities if their property becomes undesirable as a consequence of the proximity of the dolphinarium were some of the other concerns that were raised. The Fourth and Fifth Claimants, the Champaults, also wrote to the Chief Minister. Mrs. McLean was later to send two more emails and also met with the Chief Minister in his office to express her great and deeply held objection to the Development and disapproval of the Government's decision to permit the relocation to her "front yard".

[42] The Claimants assert that they and other members of the public were never given a fair opportunity to make representations; they did not receive adequate time to consider and comment upon the EIA and the government did not prepare and provide them with a consultation paper or any other adequate information upon which they could have reached informed views or engaged in consultation in a meaningful way. The Claimants say the consultation process followed by the authorities was so flawed and inadequate that it amounted to a failure to consult.

[43] Mr. Brantley argued that there was nothing to establish that the Claimants had a legitimate expectation to be consulted on the planning application.

[44] Prior to the grant of any sort of approval, there had been what could be fairly described as extensive publication and public consultation of the applications.

[45] Public consultation, particularly in relation to developments and projects that will impact the environment, is now practically routine in all jurisdictions. Sometimes the duty to consult is made a statutory requirement, but even where it is not, it has become a policy in most quarters to observe this feature of procedural fairness. Though Mr. Proctor explained that there is no statutory duty to

---

<sup>1</sup> They had previously written to each of the elected representatives voicing their opposition.

consult. he said that his Department and the LDCC have a policy of consultation on certain applications, particularly those that have an impact on other government departments and non-governmental organisations.

[46] In the Environmental Charter between the United Kingdom and Anguilla entered into on 26 September 2001, the first five Guiding Principles are stated as:

1. To recognise that all people need a healthy environment for their well being and livelihood and that all can help to conserve and sustain it.
2. To use our natural resources wisely, being fair to present and future generations.
3. To identify environmental opportunities, costs and risks in all policies and strategies
4. To seek expert advice and consult openly with interested parties on decisions affecting the environment.
5. To aim for solutions which benefit both the environment and the development.

[47] Listed under the Commitments that the Government of Anguilla undertook is "to open and consultative decision-making on developments and plans which may affect the environment, ensure that environmental impact assessments include consultation with stakeholders." One of the Vision Statements in the Government of Anguilla National Environmental Management Strategy and Action Plan states "We envision an Anguilla where key decisions makers and politicians are committed to sustainable practices and use sound data, public input, and critical environmental factors to make informed decisions on all development, especially in coastal areas". Objective 3 is stated to be "Public participation in decision making increased" and its specific activities are ensuring "that the public are provided with the information required for meaningful public participation" and "Institutionalise instruments for public participation."

[48] These documents taken together or even singly, establish that it was part of the government's policy to consult with the public on matters of major development projects which would likely have some environmental impact. These documents were published and I accept that they created a legitimate expectation in members of the public that they would be consulted and given the opportunity to make meaningful representations.

[49] Moreover directly, I accept that the press release dated 17 June 2007 notifying the public of the Planning Application and advising where further information could be sought and the press release dated 25 August 2007, in so far as it stated that the EIA would be made available for public scrutiny, each created a legitimate expectation that members of the public would be given a fair opportunity to make representations.

[50] Mr. Brantley argued that the Government had taken every step to consult with the public on the Development and that the Claimants' criticism is simply because they disagree with the Decisions, characterising the procedure as a failure to consult, merely because the Decisions were not in keeping with their representations.

[51] The consultation process must be fair and genuine. What has been described as the Sedley definition of proper consultation<sup>8</sup> was restated and approved by Lord Woolf in **R v North and East Devon ex parte Coughlan**:

*"it is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."*

[52] Mr. Proctor was adamant that the views of the public as expressed to the LDCC at the public meeting and otherwise were taken seriously and considered carefully. He pointed to the fact that the views and observations of the public, along with those of the government departments and the nongovernmental organisations were documented and informed the terms of reference to the professionals who conducted the EIA.

[53] Mr. Proctor's notes from the public meeting are in evidence. Mr. Proctor lists the views and comments raised by the community which included the physical impact on the water and coast, waste disposal, change in water quality, conflict with other land users, public access to and freedom of movement along the beach.

[54] Mr. Proctor denied that the public was told that there would be a further meeting, as suggested by Mrs. McLean; he agreed that they were told that they would be kept informed and said that the Firm that was conducting the social environmental assessment was instructed to consult with the community and to undertake follow up consultation with them. After the meeting at Maranatha Church, the LDCC issued a press release informing the public that an EIA was requested, part of

---

<sup>8</sup> as formulated by learned Queen's Counsel in **R v Brent London Borough Council, ex parte Gunning and others** 84 LGR 168

the terms of reference of which were to assess the proposed development, address the main concerns and issues raised by the community and recommend any mitigating measures

- [55] The EIA, when received, was made available to the public in the Public Library and at the Planning Department. The public was notified of its availability through radio announcements. Copies, without the appendices were sent to various government departments and nongovernmental organisations. They were given 19 days to provide comments. A round table meeting was convened with the government agencies.
- [56] Complaint was made of the fact that the EIA was described as a Draft on its face. In fact, from what Mr. Proctor says, the circulated document was not a draft; it was the final document and the inclusion of the word 'draft' was a typographical error, retained from before the social impact assessment was completed and appended to the document. Nevertheless, the Claimants maintained their issue with it being a draft report and argued that it would have affected the minds of those receiving it, since they would expect that there was going to be a final version forthcoming. Mrs. McLean expressed surprise that the approval was granted before what she believed to be a final EIA was received and published. There was also the issue of the absence of the appendices from what was circulated to the government and non-governmental agencies. Mr. Proctor's evidence is that his email included a link to the website where the full EIA could be accessed.
- [57] Is the effect of this such that it can be said the public was not given a fair opportunity to give intelligent response on the EIA? Mr. Proctor said that the larger section – the physical environmental study – had a non technical summary that would have assisted the lay person in appreciating its meaning. It is difficult to say what difference there might have been in the public discussion, had it been made clear that the EIA was in its final form and a longer period of time was given to give responses.
- [58] I think the situation would be very different if the circulated EIA was in fact a draft and that different version was subsequently relied on by the LDCC without reference to the public and other stakeholders. The public was asked to comment on the document made available at the Public Library. If they chose not to do so, awaiting a 'final' copy, can it be fairly said that they were not given an opportunity to comment on the EIA? I think not.
- [59] I am unable to conclude that the consultation process was flawed, certainly not to a degree that vitiates any decision taken. There is nothing to challenge Mr. Proctor's evidence of the due consideration of the responses from the consultations or that the LDCC took into account irrelevant considerations or omitted to consider relevant considerations

### Disclosure

- [60] The Claimants also complain that they have not been informed of the matters taken into consideration by the LDCC or the reasons for the grant of approval. Mr. Proctor prepared a memorandum to the Chief Minister and responsible Minister informing him of the decision and the reasons therefor. He also prepared an advice to the LDCC before the decision was made. The former was disclosed in the litigation but the latter was not.
- [61] Lord Walker said in **Belize Alliance of Conservation Non Governmental Organization v The Department of the Environment and Belize Electricity Company Ltd.**<sup>9</sup>: *"A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."*
- [62] The reason for the requirement that the reasons for the decision should be disclosed is precisely to enable a proper consideration as to whether the public authority conscientiously took into account the views of those consulted and that procedures of fairness were observed.
- [63] The Claimants relied on **Jory v Secretary of State for Transportation and Local Government**<sup>10</sup>. The applicant for planning permission appealed the refusal to the Secretary of State. A hearing was conducted by the appointed inspector. Jory took part in the hearing of the appeal, his property was opposite to the premises which were the subject of the application. During the hearing certain conditions to the grant of permission were put forward. The inspector allowed the appeal and granted permission. In doing so, he imposed a number of conditions that would safeguard the interests of adjoining owners. Jory learned of the decision letter after the hearing. The inspector had sought the view of the Westminster City Council and the applicant in respect of the revised conditions. Jory had not been consulted or given an opportunity to make representations about the imposed conditions. Jory applied to quash the decision on the ground that he had not been given an opportunity to make representations following the hearing and that the decision was therefore unfair and in breach of natural justice. The High Court judge allowed the claim on the basis that the decision was unfair in that the inspector had not sent Jory the correspondence that had been sent to the applicant and the council and he was thereby deprived an equal opportunity to make representations. The judge ruled that the hearing had essentially been reopened and continued but with only two of the three participants. The representations made by the applicant and the Council after the hearing had persuaded the inspector to grant the permission. In fact the representations

<sup>9</sup> [2004] 64 WIR 68 at [86]

<sup>10</sup> [2002] EWHC 2724 (Admin)

made by the Council were supportive of conditions which were in Jory's favour. The ratio decidendi of the case was that the principle of procedural fairness does not concern itself with prejudice of the representations but more on the fact that representations had been made by one party unbeknownst to the other.

[64] It seems to me that Jory's case is distinguishable. First, in cases where there is a hearing, the decision-making process takes on more of a quasi judicial element and the principles of fairness are more heightened in that setting. Second, after the hearing the inspector had sought the input of the applicant and of the Council in the absence of Jory, who had been allowed to participate in the hearing. In the present case, there was no hearing, the public meeting was a forum in which the LDCC could canvass the views of the public.

[65] It is said that the duty to disclose before a decision is made is lessened in respect of information originating within the government department. When a minister considers whether to grant a planning application following an inquiry, he is under no obligation to disclose to objectors or to give them an opportunity of commenting on advice, expert or otherwise which he receives from the department in the course of making up his mind. In **Bushell and another v Secretary of State for the Environment**<sup>11</sup>, an inquiry was held for the purpose of hearing objections in respect of two roadway schemes proposed by the minister. The inspector who conducted the inquiry provided the minister with a report on the objections made and on which evidence was taken. The minister approved the schemes. The objectors applied for an order quashing the decision as a breach of natural justice in that the minister had not reopened the inquiry to give them an opportunity of criticising the departmental report on traffic predictions given subsequent to the inquiry. The objectors also applied to quash the decision on another ground not relevant for the purpose of this case. The House of Lords held that the minister was acting administratively in making the decisions and he was entitled to receive departmental opinion, advice or evidence which he was not required to make available to the objectors for their comment or further representations. Lord Diplock said in no uncertain terms:

*"Once he [the minister] has reached his decision he must be prepared to disclose his reasons for it, because the Tribunals and Inquiries Act 1971 so requires; but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert and otherwise which he receives, from his department in the course of making up his mind. If he thinks to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so, but if he*

---

<sup>11</sup> [1980] 2 All ER 808



*does not think it will be helpful and this is for him to decide, failure to do so cannot in my view be treated as a denial of natural justice to the objectors.*"<sup>12</sup>

This was another case involving a hearing, but even so, the House of Lords agreed that there was no duty to disclose the internal advice received after the hearing

[66] In this case, it was widely known that an EIA had been received. There is no evidence that there was any other material before the LDCC from any other external source which the LDCC might have been under a duty to disclose to the Claimants prior to arriving at a decision.

