COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2018/PUB/JRV/00031

IN THE MATTER OF Order 53 of the *Rules of the Supreme Court*

AND IN THE MATTER OF an application for Leave to Apply for Judicial Review by Howard Simpson, Martha Simpson, Arpad Busson and Guy Dellal

BETWEEN

THE QUEEN
AND
HARBOUR ISLAND DISTRICT COUNCIL

First Respondent

AND

PHILIP S. WEECH
(In his capacity as Director of the BAHAMAS ENVIRONMENT, SCIENCE AND TECHNOLOGY COMMISSION)

Second Respondent

AND
BONEFISH ALLEY LTD

Interested party

- EX PARTE —
HOWARD SIMPSON
MARTHA SIMPSON
ARPAD BUSSON
GUY DELLAL

Applicants

Before Hon. Mr. Justice Ian R. Winder
Appearances: **Leif Farquharson with John Minns for the Applicants**
David Higgins with Adelma Roach for the Respondents
Gail Lockhart-Charles with Lisa Esfakis for the Interested Party

16 December 2019, 3 January 2020 and 8 February 2020.

WINDER, J

This is an application for Judicial Review of two separate but related decisions relative to an application of the interested party, Bonefish Alley Ltd. (Bonefish), to create a beach at its property (the Property) situated on the harbor side of Nesbitt Street in Harbour Island also known as the Narrows.

1. The following chronology arises from the evidence:

21 Sep 16	Letter of Mark W. Henderson of Henderson Architects Ltd. to the District Administrator applying on behalf of Bonefish to create a beach on the Property. This beach was proposed to be similar to the one located at a neighbouring property.
21 Oct 16	The Harbour Island District Council (HIDC) sat and considered the letter application of Bonefish and approved it pending further approval from the Bahamas Environmental Science and Technology Commission (the BEST Commission). Jolton Johnson, Senior Administrator of Harbour Island, wrote a letter to Henderson Architects Ltd. advising of the decision of HIDC.
1 Nov 16	Henderson Architects Ltd. wrote to Philip Weech of the BEST Commission advising that it's application to create a beach on the Property was approved subject to the approval of the BEST Commission. Upon a review of the information provided by Henderson Architects Ltd. the BEST Commission requested supporting documentation for the dock that was previously constructed onsite at Bonefish in 2011.
24 Jan 17	Henderson Architects in response to the BEST Commission's request provided an application which was approved by the HIDC on 5th February, 2011 for the construction of the dock, which was subsequently approved by the Port Department on 28th March, 2011, along with an Application for a permit to carry out dredging operations.
23 Feb 17	BEST Commission conducted a site visit to Bonefish to assess the suitability of the proposed project to the area.
14 Mar 17	BEST Commission wrote to Mr. Henderson, informing him of the findings of the site visit and outlined areas of concern and made the following recommendations: i. A coastal engineer be hired to provide a scientific report to address wave effects on the shoreline, safety for swimmers, and advise on the appropriate designs of the coastal structures to control beach erosion.

ii. The report should include details of the amount of sand needed for breach creation, method of beach construction and prediction on how frequently the beach maintenance will be required.
iii. Local public consultation is recommended to inform the community about the project.
iv. Approval should also be sought from the Department of Lands and Surveys for Crown Land use of the beach area, also be minded that beaches in The Bahamas are considered accessible to the public.
v. The costal engineering report should be submitted to BEST for review and approval.

18 Aug 17 Building permit application made by Bonefish for the construction of a proposed rock groyne at the Property.

4 Oct 17 Special Call Ceeting of HIDC held at District Council office. Timothy Breyfogle present at meeting and questioned about the application for proposed beach creation at the Property.

HIDC says that it granted approval in principle subject to the approval of the project by the BEST Commission.

The HIDC published a Notice on 4 October, 2017 informing the public that a Sitting of the Town Planning Authority would be held to consider Building Permit Applications for the following:

(1) Mad Pal Ltd. to Refurbish/Extension at Trianna Shores, Harbour Island.
(2) Matthew Cart for Home Renovation at Trianna Shores Harbour Island.
(3) Charles Finch for Demolition of a structure at Bay Street, Harbour Island.
(4) Bonefish Alley Ltd. for a propose rock Groyne, Narrows, Harbour Island.