[67] In the Memorandum to the Permanent Secretary in the Chief Minister's Office, Mr. Proctor set out that the LDCC had approved the planning application following:

- (a) Extensive planning consultation with key stakeholders;
- (b) Round table discussions with governmental and non governmental agencies to discuss the issues and the way forward;
- (c) Public consultation involving advertisement of the application and affording the public an opportunity to view the application and plans and make written representations to the LDCC, town hall meeting at which the comments and concerns were noted;
- (d) Detailed EIA which examined the issues and concerns of the public; and
- (e) Public involvement and consultation during the execution of the EIA process and planning considerations as outlined in the EIA.

[68] Mr. Proctor recorded that the major concerns expressed during the consultation process were environmental issues – marine and terrestrial impact, hydrological features and impact on water quality, the effect of noise pollution and socio-cultural issues – visual amenity, public access, health and safety and land use, compatibility and conflicts and the morality of captively housing dolphins. He reported that after the receipt of the EIA, a second round table was convened to discuss it. The main observation and criticism had to do with the absence of a hurricane evacuation plan, which was then requested. When received, it was forwarded to the Department of Disaster Management for their comments. The DDM reported that it was satisfied with the plan. The LDCC then convened a special meeting to discuss and determine the application.

[69] Its conclusion was that:

"The LDCC made its decision to approve the application with conditions, after duly considering the suitability of the site in relation to the planning application and

---

<sup>12</sup> At page 618A

information contained in the Environmental Impact Statement. The LDCC also strongly considered the comments received from the various stakeholders, interest groups and members of the public. The LDCC was satisfied that all the raised concerns were adequately covered in the EIA and the adverse impacts were low and could be mitigated. This led the LDCC to conclude that the site may be suitable for the proposed dolphin facility."

[70] I am satisfied that Mr. Proctor's note of the public meeting accurately records the concerns expressed at that meeting and that those concerns were highlighted in the terms of reference to the professionals conducting the EIA. I am also satisfied that the subsequent concerns raised after the EIA were considered by the LDCC when they met to discuss and determine the application.

[71] The planning approval of the first phase attached certain conditions, many of which appear to me to be protective of concerns raised during the consultation process. For example, nothing was to be done to cause an impediment to free movement along the beach by members of the public, all waste is to be treated and disposed of to the satisfaction of the Environmental Health Department, a careful monitor of the ambient water quality was to be kept and the dolphin evacuation plan was to be implemented upon a hurricane warning or at the direction of disaster management agencies.

[72] The LDCC's reasons have been made known through the disclosure of the Chief Planning Officer's Memorandum to the Chief Minister

[73] As in almost every case, certainly the consultation could have been wider and over a longer period and the disclosure more full. It is appropriate to remember Lord Woolf's statement of the limitation on consultation:

"It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it received or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

[74] I am satisfied that there has not been any significant failure in the consultation process. It seemed to me to be fair and adequate. The Claimants had amply made their views and concerns well known. The record shows that those concerns as well as the concerns of other stakeholders were taken into consideration.

### Predetermination and Bias

- [75] The Claimants are convinced that the Government and Dolphin Discovery reached an agreement whereby Dolphin Discovery would relocate to Sandy Point even before any application for planning or building permission or any other necessary licences or leases were made and therefore the formal decision making process was just that a mere formality, rendered otiose by the prearranged approval. They say it was the Government who suggested the Sandy Point site to Dolphin Discovery, who had previously concluded that it was not satisfactory to their needs
- [76] The Claimants say that in allowing Dolphin Discovery to take occupation of Parcel 169 and or in failing to prevent the works in view of the admission that no licences or lease had been granted is evidence of a secret agreement between the Government and Dolphin Discovery. They highlight the evidence that the Government had given assurance to Dolphin Discovery that they would fast track the applications as a further signal that the Government had predetermined the applications. They say, overall, Government seemed to have been mindful of Dolphin Discovery's pressing need to relocate from Meads Bay and was very helpful to DD and was keen to expedite the development and that the statements in affidavits of Dr. Lenzi and Ms. Jiminez demonstrate that the Government had made a decision in principle possibly even before the planning application had been made.
- [77] The Claimants also say that in the haste to help Dolphin Discovery achieve its aim of relocation of their operations, the Government cut corners in the process by proceeding on the basis of defective and inadequate applications, rushing through the process in not allowing proper consultation and proceeding in an unlawful manner in permitting the commencement of construction of the pier without the approval of the Minister responsible for ports, harbours and piers, transferring the responsibility of the decision for the use of the foreshore and seabed under the Beach Control Act from the Minister to the Executive Council and allowing the LDCC to grant planning permission for a development in the sea when it had no such remit and authority, it not being a development on land
- [78] The rule against bias is that no public authority can lawfully exercise a power of decision in which it has an interest of its own to pursue. The public authority also should not predetermine the issues before it.
- [79] The Claimants relied on Porter and another v Magill<sup>13</sup> in which Lord Hope of Craighead modified and clarified the test for apparent bias as whether there is a real possibility of bias on the part of the

---

<sup>13</sup> [2001] UKHL 67

decision maker in the sense that the case under consideration might have been unfairly regarded with favour or disfavour, and **R (Batey) v Boston Borough Council**<sup>14</sup> in which an English High Court judge summarised the principles and the court's approach to issue of predetermination, I take them to be, with particular relevance to this case.

1. A distinction must be drawn between, on the one hand, a legitimate predisposition towards a particular outcome, which is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision and, on the other hand, an illegitimate predetermination of the outcome: **National Assembly for Wales v Elizabeth Condon and another**<sup>15</sup>
2. In determining whether there was a legitimate predisposition, as opposed to illegitimate predetermination, it is for the court to put itself in the shoes of a fair minded observer in deciding whether the authority approached the application with a closed mind: **Persimmon Homes Teesside Limited v R (Kevin Paul Lewis)**<sup>16</sup>
3. Central to this consideration must be the recognition that the Minister or the LDCC is not in a judicial or quasi-judicial position. The Minister is elected to provide and pursue policies. Members of a planning committee would be entitled, and indeed expected to have express views on planning issues. **Persimmon** at paragraph 69

[80] Both the Defendant and the Interested Party pitched their argument on the basis that the decisions that were taken were in keeping with government's formulated policy in relation to development of Anguilla's tourism product.

[81] I have not seen or heard any evidence which shows or from which it is possible to infer that the Minister (in the case of the permission granted under the Beach Control Act) or the LDCC (in relation to the planning permission) had a closed mind. As the authorities establish, the authorities are expected to implement planning policies; they are likely, indeed expected to have a disposition one way or another. However in order to infer a closed mind or the real risk that a mind was closed at the time of decision, clear pointers are required: see **Persimmon** per Pill LJ at paragraph 63.

[82] In **Save Guana Cay Reef Association Ltd. And another v The Queen and other**, in which the appellant sought to impugn the Bahamian Government's decision to approve development on a small cay on the basis unfairness due to predetermination, said to be evident from the Government's statement to the proposed developer that it would facilitate all approvals and permits on an accelerated basis. The appeal court held that it was not possible to infer a closed mind from

<sup>14</sup> [2008] EWHC 3516 (Admin)

<sup>15</sup> [2006] EWCA Civ 153 per Richards LJ at [42] and [43]

<sup>16</sup> [2008] EWCA Civ 746

those circumstances since the Government was entitled to pursue its policy considerations to advance public interest through the type of investment under consideration. The Court of Appeal's decision was not disturbed on a subsequent appeal to the Privy Council on different points.<sup>17</sup>

[83] I am willing to accept that the Government was probably positively predisposed to Dolphin Discovery's application, which was, to relocate the dolphinarium. Dolphin Discovery had already been operating in Anguilla for a number of years and there seemed to have been a benefit to Anguilla's tourism and economy by way of visitor arrivals and employment opportunities for Anguillians. That would seem to me to be legitimate predisposition. I am not able to say that the Government had an illegitimate predetermination and that it approached the application with a closed mind. There was wide consultation and the concerns raised in those consultations lead to the requirement of an EIA from a highly reputable firm which was charged with addressing these concerns.

[84] Six months elapsed between the application and the grant of outline planning approval and permission for the first phase with stringent conditions. For example, nothing was to be done to cause an impediment to free movement along the beach by members of the public, all waste is to be treated and disposed to the satisfaction of the Environmental Health Department, a careful monitor of the ambient water quality was to be kept and the dolphin evacuation plan was to be implemented upon a hurricane warning or at the direction of disaster management agencies.

[85] Placing myself in the position of a fair-minded and informed observer looking at the circumstances of this case, I conclude that there is no real risk that either the LDCC or the Minister approached the application with a closed mind. There are no clear pointers that would lead me to a contrary conclusion.

#### Irrationality

[86] The Claimants also charge the Defendant acting perversely or irrationally in making the Decisions to grant planning and building permission. The Claimants say that such permissions and approvals that have been given are unlawful because the Government was predisposed in favour of Dolphin Discovery's Project and therefore would not have taken into account all the proper material considerations and will have taken into account irrelevant considerations.

[87] The landmark case of **Associated Provincial Pictures Houses Ltd. v Wednesbury Corporation**<sup>18</sup> concerned a complaint by the owners of a cinema that it was unreasonable of the

<sup>17</sup> [2009] UKPC 44

<sup>18</sup> [1948] 1 KB 223

local authority to licence performances on Sunday only subject to a condition that no children under the age of 15 years shall be admitted whether accompanied by an adult or not. Lord Greene MR, summarised the principles of unreasonableness (later to be re-christened "irrationality" by Lord Diplock<sup>19</sup>) thus:

"The court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere."

[88] Lord Diplock described it as "a decision so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[89] This test has since again been reformulated since then and the more contemporary formulation is whether the decision falls within the range of reasonable responses open to the decision-maker. **Boddington v British Transport Police**<sup>20</sup>

[90] In this case the Claimants launch a broad attack upon the reasonableness of the Decisions of the local authority and the Minister. In planning cases, the courts generally leave the balancing of considerations to the authority and where there is a broad discretionary power, there is a presumption that the decision is within the range of that discretion and the burden is therefore on the Claimants to demonstrate to the contrary. **De Smith's Judicial Review**.<sup>21</sup>

### Application to the Decisions

#### The Lease of Parcel 169

[91] The Claimants are not able to say with certainty that a lease of Parcel 169 has been granted. Their evidence is that they have not found any documentation of such a lease. The Claimants' complaint however, is pursued whether or not a formal lease has been granted. The Claimants say that the

<sup>19</sup> In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410

<sup>20</sup> [1999] 2 AC 143 at 175 per Lord Steyn

<sup>21</sup> 4<sup>th</sup> ed., para. 11-006

Government's action in allowing the works on Parcel 169 was ultra vires and or procedurally irregular, unlawful and against natural justice for the following reasons:

- (a) Dolphin Discovery was permitted to take possession of, occupy and clear land to the exclusion of the public without a licence or lease.
- (b) Parcel 169 was acquired as Crown land and the proposed dolphin facility is not a public park or sports complex; it is intended to be a commercial enterprise operated by private investors;
- (c) Dolphin Discovery being put in possession suggests that the Government has in fact taken a decision to permit the development and or is predisposed to permitting the development and that there has not been any observance of due process in reaching that decision.

[92] The Government's case is that no lease has been granted to Dolphin Discovery. Mr. Mervyn Foster Roger's evidence on affidavit is that there is an agreement in principle that a portion of Parcel 169 would be leased or licensed to Dolphin Discovery, no decision has been made on either the form or the terms and conditions

[93] There was no evidence that Dolphin Discovery was in possession or exclusive occupation of Parcel 169. There is a letter from the Chief Minister's office giving limited permission for the use of Parcel 169. Mr. Proctor explained Dolphin Discovery's use of Parcel 169 is limited to provision of a staging area where material and the like were stored during the construction on the seaward phase or which they had obtained approval. Mr. Rogers' corroborated his evidence and asserted that there was no need for a lease at that time, since Dolphin Discovery's use and access to the land was restricted to a small area.

[94] Mr. Brantley, Counsel for the Defendant, aptly pointed out that section 26 of the Registered Land Act does not support the Claimants' contention that Dolphin Discovery may only possess or occupy land by a lease or other duly granted disposition. Section 26 empowers the Governor in Council to freely dispose of land which is Crown land. Mr. Brantley relied on the letter of 18 January 2008, which communicated the decision of Executive Council to approve the construction of the enclosure and pier and expressly and stated

"The Ministry of Lands hereby notifies Dolphin Discovery that rates and conditions for the licence that will pertain to the foreshore and seabed, as well as the rents and conditions for the lease of the portion of Crown Lands (Block 26309B, Part of Parcel 169) will be determined when the planning approval process for the land based phase has been completed".

[95] Mr. Dane Hamilton QC, on behalf of Dolphin Discovery, forcefully argued that it is lawful for the Governor in Council to make regulations as to the terms and conditions on which Crown land may

be rented, leased, occupied, sold or otherwise dealt with and that the reference to occupation is instructive in that it clearly shows that the Crown is not limited to dispose of an interest in land by way of licence or lease. He relied on the provisions of the Government Lands Regulations Act and the authority of **Stanford International Bank Limited v Austin Lapps**<sup>22</sup>, a decision based on the Antiguan equivalent of the Government Land Regulation Act, which endorsed the interpretation of that Act as giving the Government the right to create a tenancy at will over public lands

- [96] The submissions made on behalf of the Government and the Interested Party are undoubtedly correct. The act of putting Dolphin Discovery into such possession of Parcel 169 as it did cannot be said to be ultra vires the powers of the Minister.

#### **Change of Purpose for Parcel 169**

- [97] Parcel 169 was compulsorily acquired for a public purpose, specifically that of a sports complex and public park. The Claimants contend that the grant of permission for the development of Parcel 169 by Dolphin Discovery and its use of the land for its private enterprise is therefore ultra vires and unlawful and that it is not open to the Government to use or permit the use of a portion of the said land for an alternative purpose.

- [98] The Claimants argue that the identification of the purpose for which the land was acquired and then vested in the Crown created a legitimate expectation that the property would be used for a public park and sports complex and that by virtue of the fact that public funds were used to acquire the land makes the Government accountable to the people, hence if there was to be a change in purpose, the people for whose benefit the land was acquired ought to be consulted or at the very least be told of the change in purpose.

- [99] The Defendant says the decision to permit Dolphin Discovery to use Parcel 169 and approval of the development is not unlawful and that the Government is well within its right to permit the use of Parcel 169 in the manner that it deems appropriate. They argue that a public purpose can be achieved through private enterprise. See **Narayan Singh v Bihar**<sup>23</sup>, **Baldwin Spencer v Attorney General of Antigua and others**<sup>24</sup> and **HMB Holdings v Antigua**<sup>25</sup>. Public purpose includes a purpose that is in the general interest of the community; See **Hamabai Framjee Petit v Secretary of State of India**<sup>26</sup> where the Privy Council refused to attempt to define precisely the extent of the phrase "public purpose" and in which Lord Devlin endorsed the view that public purpose "whatever

<sup>22</sup> Unreported, Civil Suit No. ANUHCv 1996/0239, 16 September 2002

<sup>23</sup> [1978] AIR 136

<sup>24</sup> Unreported, Antigua and Barbuda, Civil Appeal No. 20A of 1997, 8 April 1998

<sup>25</sup> (1969) 14 WIR 177 (PC)

<sup>26</sup> (1914) LR Vol XLII Indian Appeals 44



else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned."

[100] The Defendant further argues that the use of compulsorily acquired land by a private developer for his own profits is not inconsistent with its being used for a public purpose, once the developer's use is one that is in the general interest of the community and development of tourism is one such public purpose: **Baldwin Spencer v Attorney General of Antigua and others**.

[101] Mr. Brantley argued that once the land had been compulsorily acquired in a proper and lawful manner, Government has full right and authority to alter the use according to prevailing policy. That the court should bear in mind that the Government considered that the dolphinarium was consistent with the use of the land as a park – it is recreational and would have amenities that could be used by members of the public. He pointed out that the Government wishes to use a small portion of Parcel 169 for the purpose of a tourism development through a private entrepreneur; the remaining land remained available for use as a public park as originally intended. According to Mr. Rogers' evidence, the Government intends to make provision that the shops and facilities to be offered by Dolphin Discovery would tie in with a public park area on Parcel 169. Mr. Rogers' evidence is that the Government had researched other public parks and had found precedent for a public or national park, having private enterprise activities which supplement the public park and cited the example of Yosemite National Park in the United States of America.

[102] The Defendant also cautions the court against scrutinising the Government's decision as to the use of Parcel 169 in the absence of any allegation of fraud and also to refrain from overstepping its function and interfering with the legislative role and government policy decisions. Government is charged with the economic development of the Anguilla and is the constitutional and democratically elected body to chart that course. Mr. Brantley pointedly suggested that the means by which the Claimants ought to channel their displeasure is through the voting booth.

[103] The Interested Party makes the same arguments as the Government and went further, making the argument that the issue of the purpose that is spelt out in the Declaration is relevant only to the lawfulness of the acquisition.

[104] In **Baldwin Spencer v A-G of Antigua and others**, the Court of Appeal considered these very issues. The Government of Antigua entered into an agreement with a private developer for a massive project which comprised a 1,000 room resort, casino, golf course, retail shops and residential units. The Government introduced a resolution in Parliament to affirm the agreement and to authorise the acquisition of the land on which the project was to be developed. The agreement was approved and the land was acquired for the public purpose of "the promotion and

development of tourism and supporting tourism related activities". The Opposition party brought judicial review proceedings to challenge the decisions on the basis that the compulsory acquisition of land which was then to be divested to a private enterprise is not for public use. Following **Williams v Government of Saint Lucia**<sup>27</sup>, Court of Appeal reaffirmed that the promotion of tourism can be a public purpose. The Court of Appeal also reiterated the well settled principle that the executive decision as to what is a public purpose is non-justiciable in the absence of fraud. See also **Coconut Beach Residence Limited and George de Chabert v The Minister for Agriculture for Dominica et al**<sup>28</sup>.

[105] Section 2(1) of the Land Acquisition Act simply requires a declaration of the Governor in Council that land should be acquired for a public purpose, approved by the House of Assembly. The declaration is conclusive evidence that the land is required for public purposes. The land vests absolutely in the Crown upon the second publication of the Declaration and the Crown's agents are empowered to enter and take possession of it thereafter.

[106] In **Narayan Singh v Bihar**, the Indian court held that a public purpose may be achieved through private enterprise, even where that enterprise's sole aim is to make a profit. The following paragraph extracted from Singh's case is on point:

"The objective test applied from case to case, which has since been judicially recognised, is that whatever furthers the general interests of the community as opposed to the particular interests of the individuals must be regarded as a public purpose. Public purpose may be achieved through private enterprise as well as through any public agency. There is no provision in the Act precluding the acquisition at the instance of a private agency so long as the purpose for acquisition is a public purpose. If the acquisition is for a public purpose, the consideration that the State has undertaken the task at the instance of a private entrepreneur or agency or a private institution is not germane. It is well settled that even though the acquisition of land is for a private concern whose sole aim may be to make profit, if the intended acquisition of land could materially help the national economy or the promotion of public health or the furtherance of general welfare of the community or something of the like, the acquisition will be deemed to be for a public purpose".

[107] **Baldwin Spencer v A-G** has one notably distinguishing feature, namely that the acquisition was specifically for the purpose which was the subject of the agreement with the private developer. Is the government however, authorised to change the stated purpose of acquisition.

<sup>27</sup> (1969) 14 W.L.R. 177 at p 180 per Sir Garfield Barwick

<sup>28</sup> unreported, Dominica, DOMHCV2001/236, 31 July 2001

[108] It seems inarguable that the decision as to whether to vary the purpose for which Parcel 169 was acquired is an executive decision, largely dictated by government policy. It is also largely a political issue, which is of course, not justiciable. The court is necessarily reluctant to become embroiled in political issues. It is plain that the Executive has a vision for Anguilla's tourism and economic growth. Matters of social and economic policy are conferred on the executive branch of government by virtue of the principle of separation of powers. There is a clear division between the legislature, the executive and the judiciary and those lines must not be crossed. Politicians must face the public and are answerable to them to explain and justify policy. Judges are not. And as reiterated by Bernard JA in *Attorney General v K.C. Confectionery Ltd*<sup>29</sup> the court ought not to usurp the functions which are purely within the plenitude of the powers of another organ of the State.