The Notice was posted on the bulletin boards in the Government Health Centre, the Notice Board on Dunmore Street, which is the main street where Harbour Islanders go to read community announcements, and the Administrators Complex on Gaol Street, informing that a public sitting would be held on 18 October, 2017 at 3:00 p.m. in the Magistrate's Court room to consider aforesaid Building Permits.

13 Oct 17 Building permit of the applicant is approved by the HIDC.

17 Oct 17 Terrance Davis Chief Councilor, writes to Bonefish confirming the grant of the approval of the Building Permit.

17 Oct 17 Bonefish pays the Building Permit fee and receives a receipt. The building permit is approved with effect from 13 October 2017.

8 Dec 17 The Report of Caribbean Coastal Services (CCS) was delivered electronically and via hard copy to the BEST Commission. CCS had

been engaged as coastal engineers to carry out the necessary studies and designs relative to the scope of works for the proposed beach creation. On 17 December, 2017 the hard copy was delivered to the BEST Commission.

Exchange of correspondence ensues between the BEST Commission and Environmental Scientist Kelly Ashley Armstrong of CCS on 23 January 2018, 7 February 2018, 27 February 2018, 15 March 2018, 16 March 2018 and 13 April 2018 seeking clarifications and revisions to the CCS Report of 8 December 2017.

The Respondents say that the BEST Commission requested further clarification on several matters including the water flow around the coast from the creation of the beach at the Property, water depth, and source amongst other technical issues.

4 May 18 CCS revises it report and delivers a Revised Report to the BEST Commission who receives and acknowledges it.

9 May 18 Counsel for the Applicants (who are residents and/or owners of property located near the Property) wrote to the Director of Physical Planning, the Chief Councilor for the HIDC, the Administrator for the Harbour Island District enquiring as to whether permits had been granted to Bonefish for the development of the beach at the property and requesting copies of the permit.

23 May 18 Harbour Island Administrator spoke to John Minns, counsel for the Applicants, and indicated that matters concerning the development of the Property had been referred to the Department of Physical Planning.

19 Jun 18 Letter of Philip Weech to Carlos Palacious of CCS, agent for Bonefish, with respect to the proposed beach creation at the Property. The letter is settled as follows:

> Dear Mr. Palacious;
>
> The Bahamas Environment, Science and Technology (BEST) Commission acknowledges receipt of the report on Bonefish Alley submitted by Caribbean Coastal Services Ltd. (CCS) on December 12, 2017. The Commission also acknowledges receipt of the correspondences sent via email February 7, 2018 and March 16, 2018 as responses to our concerns and further requirements.
>
> The Commission has completed its review with additional concerns and responses sent via email May 4, 2018. Subsequently, CCS addressed BEST concerns via teleconference meeting (Palacious/Weech/Pyfrom/ Deal) on May 23, 2018.
>
> Please be advised that the revised report and responses are noted. CCS can now proceed with the proposed beach creation for Bonefish Alley Beach as we offer no objection subject to, the submissions of assessment reports to BEST after two (2) years as, well as after the occurrences of extreme events. We expect that

CCS will advise BEST on the commencement of the works so that site visits can be facilitated.

21 Aug 18 The Applicants say that Bonefish placed an excavator on the Property and began clearing mangroves and excavating the rocky shore. Bonefish denies that any excavation of the rocky shore took place or clearing of mangroves.

22 Aug 18 Counsel for the Applicants receives copies of the Building Permit application, stamped approved on 13 October 2017 and signed by the Chief Councilor Terrance Davis as well as the letter dated 19 June 2018 from Philip Weech to CCS.

24 Aug 18 The Applicants commence their application for judicial review.

2. The Applicants bring this application for judicial review in the prescribed Form A (as amended) which sets out, in part, as follows:

2 Judgment, Order, Decision or other proceeding in respect of which relief is sought	1. The consultation process carried out by the First Respondent pursuant to a Notice dated 4th October, 2017 with respect to Building Permit No. HI 059 of 2017. 2. The decision of the First Respondent dated 13th October, 2017 to approve a Building Permit Application for the construction of a Rock Groyne at Bonefish Alley ("the Building Permit Decision"). 3. The decision of the Second Respondent dated 19th June, 2018 authorising Caribbean Coastal Services Ltd., on behalf of Bonefish Alley Ltd., to proceed with proposed beach creation at Bonefish Alley ("the Beach Creation Decision").
3 Relief Sought	Judicial Review in the form of: 1. A Declaration that the consultation process carried out by the First Respondent pursuant to a Notice dated 4th October, 2017 with respect to Building Permit Application No. HI 059 of 2017, was not proper or adequate in law;