[109] Courts should therefore avoid interfering with the exercise of discretion by elected officials when its aim is the pursuit of policy. In *R v Secretary of State for Trade and Industry Ex p. Lonrho plc*<sup>30</sup> Lord Kinkel put it this way: *"These provisions ensure that a decision which is essentially political in character will be brought to the attention of Parliament and subject to scrutiny and challenge therein, and the courts must be careful not to invade the political field and substitute their own judgment for that of the Minister. The courts judge the lawfulness not the wisdom of the decision."*

[110] That is not to say that policy decisions are immune from scrutiny. The courts are obliged to require that all decisions, even ones based on policy, are within the scope of the power given to the administrator and has been arrived at in keeping with the standards of procedural fairness. There is ground for legitimate judicial intervention if the decision is unreasonable or not properly justified, so that even though there is no primary power to make decisions on policy, the court retains a secondary power to probe the quality of the reasoning and process. The Court is also obliged to decide whether any particular act violates the rights of citizens.

[111] The case of *Blanchfield and others v Attorney General and another*<sup>31</sup> was cited on behalf of Dolphin Discovery as authority for their submission that there is nothing which prevents the executive council from varying the public purpose for use of land after its acquisition. I have been unable to discern any dicta in the judgment of the Privy Council that expresses such a principle so plainly. That case concerned a 99 year lease of land in Trinidad granted to the United States by the United Kingdom (while Trinidad was still a colony) which had been compulsorily acquired for use by the United States as a military base in exchange for supplying the United Kingdom with naval and military equipment. The United States closed the military base in 1977 and surrendered the lease to

<sup>29</sup> 34 W.L.R. 387 at page 417

<sup>30</sup> [1989] 1 W.L.R. 525 at 536

<sup>31</sup> [2002] 4 L.R.C. 689

the Government of Trinidad and Tobago, who then transferred the land to a public body charged with responsibility for developing the area of Trinidad where the land was located. The appellants sought a declaration that upon its surrender, the land had automatically reverted to them because it was no longer required for the purpose for which it had been acquired. The issue for determination by the Privy Council was whether upon its acquisition the land vested absolutely in the Crown, thereby ruling out any reversionary interest. The Privy Council held that the publication of the statutory notice had the effect of vesting the land in the Crown and once vested and the owners compensated, there was no reversionary interest left outstanding.

- [112] Mr Hamilton QC carries the reasoning further, to submit that once the land had been acquired and vests in the Crown absolutely, the executive is free to change the purpose for which it had originally acquired.
- [113] The question before this court is different. It is whether the Government can vary the public purpose for which the land was acquired. The answer must lie in the authority of the executive government's absolute discretion to make and review such policy as it believes is in Anguilla's best interests. In this regard, I must consider whether there is truly a change in purpose or whether the land will continue to be used for a public purpose, i.e. development of a tourism product, albeit not for the specific recreational facility of a public park and sports complex.
- [114] It seems to me that if an executive decision as to what is a public purpose, for the purpose of compulsorily acquiring land, is non-justiciable, a fortiori, the decision to vary the use of the land to a different specific purpose must also be non-justiciable on the principle that this is a matter that rests squarely with those elected to lead. I take comfort in the dicta from **R v North and East Devon Health Authority ex p Coughlan**<sup>32</sup> : "Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data - in other words, as not ordinarily open to judicial review. The court's task - and this is not always understood - is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power."
- [115] I do not accept that the Claimants or other members of the public had a legitimate expectation of being consulted if the Government was considering changing the purpose for which Parcel 169 was acquired. In order to set up a legitimate expectation, the Claimants must show that some benefit or advantage which they had and legitimately expected to continue to have was taken away from them. There is presently no public park or sports complex on Parcel 169 and has not been since its acquisition twelve years ago.

---

<sup>32</sup> [2001] QB 213 at paragraph [82]

- [116] If the Government was entitled to declare that land is to be compulsorily acquired for a public purpose without any consultation, I cannot see how it would be wrong for it to change its specific use without consultation, so long as no fraud, dishonesty or improper purpose features in that decision.
- [117] Mr. Rogers' evidence sets out the manner in which the policy considerations in relation to the user of Parcel 169 was approached. He said that upon application by Dolphin Discovery for use of a portion of Parcel 169, discussions were had with the Chief Minister (who was the responsible Minister) and other ministers and public officials, including the Director of Lands and Surveys/Curator of Beaches. Mr. Rogers reports that there was general consensus that tourism is a public purpose given that it is the only industry that propels the economy directly and indirectly, that there was further general consensus that the proposed Dolphin Park is in keeping with a public park as the Development set out many amenities and facilities that would be used by the public. Another factor discussed was the recent purchase of 6 acres of land in the Blowing Point community for sports development. It was felt that this land was more appropriate for sports developments, being closer to the heart of the village. Parcel 169 was considered to be more appropriate for recreational and tourism development.
- [118] I am not knowledgeable on the mechanics of policy making. It seems like an exercise that is inherently one of internal discussion and development, taking into account a great many factors which will impinge upon the suitability and benefit to the broader goals that every government will have for the country.
- [119] Government policy will usually be expressed through some circular or a code of practice but it is not always publicised or circulated widely. It has been said that binding policy documents lack binding effect. Policy may change. Public interest is never static. The main consideration in this area is whether the change of policy results in a disappointment of an expectation. The Claimants must show that the enunciated policy has such weight that it cannot be altered where to do so would unfairly disappoint the expectation that is raised.
- [120] I accept, on the authority of *Coughlan's* case that public bodies must 'remain free to change policy; its undertakings are correspondingly open to modification or abandonment.'<sup>33</sup>
- [121] The Claimants have not provided any evidence that in changing the public purpose use of Parcel 169 the Minister did not consider their and the wider public's interest in having recreational

---

<sup>33</sup> at paragraph [64]

grounds. Nor does it appear to me that the process that the Defendant pursued was unreasonable, irrational or defies logic.

- [122] The cases establish that the arguments made by the Defendant and the Interested Party are well made. The Minister was well within his rights to permit Dolphin Discovery to use Parcel 169 as part of the landward development of the project.

**Licence to Use the Beach, Foreshore and Seabed**

- [123] The Claimants say that Government's decision to permit Dolphin Discovery to construct a pier without the necessary licences and Port Superintendent permit was ultra vires, unlawful and against natural justice.
- [124] The Claimants contend that Dolphin Discovery did not apply for a license to use the foreshore and floor of the sea nor was the written permission of the relevant Minister ever sought or obtained for the construction of the pier. They complain that neither did Dolphin Discovery make any application to the Superintendent of Ports but that notwithstanding these failures, Dolphin Discovery was permitted to construct a dolphin pier at Sandy Point.
- [125] The Claimants rely on an admission made by and on behalf of the Government during the interlocutory injunction proceedings that it has not granted a licence to use the beach.
- [126] The specific legal issues identified by the parties are.
- (a) Did the Defendant misdirect itself as to, and/or misunderstand, the impact and import of the Beach Control Act and, by so doing, did it act ultra vires?
  - (b) Did the Defendant, in permitting Dolphin Discovery to construct a pier at Sandy Point Beach without the written permission of the responsible Minister and without the requisite application being made to the Superintendent of Ports, fail to comply with the relevant legislation, namely the Ports, Harbours and Piers Act, R.S.A., Chapter P55?
  - (c) Did the Defendant permit Dolphin Discovery to construct a pier at Sandy Point Beach without the permission of the responsible Minister and without application being made to the Superintendent of Ports, and in doing so failed to comply with the relevant legislative provisions?

- (d) Notwithstanding the relevant legislative provisions, did any purported permission granted by the Defendant to the Interested Party fail to be considered as a matter of executive policy?
- (e) Is the decision by the Defendant to permit the Interested Party the use of a portion of parcel 169 a matter of executive policy?
- (f) Is the lack of the application being made to the Superintendent of Ports directly fatal to the permission granted?

[127] The Beach Control Act provides that the floor of the sea and the foreshore vests in the Crown (Section 2) and that no person shall use the foreshore or seabed without a licence (Section 3).

Section 4 provides:

- 4 (1) The Minister, may on application made in such manner as may be prescribed under section 8, grants licences for the use of the foreshore, or the floor of the sea, for any public purpose, or in connection with any trade, business or commercial enterprise to any person, upon such conditions and in such form as he thinks fit
- (2) Every application under subsection (1) is to be published in the Gazette and members of the public given an opportunity of making representations to the Minister in respect thereof.
- (3) Where an application is made for a licence under subsection (1), the Minister shall consider what the public interests in regard to fishing, bathing or recreation or in regard to any future development of the land adjoining that part of the foreshore in respect of which the application is made, that require to be protected, and he may provide for the protection of such interests by and in the terms of the licence or otherwise in accordance with the provisions of the Act.
- (4) Subject to such regulations as may be made under section 8, an appeal shall lie to the Governor in Council from a decision of the Minister as to whether such licence should be granted or refused.
- (5) Every grant or refusal of a licence by the Minister or the Governor in Council shall be published in the Gazette.
- (6) The decision of the Governor in Council as to whether such licence should be granted or refused shall be final and shall not be questioned in any legal proceedings."

[128] Section 36 of the Ports Harbours and Piers Act provides.

"Notwithstanding the provisions of any other written law, no person shall construct or install any pier, . . on any part of the foreshore without the written permission of the Minister."

[129] Section 37 provides that the owner of a pier or permanent construction or installation on any foreshore shall apply to the Superintendent in the prescribed form for a licence, such licence is issued annually on the first Tuesday of April each year.

[130] The impact and import of the Beach Control Act is to regulate the use of the foreshore and the seabed. There is nothing to suggest that the Government did not appreciate the purport and intent of the legislation. The Act specifically requires the Minister to take into account the public's interest as well as future development of adjoining areas when considering an application for the use of beach property. The Act even contemplates that if and when granting a licence, the Minister ought to make provisions for the protection of those public interest rights.

[131] The Government and the Interested Party rely on the letter of 7 June 2007 from Dolphin Discovery's lawyers as the application for licence to use the beach/foreshore and seabed to construct a pier in the sea at Sandy Point. Notice of such application was gazetted, as required by section 4(2) of the Beach Control Act, on 28 September 2007. The letter, which was addressed to the Chief Minister and Minister of Immigration, Labour, Lands, Physical Planning, Environment, Human Rights, Gender Affairs and Information stated:

"As part of its dolphin operations, our Client desires to utilise a portion of the foreshore and sea to construct a pier, for which they are aware that a Licence from the Government would be required. The pier would be constructed of wooden columns which would be sunk into the bottom of the sea."

[132] Permission was granted on 18 January 2008 through a letter emanating from office of the Chief Minister and listing all his portfolios as set out above. The letter stated: *"Additionally, this enclosure and pier must not, at anytime for the life of the project, be used as a docking area for boats, or as a port of entry into Anguilla."* The letters reads.

"The Ministry of Lands hereby notifies Dolphin Discovery that rates and conditions for the licence that will pertain to the foreshore and seabed, as well as the rents and conditions for the lease of the portion of Crown Lands (Block 28309B, Part of Parcel 169) will be determined when the planning approval process for the land-based phase has been completed."