2. A Declaration that the Building Permit Decision is unlawful;
3. An Order of Certiorari quashing the Building Permit Decision;
4. A Declaration that the Beach Creation Decision is unlawful;
5. An Order of Certiorari quashing the Beach Creation Decision;

3. The Originating Notice of Motion for Judicial Review seeking relief in terms of the amended application for judicial review was filed on behalf of the Applicants on the 30 October 2019.

4. The application for judicial review is supported by the affidavit of Samuel Brown filed on 27 August 2018. The Respondents rely on the affidavits of HIDC Chief Councilor Terrance Ashderon Davis and BEST Director Philip S. Weech both filed on 10 December 2018. The Interested Party, Bonefish, relies on the affidavits of Timothy Breyfogle filed on 25 October 2019 and Malcolm Johnson filed on 20 November 2019.

5. The decisions, for which the Applicants complain of, are the following:
   a) The consultation process carried out by the HIDC pursuant to a Notice dated 4 October, 2017 with respect to Building Permit Application No. HI 059 of 2017.
   b) The decision of the HIDC dated 13 October, 2017 to approve a Building Permit Application for the construction of a rock groyne at the Property.
   c) The decision of the BEST Commission dated 19 June, 2018 authorising CCS, on behalf of Bonefish to proceed with proposed beach creation at the Property.

6. The grounds which arise for consideration in this application are therefore:-
   a) Procedural impropriety in alleging a breach of the rules of natural justice in that there was no proper consultation relative to the granting of the Building Permit.

b) Illegality of the beach creation decision by the BEST Commission due to the failure to obtain prior approval under the Conservation and Protection of the Physical Landscape of the Bahamas Act (CPPLA).

7. The Respondents and Bonefish have all raised preliminary objections to the application for judicial review. The objections related to what is alleged as the delay in bringing the application for judicial review and the failure of the Applicants to exhaust alternate remedies available to them prior to applying for judicial review.

8. The issues arising for resolution by the Court may be identified as follows:
   a) The preliminary objections;
   b) Whether the HIDC Notice of A Sitting of the Town Planning Authority dated 4 October, 2017 amounted to a Notice to consult the residents of Harbour Island.
   c) Whether the decision of the BEST Commission in its letter of 19 June 2018 to Bonefish relative to the application to build a rock groyne was illegal and contravened the CPPLA.

Delay

9. The Respondents and Bonefish have complained that the Applicants have not acted timely in accidence with Order 53 of the Rules of the Supreme Court and the relevant authorities. Order 53 Rule 4(1) provides as follows, with regard to the timeliness of bringing a judicial review application:

> (1) An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

10. A review of the appropriate law on the question of promptness and delay was carefully given by ***Isaacs JA*** in the Court of Appeal case of ***R v Bahamas Bar Council ex parte Marva Moxey SCCivApp No. 86 of 2015.*** At paragraphs 26-28 he stated:

> 26. In Regina Securities Commission of the Bahamas v. Ex Parte Petroleum Products Ltd [2000] BHS J. No. 30, an application for judicial review by Petroleum

Products Ltd. ("Petroleum") in respect of the decision of the Securities Commission of The Bahamas (the "Commission") to register a prospectus for the public floatation of Freeport Oil Holding Company Limited ("FOHCL"), the parties disagreed as to the date upon which Petroleum became aware of the 11 grounds upon which a judicial review application could be made. The Commission registered the prospectus on 1 June 1999; but Petroleum contended that the operative date was, 1 July 1999. Hayton, JA said at paragraphs 18 and 19:

> 18. In my view, when grounds for the application first arose was on 1 June 1999, when the prospectus was registered, being the complained of conduct of the Commission, not on 1 July 1999 when FOHCL inevitably took advantage of such registration to market itself to the public. Thus, the application is even beyond the six month limit, quite apart from the fact that, as the English Court of Appeal stated in R v Stratford-on-Avon DC ex p Jackson [1985] 1 WLR 1391 at 1322, 'The essential requirement is that the application must be made promptly'
>
> 19. If such essential requirement is not satisfied in any event within the objective six month period, the question arises whether or not "the Court considers that there is good reason for extending the period". It is here, in my view, that the Court should take account of the time the impugned matter came to the knowledge of the applicant, it should consider whether the applicant, after acquiring such knowledge, made the application promptly, there being a greater need to act promptly the greater the period since the objective date of the grounds for the application. If the applicant did then apply promptly the period should be extended to that necessary to make the application timely.

11. In ***Bahamas Hotel Catering & Allied Workers Union v. The Attorney General and the Bahamas Hotel & Maintenance & Allied Workers Union; West Bay Management Limited v. Bahamas Hotel Maintenance & Allied Workers Union [2010] 1 BHS 3. No. 67***, the appellant sought to reverse a decision of ***Hall CJ*** to refuse the relief sought in a judicial review application. ***Longley, JA*** delivering the decision of the Court, stated:

> 16. Applying the overriding principle of promptness, it seems to me that where the six month limitation period has expired the court must ask itself several questions. The first is: what is the decision the applicant seeks to impugn? Second, when did the applicant first become aware of the decision it seeks to impugn? Third, did it act promptly in seeking leave to make an application for judicial review once it became aware of the decision? Fourth, as an alternative to question three, if the applicant did not act promptly in making the application to challenge the decision it seeks to impugn has it otherwise proffered good reason for the entire period of delay?

> 17. There is undoubted overlap between questions three and four. It is only if the court concludes that the applicant acted promptly after becoming aware of the decision it seeks to impugn, or that it has proffered good reasons to explain the delay in making the application to apply for judicial review, will time be extended on the basis that good reason exists.

12. ***Longley, JA*** continued at paragraph 26 and said, inter alia:

> 26. However, for the purposes of Order 53 r.4 of the RSC time begins to run from the date when grounds for the application first arose.

13. Following the guidelines of ***Longley JA***, in ***Bahamas Hotel Catering & Allied Workers Union v. The Attorney General et al; West Bay Management Limited v. Bahamas Hotel Maintenance & Allied Workers Union***, I begin by determining what the period of delay is. The impugned decision in respect of the HIDC is 4 October 2017 and in respect of the BEST Commission is 19 June 2018. This application was commenced on 24 August 2018. The period in relation to the HIDC decision is about 11 months and in relation to the BEST Commission is 2 months. The Respondents argue that the Applicants ought to have had notice of the building permit application of Bonefish as a result of the Notice issued by the HIDC to hold the pubic sitting on 18 October 2017. The available evidence however is that the Applicants only actually became aware of the decisions formally on 22 August 2018, a few days prior to commencing the application for judicial review. There is no credible challenge to this position.

14. Did the Applicant act promptly in seeking leave to make an application for judicial review once it became aware of the decision? Having considered the evidence filed on its behalf, I am satisfied that there was promptness by the Applicants in applying for judicial review. On the face of the application for leave for judicial review and indeed in the notes of ***Charles J,*** it is evident that this issue of delay was canvassed at the ex parte hearing for leave and ***Charles J*** nonetheless granted the leave out of time (in respect of the HIDC decision). *Order 54 rule 4(1)* empowered ***Charles J*** to extend the time for granting leave at the ex parte application if there was good reason to do so. The fact that the Applicants only became aware of the decision a few days earlier, after being told by the

Department of Physical Planning a few months earlier that no approvals had been granted, is good and sufficient reason. I am not satisfied that any good and sufficient reason exist to disturb the decision of ***Charles J,*** made at the ex parte hearing to extend the time for applying for judicial review

Alternative Remedies

15. Bonefish alleges that the appropriate remedy for the Applicants, if aggrieved by the decision of the HIDC to grant the approval for the building permit, was a statutory appeal. In this vein they say that, as there is an adequate alternative remedy available to the Applicants, the relief of judicial review ought not be allowed.