#### Permission under the Beach Control Act

[133] Mr. Roger's affidavit catalogues the matters to which consideration was given in deciding to approve the use of the foreshore and seabed for the construction of the pier. The list is comprehensive and includes the EIA, internal governmental reports, the objections received from



the public and others, that 35 Anguillians were employed to Dolphin Discovery and were at risk of losing their jobs, the fact that over 10,000 visitors came to Anguilla to swim with the dolphins, the diversification of the Anguilla tourism product, the benefit to ancillary tourism related services provided by taxi, tour bus and ferry operators, the traditional use of Sandy Point beach for picnics, the possible effect of the project on the Ferry Boat Inn and neighbouring villas, the fact that Parcel 169 had been acquired for a particular public purpose, and the fact that Sandy Point Beach was a protected beach.

- [134] The Claimants also took issue with the method of approval of the seaward portion of the Development as set out in the letter of 18 January 2008. The first paragraph of the letter reads:

"Please be advised that Executive Council has reviewed the above-mentioned proposal and have agreed for Dolphin Discovery to construct a dolphin enclosure, and pier at Sandy Point, Blowing Point, Anguilla."

- [135] The Claimants argue that the permission granted was unlawful because it was not given by the duly appointed functionary; that the Legislature stipulated in the Beach Control Act that the power to permit the use of the foreshore and seabed was delegated to the Minister and that the Minister had no right or authority to delegate this decision to the Executive Council. Ms. Davis for the Claimants makes the point that Executive Council has no authority to grant the permission and prayed the following passage from Wade's Administrative Law<sup>34</sup> in aid of her submission:

"The Crown itself, however, has relatively few important legal powers except in the capacity of employer. In almost all other areas administrative powers are statutory and it has long been the practice for Parliament to confer them upon the proper minister in his own name. The Act will say 'The minister may make regulations' or 'The minister may approve'. The minister will of course be acting as a minister of the Crown and on behalf of the Crown. But his powers and duties under the Act will in law be his alone. This is of great legal and constitutional importance, since the minister has none of the Crown's prerogatives and immunities. His lawful actions may be invalidated, or he may be compelled to perform his duties, by remedies which do not lie against the Crown: and judgments may be enforced against him personally in ways which are impossible in the case of the Crown. If, on the other hand the Act had conferred the powers upon the Crown itself, as by saying 'Her Majesty may (etc.)', the minister would in law be merely the servant or agent of the sovereign. The settled practice of conferring powers upon designated ministers therefore greatly assists the operation of legal remedies."

---

<sup>34</sup> 4<sup>th</sup> ed., pp.49-50

[136] Ms. Davis also submitted that further support for a finding that the decision of the Executive Council was unlawful can be derived from section 4(5) of the Beach Control Act which provides for an appeal from the Minister's decision to the Governor in Council, i.e. Executive Council, and section 4(6) makes the decision of the Governor in Council final. Ms. Davis points out that to countenance the Executive Council's decision is in effect to rob an interested party of the right to appeal.

[137] A discretionary power must, in general, be exercised only by the public authority to which it has been committed. I believe this issue has to be examined through the prism of abdication of the responsibility. If the Minister acted under the dictation of the Executive Council or surrendered his power to determine the application to the Executive Council, the decision would be illegal and must be invalidated. Authorities directly entrusted with statutory discretions are usually entitled to take into account considerations of public policy and it is easy to see where the policy of a minister or of the government as a whole may be a relevant factor in weighing the decision.

[138] In *Re Robert Bropho and Robert Tickner*,<sup>35</sup> a case from the Federal Supreme Court of Australia, Wilcox J expressed what is to me sound judgment:

"Many decisions committed to Ministers by statute have political implications, no doubt that is why they are committed to Ministers rather than to public servants.. The political implications of a prospective decision include not only its likely electoral consequences.... but also its compatibility with the philosophy, policy and program of the government. These are matters about which a Minister is entitled to have the views of the other members of the government, even though he or she has the ultimate individual responsibility for what is decided. It seems to me that, at least where a statute empowers a Minister to make a decision relating to a matter of general community concern as distinct from determining the legal rights of a particular person and where the statute does not specify any precise procedures or criteria, the Minister is entitled to consult other members of Cabinet before determining the appropriate decision. Of course, even in such a case, the ultimate decision must be that of the Minister."

[139] Mr. Rogers' evidence is that the Minister of Lands informed him that he had decided to grant permission to Dolphin Discovery to use the foreshore and that he was present when the Minister presented his views and the basis for his views to the Executive Council in the presence of all the ministers who expressed approval of his decision. The clear indication is that the Minister had

---

<sup>35</sup> (1993) 40 FCR, referred to by Ganpalsingh JA in *Save Guana Cay Reef Association Ltd. And another v The Queen*

himself exercised his mind on the consideration of the application and had formed a view. Mr. Rogers' evidence in this regard was not challenged.

- [140] There is no evidence before me to suggest, far less establish that the Minister did not exercise his personal judgment in granting the approval for the construction of the pier and dolphin pens in accordance with the power conferred on him by the Beach Control Act.
- [141] Before me, it was argued that the Claimants' challenge to the lack of a licence was misconceived in that they were labouring under the misconception as to what is a licence. In basic terms, a licence is permission given to do something which would render legal what would otherwise be illegal. A licence may be bare, gratuitous or coupled with a proprietary interest. A licence which grants proprietary interest in land is required to be in writing under seal. Mr. Hamilton QC argued that equity treats an agreement to grant a licence with a proprietary interest as if the formalities required by law have been observed. See Walsh v Lonsdale. Mr. Hamilton QC submitted that in the context of the Beach Control Act, licence simply means "special permission" and that since the Act did not define or specify the nature of the licence, it was left to the Minister to determine the terms and conditions as well as its form.
- [142] The Minister's letter of 18 January 2008 clearly contemplates formalising a licence as required under the Beach Control Act. I am of the view that the Defendant fully appreciated the impact and import of the Beach Control Act and the approval expressed in the letter of 18 January 2008 is valid and in conformity with the legislative requirements.
- [143] I should here note that on 11 August 2008, the Government and Dolphin Discovery executed what purports to be a Licence under the Beach Control Act. I doubt the effectiveness of it, since it states that it shall commence on the date of discharge or variation of the Order of the Court dated 6 May 2008 (sic). At best it seems to be an agreement for a licence, conditional upon a future act.

Permission under the Ports, Harbours and Piers Act

- [144] On 9 June 2008 Dolphin Discovery wrote to the Minister of Infrastructure, Communications, Utilities, Housing, Agriculture & Fisheries, the Minister responsible for ports, harbours and piers, rehearsing the approvals that it had obtained and that it believed that all necessary approvals and licences were in hand but on advice, was now seeking permission under section 36 of the Ports, Harbours and Piers Act for a licence. At this point, a pier had already been constructed and installed from the shoreline to some distance out to the sea.
- [145] On 27 August 2008 the Minister purported to grant permission to construct the dolphin pier.

[146] The Defendant sought to persuade the court that the 18 January 2008 letter constitutes the approval of the Minister with responsibility for ports, harbours and piers given that it expresses that approval was granted by Executive Council and that the Minister, Mr. Kenneth Harrigan was present and approved the construction of the pier.

[147] I do not accept that. Mr. Rogers' evidence as to what transpired at Executive Council was very clear, and as I have found before, very persuasive that they were there acting as a sounding board for the Minister of Lands in his determination of the application pursuant to the Beach Control Act for the use of the foreshore and seabed: see paragraph 31.

[148] The Minister's letter refers to Dolphin Discovery's letter of 9 June 2008. That letter stated "*It has now come to our attention, however that we specifically need to receive from your good office, permission under Section 36 of the Harbour, Ports and Piers Act (sic) and as such we hereby apply for same.*" The Minister's letter goes on, "*The Minister has considered your request for permission for construction to completion of a Dolphin Pier at Sandy Point, Blowing Point ..... I am pleased to inform you that, in accordance with the Ports, Harbours and Piers Act R.S.A. c P55, the Minister has granted his permission for you to construct to completion the Dolphin Pier at Sandy Point, Blowing Point.*" The letter goes on to state that the permission is subject to the injunction order.

[149] Evidence on behalf of Dolphin Discovery came from Mr. Eduardo Villanueva, its Chief Executive Officer. In paragraph 19 of his affidavit, Mr. Villanueva said, "With respect to the licence under the Piers Act, indeed we had not received the same at the time construction commenced, but it would appear that this was an administrative oversight."<sup>36</sup> This statement is somewhat ambiguous and Mr. Villanueva was not cross examined at all. I am not sure if he is referring to the Superintendent's licence or the Minister's approval. It would seem to be that by remarking on not having had the licence at the time construction commenced, he was in all likelihood referring to the approval or permission. In the affidavit of Mr. Alejandro Raygoza filed in support of the application to discharge the injunction, he referred to formal permission from the Minister of Infrastructure being received on 27 August 2008<sup>37</sup>. What is clear is that nowhere in the evidence filed on behalf of Dolphin Discovery is there any reference to an application to the Minister of Infrastructure.

[150] I am satisfied that no application had been made by Dolphin Discovery to the relevant Minister for the construction and installation of the pier until after the fact.

<sup>36</sup> Affidavit filed 21 January 2009, paragraph 19

<sup>37</sup> Affidavit filed 25 September 2008, paragraph 5

[151] I have formed the view that the omission to seek and obtain the written permission in accordance with the Ports, Harbour and Piers Act was a genuine oversight on the part of both the Defendant and the interested Party. Nonetheless, Dolphin Discovery clearly commenced construction of a pier without the requisite written permission of the Minister of Infrastructure.

[152] The expectation would be that a proper application would of necessity be submitted to that ministry and obtain the benefit of full internal consultation or careful consideration of the factors that have a bearing on the construction of a pier from an infrastructural point of view in order to arrive at a proper decision. The purported permission granted by the letter of 27 August 2008 seems very much like a rubber stamp of earlier decisions.

[153] Such written permission that was given pursuant to the Ports Harbours and Piers Act was therefore unlawful in that there is no evidence that the proper procedures had been followed and must be quashed. I note that the said Act provides that the penalty for breach of the Act is a fine of \$25,000 or twelve months imprisonment upon summary conviction.

#### Licensing of the Pier

[154] The Claimants contend that the Superintendent of Ports is the only person empowered by the Ports, Harbours and Piers Act to consider applications for the licensing of piers. The short answer to that is that the Act requires licensing of a completed pier. Licensing takes place annually in April. The Defendant relies on the fact that the pier was not to be used as a true pier, that is, for the docking of boats. This was a specific condition of the grant of approval. Section 37 does not express that a licence is only required if the installation was to be used as a pier. I accept that the stage at which the application for licence was required to be made to the Superintendent had not been reached, since the pier had not been constructed to completion.