16. The learned editors of ***Judicial Review, Principles and Procedure,*** 2008, Oxford press, provide a clear statement on the law on the question of alternative remedies, which I accept as the true state of our law. At paragraph 26.90, it is stated,

> Because judicial review is a remedy of last resort where an adequate alternative remedy is available the court will usually refuse permission to apply for judicial review unless there are exceptional circumstances justifying the claim proceeding. The availability of an adequate alternative remedy is a matter that is relevant to the exercise of the courts discretion to grant permission to apply for judicial review; it does not go to the court's jurisdiction to entertain a claim for judicial review.

At paragraph 26.97, it was further stated,

> If an alternative remedy is not actually available to a claimant it is difficult to see how the mere existence of that remedy could justify the court refusing permission to apply for judicial review. However, if what would otherwise have been an adequate alternative remedy ceases to be available to a claimant because he or she have instead, choosing to bring a claim for judicial review the previous availability adequate alternative remedy may cause the court to refuse permission.

In respect of statutory appeals, it continued at paragraph 26.104 as follows,

> A court is extremely unlikely to grant permission to apply for judicial review in any case where there is a statutory right of appeal against the decision under challenge unless there are wholly exceptional circumstances. The fact that a claim raises a point of law of general importance might constitute an exceptional circumstances for this purpose, but when considering this issue the court will be likely to have regard to whether the relevant appellate body can itself definitively determine the relevant point and if not, whether there are subsequent avenues of appeal to other bodies (or to the court) which could provide the requisite determination.

17. In ***R .v. IRC ex parte Preston, 1985 AC 835 at 852***, Lord Scarman had this to say:

> [A] remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision.

18. Bonefish relies on the recent decision of ***Stewart J*** in the recent case of ***R v Town Planning Committee and another ex parte Benjamin Coupland Simmons and another 2019/PUB/jrv/00018.*** In that case there was a challenge to the decision of the Town Planning Committee made pursuant to the provisions of the Planning and Subdivision Act to grant site plan approval with respect to the redevelopment of the Harbour Island Marina and Resort. In refusing an application to amend, ***Stewart J*** found that an adequate remedy existed under the statutory frame work to challenge planning decisions. At paragraph 27 of the decision ***Stewart J.*** stated:

> 27. The issue which this Court must determine is whether there is any overreaching by the Intended Applicants in seeking the proposed amendments. In considering this the court must be mindful of the law governing alternative remedies particularly where a statutory appeal process is provided. Without making any determination as to what act applies to Harbour Island the [Town Planning Act (TPA)] specifically states that any appeal for the decisions made under that act must comply with section 13 of the Act. If the Intended Applicants wish to challenge decisions made under the TPA, they must comply with all the provisions. I have reviewed ***Moxey and the Bahamas Bar Council*** and I am satisfied that that principle of law which mandates complying with a statutory appeal process provided which is not prejudicial to the rights of the applicant is applicable to the facts of this case. The intended Applicants would not be deprived of any remedy by complying with the statutory right of appeal granted under section 13 of the TPA Act. Accordingly I refuse the amendments which seek to add the Harbour Island District Council as a second intended respondent and to challenge different aspects of their decisions. Relief 1 b is refused and the reference to the District Council approval in relief 1 c is refused.

19. Section 13 of the TPA provides:

> 13. (1) An appeal shall lie to the Supreme Court from any decision of the Committee and/or the magistrate under this Act.
>
> (2) An appeal against the decision of the Committee shall be on motion. The appellant within twenty-one days after the day on which the Committee has given

its decision shall serve a notice in writing signed by the appellant or his counsel and attorney on the Committee of his intention to appeal and of the general grounds of his appeal: Provided that any person aggrieved by the decision of the Committee may upon notice to the Committee apply to the Supreme Court for leave to extend the time within which the notice of appeal prescribed by this section may be served, and the Supreme Court upon the hearing of such application may extend the time prescribed by this section as it deems fit.

20. The ***Benjamin Coupland Simmons*** case is markedly different from the case before me. The decision in ***Benjamin Coupland Simmons*** was a planning decision made by the Town Planning Committee under the town planning legislation whilst the decision made in this case, by the HIDC, was made under a different legislative regime, namely the Buildings Regulations Act.

21. The HIDC obtains its power to issue building permits from the Local Government Act. Section 14 (2)(b) of the Local Government Act, provides:

> 14. (1) Notwithstanding the provisions of any other law but subject to subsections (2) and (3), each Council of a district (other than a district specified in the Third Schedule) —
>
> (a) ...
>
> (b) shall have and exercise, in relation to that district, the powers of the Buildings Control Officer to grant building permits under the provisions of the Buildings Regulations Act, and, for that, purpose, the relevant provisions of that Act shall mutatis mutandis apply as if the references therein to the Buildings Control Officer were references to a Council;
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> ...
>
> (2) The Councils of the districts specified in the Third Schedule (other than the district of the City of Freeport) shall perform in relation to the respective districts —
>
> (a) ...
>
> (b) the functions conferred upon Councils by subsection (1)(b) to (k) of this section; and
>
> ...

The HIDC is a Council of a district specified in the Third Schedule to the Local Government Act. It therefore acts as the Buildings Control Officer with respect to the grant of building permits under the Buildings Regulations Act, in the Harbour Island district.

22. Appeals from decisions of the Buildings Control Officer are provided for in Section 8 of the Buildings Regulations Act, which provides:

> 8. Any person considering himself aggrieved by the decision of the Buildings Control Officer refusing to grant to him a building permit, or revoking, or suspending, or refusing to remove the suspension of, a building permit, may appeal in the prescribed manner and within the prescribed time to the Minister.

The Applicants argue, and I agree, that Section 8 only permits an appeal by the subject of a building permit application and not persons such as them. They are not persons ***aggrieved by the decision of the [HIDC] refusing to grant to them a building permit, or revoking, or suspending, or refusing to remove the suspension of, a building permit.*** It is also worth noting that the appeal is to the Minister and not to the Supreme Court as in the case of the TPA. In any event I am not satisfied there is an adequate alternate remedy available to the Applicants.

23. Bonefish also claimed that the Applicants were less than full and frank in making the application and a number of matters were raised by learned counsel. I did not find that this allegation was sufficiently made out such that I ought to set aside the leave granted by ***Charles J.*** Insofar as some of these complaints may have meritorious, factually, I was not moved to exercise my discretion in Bonefish's favor by setting aside the leave granted. In any event, there was no Summons or other application formally made to set aside the leave to apply for judicial review.

24. I am satisfied therefore that none of the preliminary objections raised are sustainable.

Consultation

25. The Applicants say that regardless of whether or not there is a legal obligation to consult, where consultation is embarked upon it must be carried out '*properly*'. They rely on the English Court of Appeal decision in ***R. v. North East Devon Health Authority, ex part Coughlan [2001] QB 213 [108].*** In ***Ex parte Coughlan, Lord Woolf MR,*** stated at para. 108, as follows:

> 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 an 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: R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168." (Emphasis added)

The decision in ***Ex parte Coughlan*** was approved by this court in the case of ***R v. Rt. Hon Perry Christie and Others ex parte Frederick Smith QC and Carey Leonard 2015/PUB/jrv/00005.***

26. Further, says the Applicants, in the present case, having promised to embark upon a consultation exercise with respect to the grant of the relevant building permit, the HIDC was clearly under an obligation to carry out the exercise *properly*. They say that a proper consultation exercise requires, *inter alia*:

    (i) the consultation be undertaken at a time when proposals are still at a formative stage, and

    (ii) the decision-maker disclose important documents to which he has access which are material to his determination and whose contents the public has a legitimate interest in knowing.

27. The Respondents accept the legal propositions advanced by the Applicants but were adamant that the HIDC did not embark upon any consultation. Their primary contention is that there is no requirement under the Town Planning Act (TPA) for the HIDC consult and that the HIDC did not embark on a consultation process. They say that consultation is triggered when there is legitimate expectation which is either substantive or procedural. They rely on the case of In ***R v. Independent Assessor ex parte Bhatt Murphy (a firm) 2008 EWCA Civ 755*** paragraphs 41, 47 and 49 as follows:

    41. There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in *Preston* at 864; compare *ABCIFER* [2003] QB 1397 per Dyson LJ at paragraph 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such

a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel. All this is involved in what Sedley LJ described (*BAPIO* [2007] EWCA Civ 1139 paragraph 43) as the entitlement of central government to formulate and re-formulate policy. This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation. It is repugnant also to an enforced obligation, in the name of a procedural legitimate expectation, to take into account and respond to the views of particular persons whom the decision-maker has not chosen to consult.