#### Grant of Planning Permission

[155] Planning permission was granted on 12 December 2007. I have heard and I accept that the LDCC made, in effect, two planning decisions: the outline approval of the Development as a whole and the full planning permission for the first phase, i.e. the dolphin pier and enclosure.

[156] The Claimants level a multitude of criticisms against the planning permission. I have compressed them as follows:

- (a) The planning application was incomplete and or inadequate in that it lacked information that would have been necessary for a reasonable decision maker to have before making a decision;

- (b) The EIA was inadequate and seriously flawed and therefore the Government acted perversely or irrationally by failing to require Dolphin Discovery to provide further and better information;
- (c) The LDCC was not authorised by law to grant planning permission for seaward development; it therefore acted ultra vires and therefore unlawfully;
- (d) The Government decision to grant planning permission was perverse and irrational and unreasonable in the *Wednesbury* sense.

[157] The parties have agreed on eight specific legal issues that the court must determine. Again, I have compressed them into the following:

- (a) Was the application deficient or incomplete?
- (b) Did the LDCC fail to follow the proper procedure, and/or act ultra vires if the application was found to be incomplete?
- (c) Was the Draft EIA invalid or otherwise defective?
- (d) If it was invalid or otherwise defective, was the LDCC's decision to grant planning permission in reliance on an invalid and/or defective EIA irrational?
- (e) Further or alternatively, was the decision to grant planning permission made irrationally, in that it failed to take account of relevant matters which ought to have been considered relevant and took into account matters which were irrelevant?
- (f) Was the decision by the LDCC to grant planning permission for a dolphin pier one they were empowered by the relevant Act to take? If not, did they, in so doing, act ultra vires?

[158] The LDC Act defines "land" this way - "includes land covered with water and also includes incorporeal as well as corporeal hereditaments of every tenure and description ..." Section 4 requires an application to develop land to be "accompanied by such maps and plans as may be necessary or as may be required by the Committee." The Claimants say that the LDCC acted contrary to the Guidance Notes issued pursuant to section 3 of the LDC which describe the Act as providing "...for the introduction of a system of planning control with the aim of ensuring that development proceeds in an organised manner without destroying the environment or creating bad neighbourly development." The Guidance Notes also set out the information that an applicant is required to provide

#### Was the application defective

- [159] Mr. Proctor's evidence is that the application was accompanied by plans and drawings. This is borne out by Dolphin Discovery's letter dated 5 September 2006 which was a cover letter delivering blueprints for the new dolphin facilities. This letter related to the first application for the Sandy Ground site; however I think it is fair to accept on a balance of probabilities that the Department had in fact received drawings and plans in relation to the proposed Development. Further blueprints, water treatment plan parking lot drawings and accessibility drawings were delivered under cover of letter dated 15 November 2006. From all accounts, Dolphin Discovery planned to pursue the Development according to the same plans for the Sandy Ground site: see Affidavit of Mr. Eduardo Villanueva at paragraph 15
- [160] Mr. Villanueva's evidence is that application form seemed more designed for land development and that they filled in the form as best as possible, adapting it to the purpose of construction of a pier.
- [161] Mr. Proctor gave a detailed exposition of the process of an application to the Department. I accept Mr. Proctor's evidence in so far as in the opinion of that department, the information received from Dolphin Discovery was adequate for the consideration that the LDCC had to make and that the application was not defective.
- [162] The evidence of Mr. Vincent Proctor, the Chief Planner, is that it is not unusual for approval of a development to be given in stages. Mr. Proctor's evidence is that Dolphin Discovery has been granted outline planning permission to establish a dolphinarium at Sandy Point<sup>38</sup>. He said that full permission has been granted for the first phase of the Development, which is the construction of the dolphin pier, but that no approval has yet been given to the landward phase, which will be the subject of later applications. Mr. Proctor gave examples of other large development projects which had also been given detailed planning permission in phases, which he said is consistent with government's policy and practice.
- [163] The LDCC issued a detailed memorandum dated 10 January 2008 setting out the process it followed in arriving at the approval of the application. Its conclusion has been set out in paragraph [69] above

#### The Environmental Impact Assessment

- [164] The LDCC required Dolphin Discovery to undertake an EIA by a reputable and independent body. Dolphin Discovery chose Applied Technology & Management Ltd. ("ATM"), a US based firm, from

<sup>38</sup> See paragraph 39 of his Affidavit filed on 12 June 2008 and paragraph 2 of the Second Affidavit filed on 25 June 2008

the LDCC's committee of approved firms. ATM specialises in coastal, environmental, marine and water resources engineering.

- [165] The terms of reference and the scope of influence issued to ATM for the EIA were determined by the LDCC after consultation with government and nongovernmental agencies. The terms of reference appear to me to be exhaustive and include all of the concerns raised during the consultation process.
- [166] ATM was responsible for the technical aspects of the EIA, with particular reference to the physical, biological and ecological environment. Young's Consultancy Services, a local firm, was retained to conduct a Social, Cultural and Economic Impact Assessment. This socio-economic report was appended to the EIA.
- [167] During the conduct of the assessment, both firms were in contact with government and nongovernmental organisations and Young's Consultancy interviewed with several members of the public.
- [168] The report was completed in November 2007 and circulated by the LDCC. The EIA concluded that the Development would not have significant impacts. The identified impacts from the Development to the environment were some loss of vegetation (which could be repaired), an increase of visitors to the area, moderate increase in the pressure on Sandy Point Beach and low to moderate impact on water quality from waste. ATM concluded that "the facility has been sited and designed to minimise any direct impacts to either the terrestrial or the marine environment." It said that the environmental impacts will be mitigated and the net impacts should not be significant.
- [169] The Claimants heavily criticise the EIA as being inadequate and defective and assert that the decision made by the LDCC in reliance on it is therefore irrational.
- [170] The decision by a planning authority that it has sufficient information to decide whether a proposed development would have significant impact on the environment can only be challenged on Wednesbury grounds: *R (on the application of Noble Organisation Ltd.) v Thanet DC*<sup>39</sup>.
- [171] The Claimants' efforts to undermine the quality of the EIA and thus the validity of the LDCC's reliance upon it was led by their witness, Dr Naomi Rose a well qualified and experienced marine mammal biologist with an impressive résumé.

<sup>39</sup> [2006] Env LR 8 at [29]



[172] Dr. Rose criticised the EIA for using dated reference material and making unsubstantiated statements, particularly as it relates to the well-being of the dolphins and the impact upon them of that particular environment, being as close as it is to a busy port. Dr. Rose was also highly critical of the social economic and cultural aspect of the report. She is of the view that there was no rigorous analysis of any of the components of this assessment. Overall, Dr. Rose considered the EIA is not independent and objective and reflected a bias in favour of Dolphin Discovery.

[173] By order of the court, Dr. Barry Wade was appointed as the single expert to give evidence on the adequacy of the EIA. Dr. Wade too has quite an impressive résumé. He was appointed after a contested hearing at which the Defendant and the Interested Party preferred another expert. Dr. Wade was the Claimants' choice.

[174] Dr. Wade acknowledged that the EIA did not satisfy the exhortation of the terms of reference to ensure that all its requirements be complied with. He noted that there are items that have not been discussed nor has any justification been given for not doing so, however, all the critical elements have been dealt with.

[175] Among the impacts not adequately dealt with in the EIA are the coastal water quality and waste disposal. In this regard, Dr. Wade reported that his own consultant expert had found the analysis of the source and level of pollutants to be incomplete. The effect of this was mitigated by the consultant's expert's own knowledge and opinion that there would not be any critical impact on the water quality. It seems ATM and the consultant expert shared the same view.

[176] Dr. Wade also reported that the only a few of the negative impacts and the opposition to the Development relate to the hard science and empirical evidence, some opposition revolved around Government's tourism policy and the ethical and social concerns of a minority of the population.

[177] Dr. Wade's overall view of the EIA was set out as follows:

"Despite these shortcomings in the structure and content of the EIA Report (main text and appendices), this expert witness is of the view that the main potential impacts of the project, both positive and negative, have been adequately identified, clearly presented and even discussed."

[178] Dr. Wade's answered the questions put to him jointly by the parties. He said that the terms of reference were comprehensive, clear and adequate. He said that the EIA did not fulfil all the requirements of the terms of reference, which is not unusual, but that what is important is that the authority agrees that the document addressed all the relevant issues which produced a credible document on which the necessary decisions can be based. Dr. Wade is of the view that the EIA

had several weaknesses both as to structure and to contents but that they were not so significant and the whole document is wide-ranging, competent and credible. He expressed the view that it compares favourably with similar EIAs for dolphinariums in other parts of the world. Finally, in answer to the specific question as to whether the EIA is an adequate document on which to make a decision as to whether Sandy Point Beach is a suitable location for a dolphinarium, Dr. Wade said, "In my view, the critical aspects of the EIA have been adequately addressed....With respect to the specific location of Sandy Point Beach, this witness is of the view that the EIA report has provided the necessary information for an assessment of the site on which the Regulator may make a decision."

- [179] The Claimants ask the court not to accept the expert's evidence; they prefer Dr. Rose's evidence as to the EIA's inadequacies and flaws and ask the court to find that the EIA is defective, inadequate and unreliable.
  
- [180] Witnesses are entitled to give evidence of factual matters within their knowledge. Expert witnesses are permitted to give evidence of their opinion. There was no application to have Dr. Rose deemed an expert.
  
- [181] The Defendant and the Interested Party urged me to entirely disregard Dr. Rose's evidence on account of her actual bias and that she is not a person without an interest to serve in this matter. Indeed, she admitted as much in Mr. Brantley's cross examination of her.
  
- [182] Dr. Rose is employed to Humane Society International. In the first paragraph of her affidavit she admits that she has been working in the Caribbean region for some time with a focus on Swim-with-Dolphins attractions, as part of the Humane Society's larger campaign against holding marine mammals in captivity. Her résumé is testament to her work in that regard and included in her listed job description with the Humane Society is the preparation of campaign materials, reports etc. that present the organisation's policy and rationale on various wildlife issues and conduct of research whose results bolster and strengthen campaigns and policies. She also lists numerous credits for lectures and publication of papers on the subject of captive marine mammals. In cross examination she admitted that she is opposed to the maintenance of bottlenose dolphins in captivity. She also admitted that it is the policy of Humane Society International that it opposes the capture of all marine animals for any type of public display or entertainment and that on its website it has advocated for the boycott of hotels who promote the Swim with Dolphins program and that Anguilla is specifically listed. She also admitted that she is not an impartial witness.