...

47. I posed the question earlier: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of notice or consultation? Under this head I will first cite one of the cases given by Simon Brown LJ in *Ex p Baker* as "clear examples" of this kind of legitimate expectation. In *Ex p Schemet* [1993] 1 FCR 306 the claimants were the parents of two children who went to a school outside the local authority's district. The local authority had paid for the elder child's travel costs, but then changed their policy. They stopped paying for the elder child's travel, and never paid for the younger's. There had been no promise or practice of notice or consultation. Roch J as he then was nevertheless held (324C –D) that the claimants enjoyed a legitimate expectation that the benefit would continue in relation to the elder child until there had been communicated to them some rational ground for withdrawing it on which they had been given an opportunity to comment. It might be thought that the decision was a generous one. However, again, the affected persons were

few in number. And Roch J's reason for upholding the expectation was expressed thus (324D – E):

> "There could well be cases where the withdrawal of a travel pass would mean that the child would have to change schools, and it would seem right and sensible that the local education authority should pay some regard to the effect that a change of schools would have on that particular child before finally deciding whether to withdraw that advantage."

49. I apprehend that the secondary case of legitimate expectation will not often be established. Where there has been no assurance either of consultation (the paradigm case of procedural expectation) or as to the continuance of the policy (substantive expectation), there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power. Here is Lord Woolf again in *Ex p Coughlan* (paragraph 66):

> "In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process."

Accordingly for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to inure for their particular benefit: not necessarily forever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult.

28. I am not satisfied that the Respondents' contentions are supported by the evidence. On any reading of the evidence of Chief Councilor Terrance Ashderon Davis, filed on

behalf of the Respondents, it would appear, in clear and unambiguous terms, that the HIDC considered Public Consultation as a part of its process. Paragraphs 8-11 of Davis' affidavit specifically states as follows:-

> 8. At a Special Called Meeting of the Council, Tim Breyfogle, the representative of bonefish Alley Ltd. was invited to provide clarification on the purposed development of Councilors with regards to the said Application. Following Tim Breyfogle's presentation, the Council considered the said application and granted approval in principle subject to approvals from the Department of Environmental Health, the Foreign Investment Board, the Bahamas Environment Science and Technology Commission and Public Consultation.
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> 9. Following the Special Called Meeting, the Council posted Public Notices on 4 October 2017 on the bulletin boards in the Government Health Center, the Notice Board on Dunmore Street, which I the main street where Harbour Islanders go to read community announcements, the Administrators Complex on Goal Street, informing that a public sitting of the District Council of Harbour Island would be held on 18 October 2017 at 3:00pm in the Magistrate Courtroom to consider various Building Permit applications including the Application by Bonefish Alley Limited for the purpose Rock Groyne at the Narrow, Harbour Island
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> 10. On 13 October 2017, the Council in its capacity as the Town Planning Committee considered and approved the application of Bonefish subject to the agreed conditions in the said Special Called Meeting stated at paragraph 8 above and by letter dated 17 October 2017, I informed Tim Breyfogle of Bonefish Alley Limited of the Council's decision and that the remaining fee of $356.25 for the Building Permit be paid at the Administrator's Office Harbour Island.
>
> 11. The Public Sitting was held as scheduled and there were no objections to the Bonefish Project.
>
> (Emphasis added)

29. According to Davis, the HIDC did not really grant full approval for the issuance of the Building Permit to Bonefish, but granted an approval in principle subject to several conditions, namely:

    (a) the approval of the Department of Environmental Health;

    (b) the approval of the BEST Commission;

    (c) the approval of the Foreign Investment Board; and

    (d) the Public Consultation

The Respondents' submissions suggest that the meeting of 18 October 2017 was merely for the notification of the community as to the decision already taken. This is

not supported by the evidence of Davis who noted that no objections were made to the project by the person attending the specially called meeting, suggesting that it was raised for consideration by the body and not for mere notification. I am satisfied therefore that the HIDC did in fact engage in, or purport to engage in some form of public consultation. I am also prepared to accept the submissions of the Applicants that this public consultation was inadequate and was not a proper consultation as:

(a) The Public Notice referred to a public sitting of the HIDC to be held on 18 October 2017 to consider several applications for building permits, including that of Bonefish, however, by the time the meeting was held HIDC had already approved and issued the Building Permit to Bonefish
(b) The public sitting was therefore not being carried out at a "*formative stage*" as it ought to have been but in fact after the decision had been made.
(c) The CCS Report dated 24 August 2017 which the HIDC says informed its decision making process for the approval of the Building Permit was not made available or disclosed to the public as a part of the consultation exercise referred to in the Notice.