[183] By her own admission, Dr. Rose's primary point of departure with Dr. Wade in the assessment of whether the EIA is an adequate report for the purpose of informing the LDCC in its decision is the EIA's assessment of the impact on dolphins.

[184] Given Dr. Rose's political position on the Swim with the Dolphins program, I doubt that she is capable of giving unbiased evidence in relation to this matter. Dr. Rose admitted that she had never seen an EIA for dolphinaria that satisfied her. I accept her evidence in that regard.

[185] As stated in **Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment**<sup>40</sup>, the LDCC is not under a standard of perfection in exercising its judgment on whether to rely on the EIA in making its decision. What is important is that EIA is comprehensive in its treatment of the subject matter, objective in this approach and met the requirement that it alerted the decision maker and the public to the activity on the environment; that it had not covered every topic and explored every avenue advocated by Dr. Rose did not invalidate it.

[186] I prefer Dr. Wade's opinion as to the adequacy of the EIA since his methodology in analysing and assessing its merit seemed the appropriate standard. I find as a matter of fact that the EIA is a credible document on which the LDCC was entitled to rely in making its decision.

**Is the Decision to grant Outline Planning Permission Irrational**

[187] The Claimants accepted that Government may give approval in phases, particularly of a large development project. What they complain of is that the process by which the Government gave approval of the seaward phase of the Development is flawed in that in granting permission for the use of the foreshore and construction of the pier and dolphin pens in the sea, proper regard must be had to the "landward" phase of the development and in that regard, the Government had insufficient material on which to properly assess the proposed Development as a whole.

[188] The evidence of both Mr. Foster Rogers and Mr. Vincent Proctor is that a full application for the Development was submitted along with plans and drawings and that at the time of the LDCC's consideration of the application for the construction of the pier, which was the first phase, the LDCC was aware of the developer's comprehensive project plans. The EIA addressed and detailed other key areas of the Development and mitigating factors to be employed by the developer. Mr. Proctor said that the LDCC granted outline planning permission for the proposed Development and full planning permission for the dolphin pier based on its consideration of all the material.

<sup>40</sup> [2004] Env. L.R. 38 (PC)

- [189] The Claimants allege that in making its decision, the LDCC failed to take into account:
- (a) Whether the development is in accordance with Government's policies as regards tourism and economic development;
  - (b) The ethics of encouraging holding dolphins in captivity;
  - (c) The proper impact of development on neighbouring owners and occupiers, users of the beach and the area in general;
  - (d) The impact on dolphins of the Blowing Point Port and plans for further development of the port;
  - (e) The LDCC failed to take into account the fact that Parcel 169 had already been set aside for a public purpose/ Permitting the dolphinarium prevents Parcel 169 from being used for its designated purpose of a public park;
  - (f) Whether private interests of Dolphin Discovery outweighs the interests of neighbouring owners.

[190] Save for the issue of 'the ethics of encouraging the holding of dolphins in captivity', the matters set out above are dealt with in the EIA, which was commissioned for the benefit of the LDCC and on which they took consultation. In addition to being addressed in the EIA, most of the points had been raised in correspondence and consultation with the government and non-governmental agencies, as well as at the public meeting.

[191] The LDCC was certainly aware of the opposition expressed by some concerning the ethics of keeping the dolphins in captivity.

[192] Obviously, when exercising a discretionary power, the decision maker may take into account a range of relevant considerations. There are no statutory provisions specifying matters to which the LDCC is to have regard in determining planning applications, however Mr. Proctor has set out a list of material considerations which the LDCC guides itself by and which appear to be taken from the draft Physical Planning Act 2005<sup>41</sup>. The LDCC's considerations specific to this application are as set out in Mr. Proctor's memorandum to the Chief Minister dated 10 January 2008.

[193] It has been said that where relevant considerations are not specified in a statute the decision-maker's consideration of what are the relevant considerations can only be subject to review on the ground of unreasonableness: **R v Secretary of State for Transport ex parte Richmond LBC**<sup>42</sup>

[194] Since the challenge is that relevant considerations have not been taken into account, I have to assess the actual or potential importance of the factor that was overlooked

<sup>41</sup> See paragraph 36 and 37 of his Affidavit filed on 12 June 2008

<sup>42</sup> [1994] 1 WLR 74 at page 95 per Laws J.

[195] Dolphin Discovery had been operating a dolphinarium in Anguilla for seven years, since 2000. Reportedly, in a survey of 120 members of Anguilla's population, 96% of them supported the Dolphin Discovery remaining in Anguilla<sup>43</sup>. It is interesting to note that in the Social, Cultural and Economic Impact Assessment, there is a reference to bilateral political support for the dolphinarium. Dolphin Discovery entered the Anguilla market in 2000 during the tenure of the previous administration led by Mr Hubert Hughes. A motion was tabled by the Fleming administration and the House passed *"that the Dolphins should stay on Anguilla."*<sup>44</sup>

[196] In these circumstances, I doubt very much whether the matter of ethics of holding dolphins captive was a relevant one for the LDCC's consideration. Even if it were a matter of relevant consideration by the LDCC, the decision cannot be said to be irrational on the basis of that one point alone.

[197] Lord Greene MR said in **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation**<sup>45</sup>, "it is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the fact do not come anywhere near anything of the kind ...". It means that the Claimants' have not met even the strict Wednesbury test.

[198] I am unable to discern any irrelevant considerations that were taken into account in the decision making process. From what has been set out in Mr. Proctor's memorandum to the Chief Minister's office, it would appear that the LDCC considered relevant factors.

[199] I am unable to say that the LDCC acted perversely in granting outline permission for the dolphin facility. It appears to me that they undertook the task properly, did a proper and acceptable consultation, they were fully apprised and cognisant of the relevant factors and guiding policy. In addition, they were informed by the EIA which was not defective or inadequate, as I have already concluded above.

#### Is the Approval of the First Phase Ultra Vires

[200] The Claimants contend that the LDCC has no authority to grant planning permission for construction of a pier and the approval is therefore ultra vires and unlawful.

<sup>43</sup> Page 44 of the Social Cultural and Economic Impact Assessment, Appendix B to the EIA

<sup>44</sup> Page 46

<sup>45</sup> [1948] 1 KB 223 at page 230

- [201] The basic principle of illegality that a decision is illegal if: (1) it contravenes or exceeds the terms of the power which authorises the making of the decision; (2) it purports an objective other than that for which the power to make the decision was conferred; (3) it is not authorised by any power; and (4) it contravenes or fails to implement a public duty: **De Smith, Administrative Law**<sup>46</sup>.
- [202] The Claimants say that the LDCC is empowered to consider applications for development of land and not in the sea and that they therefore had no authority to grant planning permission for Dolphin Discovery's construction of a dolphin enclosure and jetty.
- [203] Neither the Defendant nor the Interested Party made any real rebuttal to this argument.
- [204] I am called upon to construe the content and scope of the Land Development (Control) Act, to see whether in granting the planning permission for the construction of the pier, the LDCC was acting within the bounds of the powers they have been given.
- [205] Mr. Villanueva's evidence as to the inappropriateness of the planning permission application form to a proposed development that is not land based struck me
- [206] The LDCC is established by section 2 of the Land Development (Control) Act. Its mandate is to determine applications made under the Act "for permission to carry out any development and such other functions as are by this Act conferred upon it." "Development" is defined and it is utterly impossible to construe its meaning to include development other than land based. Section 4(1) of the Land Development (Control) Regulations states that any person who intends to develop any land shall make an application to the Committee
- [207] I have come to the conclusion that the LDCC has no authority to determine planning or development applications that are not land based
- [208] It would seem that the proper authority to approve the development of the infrastructure over the foreshore is the Minister under the Ports, Harbours and Piers Act. Both Mr. Proctor and Mr. Rogers referred to the fact that the Ministry of Infrastructure is represented on the LDCC and that as part of the consultation process, the views of the Departments of Environment, Fisheries and Marine Resources, among others, were sought. What is certain is that the Minister of Infrastructure could not have delegated the authority to determine an application for the construction on the foreshore to the LDCC
- [209] The approval granted by the LDCC to Dolphin Discovery to construct the pier and enclosure is ultra vires and must be quashed.

<sup>46</sup> 4<sup>th</sup> ed., para. 5-002

**Decision to grant Building Permission**

- [210] The Claimants contend that by virtue of the following facts the decision to grant building permission was ultra vires and or procedurally irregular:
- (a) There was never an application for building permission made in respect of the Sandy Point beach site;
  - (b) The permission to build at the Sandy Point beach site was merely purportedly transferred from the Sandy Ground site;
  - (c) Further and in the alternative the purported application for a building permit for the Sandy Point beach site not only bore the same application number as that for the Sandy Ground site but was incomplete;
  - (d) The Sandy Point beach application was made on 14 or 19 February 2008 but approved on 14 December 2007;
  - (e) The person who approved the application was Mr Noel Rogers who was deputising for Mr. Rawle Hazell and had no previous experience working at the Building Board.
- [211] Section 4 of the Building Act express requires the Building Board to consider the fitness of the proposed site and the proposed work. The Claimants assert that the Board simply transferred the permission given for the Sandy Ground site to the Sandy Point site without satisfying itself of the suitability of the plans for that specific site.
- [212] The legal issues identified are:
- (a) Was the purported grant of building permission by mere transfer of the permission from one location to another invalid or improper, either because it failed to follow the procedures laid down by the Building Act, R.S.A., Chapter B65 or because the criteria applicable to one location cannot, ex hypothesi, apply to a different location.
  - (b) Was the Building Board acting irrationally when, in granting building permission, it failed to take account of considerations expressly mandated by the Act?
  - (c) Further or alternatively, was the Building Board acting irrationally by granting building permission on 14 December 2007 in respect of an application made on 19 February 2008?
  - (d) Was the purported grant of building permission also ultra vires the Building Board, and therefore illegal?

### The Curiosity of the Building Permit Applications

- [213] The Claimants rely on an affidavit sworn by Ms. Delora Anderson, a paralegal employed to the Claimants' legal representatives Webster Dyrud Mitchell ("WDM"), in which Ms. Anderson avers that she conducted a search at the Department of Physical Planning and found a single application for building permit which related to the Sandy Ground site. Ms. Anderson said upon inquiry, she was informed by an officer that there was no separate building application for the Sandy Point site and that the application for the Sandy Ground site had been transferred to the Sandy Point site. Exactly two months later, Ms. Anderson's assistant Jennyville Smith, conducted a search at the Department and located two building applications, both bearing the parcel number relevant to the Sandy Ground site and dated 14 December 2007, however they had different application numbers, and one was marked "Approved" on 14 December 2007 and dated as received on 14 February 2008.
- [214] There is an approved Building Permit Application exhibited to the affidavit of Dr. Lenzi filed in the Barnes Bay recovery of possession litigation and exhibited to the affidavit of Ms. Jennyville Smith. That application bears permit number 0017/07, is dated 26 January 2007 and has an approval stamp dated 26 January 2007.
- [215] In his affidavit filed on 30 April 2008, Mr. Proctor states that he was advised by the former Chief Building Inspector, Mr Rawle Hazell, who dealt with Dolphin Discovery's Building Permit Application that an application had been received and approved in relation to building on Sandy Ground and that the developer proposed to build the same building at Sandy Point and that in accordance with the Department's policy, "the building permit" was transferred to the new site<sup>47</sup>. Mr. Proctor says that Mr. Hazell told him that there were never two separate applications for the project. The Building Permit Application exhibited to Mr. Proctor's affidavit bears the application number 0017/07, correctly identifies the Sandy Point parcel number and description and is dated 14 or 19 February 2008. The Approval stamp is dated 14 December 2007.
- [216] On 12 February 2008 the Claimants' lawyers, wrote letters addressed to the Chief Minister in which, *inter alia*, they requested information and supporting documentation which would demonstrate that the approvals that had been granted were done in accordance with the applicable legislation. With specific reference to the building permission, WDM's letter reported that inspection at the Department had revealed that no application had been made for the Sandy Point site.

---

<sup>47</sup> See paragraph 23.



- [217] In a letter dated 14 February 2008 to the Permanent Secretary (Mr. Rogers) in the Chief Minister's Office, Dolphin Discovery adverted to the intention "to submit all the necessary documents to the Planning department for land Construction permits".
- [218] In a letter to the Minister of Infrastructure, Communications, Utilities, Housing, Agriculture & Fisheries dated 9 June 2008, Dolphin Discovery refers to the fact that it had received a building permit from the Building board on 14 December 2007.
- [219] Neither of the Government's witnesses could give a satisfactory explanation of the building permit applications.
- [220] In paragraph 17 of Mr. Villanueva's affidavit, he swears that a building permit application in relation to the Sandy Point site was submitted to the Building Board on 17 December 2007 and was approved on the same day. At the trial Dolphin Discovery tendered an original Building Permit Application bearing the permit number 17/07 and dated 17 December 2007 through Mr. Villanueva, bearing an Approval stamp dated 14 December 2007. Yet in paragraph 44 of his same affidavit, Mr. Villanueva also said that *"From our standpoint, and in relation to what our company did. We submitted the application for Sandy point (sic) on 14<sup>th</sup> February 2008."*

**Was the decision irrational or ultra vires**

- [221] Mr. Rogers agreed that the Building Board is required to consider each site in order to determine whether application for the proposed building on that site would be granted. He conceded that permission granted for a building on one site cannot simply be transferred to another site and that that it is not the policy to do so.
- [222] It appears to be that precisely that was done. It was not merely the application fees that were transferred. I find as a fact that the building permit application for the Sandy Point site was submitted in February 2008 after the WDM letter. There is absolutely no evidence of the steps taken to inspect and assess the Sandy Point site as to fitness for the building plans. The inescapable inference is that the approval that is recorded on the Sandy Point application did not involve a true consideration of that site and was simply a transfer of the approval for the Sandy Ground site. In other words, the Building Board's approval is perverse in that it proceeded on the basis of approving the building, without reference to the fitness of the Sandy Point site and the suitability of the plans for that specific site.
- [223] The Building Board was required to consider the application for building on a new site de novo. The decision to grant building permission on the Sandy Point site is procedurally irregular and must be quashed.

#### **Claimants' Standing**

[224] The Defendant made a challenge to the Claimants' standing to obtain relief through these judicial review proceedings and suggested that they are mere busybodies. The question of standing would of course have been considered by the court at the stage of granting leave to make the claim. It is, however, also relevant at the full hearing of the claim. For an administrative act or decision to be susceptible to judicial review, it must have consequences on some person or body of persons either by altering the rights and obligations of that person or by depriving him of some benefit or advantage which he either has enjoyed in the past or which he can legitimately expect to continue to do

[225] The Claimants must satisfy the court that they have "a sufficient interest in the subject matter of the application". The CPR provides as follows:

#### **56.2 Who may apply for judicial review**

- (1) *An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.*
- (2) *This includes -*
  - (a) *any person who has been adversely affected by the decision which is the subject of the application;*
  - (b) *any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);*
  - (c) *any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;*
  - (d) *any statutory body where the subject matters falls within its statutory remit,*
  - (e) *any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or*
  - (f) *any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.*

[226] Moreover, the legislative framework within which the challenged decisions were made expressly indicates the rights of members of the public in general to be heard and to some extent, to participate in the process before the decision is made

[227] The test for determining whether a claimant has sufficient interest was considered in *R v Inland Revenue Commissioners ex parte National Federation of Self Employed and Small*

**Businesses Ltd**<sup>48</sup>. The House of Lords made it clear that the issue of standing should also be considered at the substantive hearing as to whether the claimant had made out a case on the merits assessed in relation to the claimant's connection with the subject matter and also as it relates to the remedies that they seek

[228] The courts have adopted a broad and flexible approach to this test and are guided by the importance of the issue and the merits of the claim

[229] These Claimants have exhibited and documented their interest in this matter long before any decision was ever made. I also regard the subject matter of this review to be of significant importance to the general public. A single example of the direct affect to the wider Anguillian population is the concern that the Defendant's activities will likely negatively impact the beaches and the public's right to access (a right jealously guarded by Anguillians and rightly so) as well as the proposed development of the Blowing Point Port.

[230] Further, a significant aspect of the Claimants' challenge has been focussed on the compulsory acquisition of Parcel 169 for a specified public purpose and the decision by which that land is to be utilised by a private entrepreneur. There is no question that the Claimants, each of whom is a resident of the Blowing Point area<sup>49</sup> have a sufficient interest, shared with the rest of the public. This is not to say that their interest originates from their physical proximity to the site; but the activities, which are to take place "in their front yard" can only make their case for interest even more compelling.

[231] Their standing has to also reviewed in relationship to the remedies sought. In this case the Claimants seek relief by way of the prerogative orders of prohibition and certiorari. The writ of prohibition may be granted on the application of any party if the defect of jurisdiction which the writ seeks to prohibit is apparent on its face. If the defect is not apparent then the courts are loathe to award the grant to a party other than a person who is aggrieved by the unlawful act, except in very strong cases.<sup>50</sup> The principle is similarly applied to grants of certiorari, the effect of which is to quash unlawful acts and the category of aggrieved persons is drawn very widely to include neighbouring landowners objecting to the grant of planning permission: *R v Hendon RDC ex parte Chorley*<sup>51</sup>

---

<sup>48</sup> [1982] AC 617

<sup>49</sup> Though only the Second Claimant is a full time resident

<sup>50</sup> De Smith's Judicial Review, 6<sup>th</sup> ed., para 15-029

<sup>51</sup> [1932] 2 KB 696

[232] By these proceedings the Claimants raise serious issues in which they have a genuine interest. I find that the Claimants hold a bona fide concern about the subject matter of the proceedings and have a sufficient interest.

[233] At the end of the hearing, the Defendant also challenged the admissibility of the evidence of the Second Claimant, Mrs. Marjorie McLean. The argument was that Mrs. McLean's affidavit was filed in support of the application for leave to apply for judicial review and not in the judicial review application itself. The challenge to the admissibility of the evidence fails for the reason that the Defendant cross examined Mrs. McLean on said affidavit and, in my view, thereby waived any right they may have had to ask the court to disregard the evidence.

#### Remedies

[234] Mr Hamilton QC and Mr Brantley urged me to dismiss this application because the Claimants did not pursue alternative remedies available to them.

[235] The issue of availability of alternative form of redress is one of the threshold issues that an application for judicial review has to cross at the leave stage: CPR 56.3(3)(e). I do not doubt that it is still appropriate to consider it at the substantive hearing, given that the remedies sought are discretionary.

[236] It is only the decision to grant permission for the use of the foreshore and sea bed under the Beach Control Act that is amenable to a statutory appeal. Moreover, a number of the challenges made by the Claimants are concerned with the legality of the actions of the responsible authority. For these reasons I consider that the Claimants have acted appropriately in seeking relief by way of judicial review.

#### Conclusion

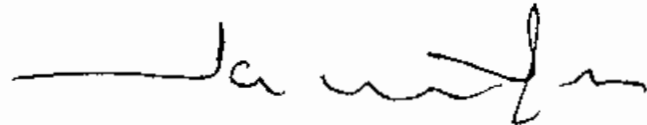
[237] For the reasons set out above:

1. The Claimants are granted a declaration that the construction of the pier and dolphin enclosures at Sandy Point, Anguilla without the permission of the Minister pursuant to the Ports, Harbours and Piers Act is unlawful.
2. The decision of the Land Development Control Committee issued on 12 December 2007 granting permission to Dolphin Discovery to construct a pier at Sandy Point, Anguilla is quashed on the ground that it is ultra vires.
3. The permission granted by the Minister of Infrastructure dated 27 August 2008 is quashed by reason of its procedural irregularity.

4. The application made by Dolphin Discovery to the Minister responsible for ports, harbours and piers dated 9 June 2008 is remitted to the Minister with a direction that he reconsider the matter and reach a decision in accordance with the findings of the Court.
5. The decision of the Building Board to approve the building permit application dated 14 February 2008 is quashed by reason of its procedural irregularity.
6. The application for building permission made by Dolphin Discovery on 14 February 2008 is remitted to the Building Board with a direction that it be considered in accordance with the findings of the Court.

**Costs**

- [238] The parties were directed to file submissions on costs on or before 17 August 2008. The Claimants filed a Skeletal Bill of Costs. The Defendant and the Interested Party filed submissions in each case, arguing that the Claimants were entirely misguided and that the general rule not to award costs against an unsuccessful claimant for judicial review should not be followed.
- [239] The Claimants have been successful on some parts of the claim and the Defendant and the Interested Party have prevailed on others. Where the Claimants have been successful, it has been on the ground of illegality and or procedural irregularity of the impugned decision. For this reason, I consider that the Claimants' should have 50% of their costs.
- [240] CPR 65.13(5) directs me to CPR 65.12 as the proper method of assessing costs in judicial review cases.
- [241] The Defendant shall pay 50% of the Claimants' costs, such costs to be assessed pursuant to CPR 65.12(3) on application to the Master for the directions as to how the assessment is to be carried out. The Defendant and the Interested Party shall bear their own costs.
- [242] I must commend all counsel for their tremendous assistance and diligence in the conduct of this case and the high quality of the written and oral arguments.



Yana'anla Small Davis  
High Court Judge [Ag]