30. I readily accept the submission that there was no right to or obligation for public consultation under the existing statutory regime under which the HIDC was governed. On my reading of ***Ex Parte Coughlan*** however, such matters become irrelevant where, as in this case, the decision maker embarks upon consultation. Such consultation must therefore be engage properly.

31. No explanation is given as to why the HIDC moved from the position which obtained on 4 October 2018 when it agreed in principle to grant the permit to Bonefish upon conditions to the position on 13 October when is determined that the permit would actually issue upon conditions. These conditions were not indorsed on the permit. In the circumstances where a permit was granted, subject to conditions, which conditions are not indorsed on the face of the permit the permit ought not to stand and at the very least ought to have been reissued. Having regard to the conditions it would seem that the prudent position to have taken, as was taken by the HIDC in 2016, was that no permit ought to have been issued until the HIDC was satisfied that the conditions imposed had been met.

32. I am satisfied therefore that the Building Permit issued to Bonefish ought to be quashed not only for failure to pursue proper consultation, having embarked upon the same, but on the basis that the permit issued did not reflect the true decision of the HIDC as none of the conditions purportedly imposed were indorsed on the said building permit.

Illegality

33. The Applicants contend that the decision of the BEST Commission granting approval to proceed with the beach creation on the property runs afoul of the CPPLA. The CCS Report, says the Applicants, involves: the construction and placement of a large groyne(s); removal of the iron shore along the coastline fronting the Property; filling in the area with other rocks as a base; and the placement of large quantities of sand in the area along the coastline where iron shore has been removed. They argue that as Section 6 of the CPPLBA prohibits the carrying out of any excavation or landfill works without a permit from the Director of Physical Planning, the BEST Commission could not so authorize such excavation.

34. The Respondents' case is that, contrary to the Applicants' submissions, the BEST Commission did not give permission to CCS to construct the Beach at Bonefish. They say that *"the role of the BEST Commission is to provide advice on the environmental aspect of proposed developments, make recommendations based on its own professional experience and evaluations undertaken by specialist in the Bahamas with required technical competencies."* Further, they say that *"it is in the role of advisor to the HIDC on environmental matters that the BEST Commission functioned with regards to the Application for the said Building Permit for the installation of the groyne and was the only Application before sent to the BEST Commission to evaluate the suitability of the proposed structure for Bonefish. All development projects in the Commonwealth of the Bahamas that would have an impact on the environment fall within the purview of the BEST Commission and accordingly are sent to that agency to ensure that it meets the threshold for environmental approval. The BEST Commission is not a permitting agency and did not attempt to be a permitting in this*

instance. The BEST Commission was established by Cabinet under which it is authorized to meet its mandate set by government policy and NOT by statute."

35. I accept the evidence of Philip Weech on behalf of the BEST Commission that he did not purport to grant approval or a permit for the excavation and or construction of the rock groyne for the creation of the beach. I also accept the submission therefore that his indication that Bonefish may proceed was merely an indication that the project was, as far as the BEST Commission was concerned, environmentally sound and could proceed to the next phase inclusive of making application pursuant to the CPPLA. The HIDC had referred Bonefish to the BEST Commission with respect to the application for a Building Permit for the groyne. Bonefish since 2016 now had the greenlight of the BEST Commission, The letter was indeed a ***no objection*** letter rather than an approval. There is no evidence that the BEST Commission was purporting to grant an approval or any decision pursuant to the CPPLA. That Bonefish or anyone would treat the BEST Commission letter as something more, did not mean that the BEST Commission was acting afoul of the CPPLA.

36. I am satisfied therefore that this challenge to the decision of the BEST Commission ought to fail.

37. In the circumstances therefore, having succeeded on one of the decisions under review but failing on the other, I am inclined to make no order for costs. I will nonetheless hear any of the parties should they wish to advance an alternative order.

Dated the 11th day of February 2020

Ian R. Winder
Justice