In The Supreme Court of Bermuda

COMMERCIAL COURT

APPELLATE JURISDICTION

2014: No. 135

THE BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE

Appellant

-AND-

THE MINISTER OF HOME AFFAIRS

(in his capacity as Minister responsible for planning)

Respondent

JUDGMENT

(in Court)

Date of hearing: July 14-16, 2014

Date of Ruling: August 6, 2014

Mr. Alex Potts, Sedgwick Chudleigh Ltd., for the Appellant ("BEST")

Mr. Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent (the "Minister")

Mr. Andrew Martin, MJM Limited, for the Joint Receivers of TPC Management Limited and Tuckers Point Golf, Beach and Tennis Club Ltd., Interested Parties ("the Applicants")

Introductory

1. The Appellant, "*an independent, grassroots Non-Governmental Organisation*"[1] ("BEST"), appeals by Notice of Motion dated April 2, 2014 against the March 12, 2014 decision of the Respondent ("the Minister") dismissing BEST's appeal against four decisions of the Development Applications Board ("the DAB") dated July 17, 2013 and published on July 26, 2013. Conditional approval was granted in respect of four applications for the approval of final subdivision plans, further to the approval of draft plans granted by the Tucker's Point Residential Development (Hamilton and St. George's Parishes) Special Development Order 2011[2]. BEST sought orders quashing both the Minister's decision and the underlying decisions of the DAB.

2. On June 25, 2014, I granted BEST's interim application for a Protective Costs Order, seemingly the first time such an order has been made by a Bermudian Court. The basis for the Order was that the present appeal raised issues of general public importance and that there was a risk that the appeal might not be pursued if the Appellant was not protected from the risk of an adverse costs order because of its limited resources.

3. Between the date of that Ruling and the date of the substantive hearing of the appeal, the Minister conceded that his own decision was liable to be set aside on natural justice grounds and offered to withdraw it. No concession was made as regards the other grounds on which his decision was impugned. In the event, the main issues in controversy at the hearing of the appeal were the following:

    (a) whether the SDO and/or Bermuda law required an Environmental Impact Assessment ("EIA") to be carried out before the DAB granted planning permission;

    (b) whether, if (a) was answered in the negative, the SDO was substantively ultra vires or procedurally invalid;

    (c) whether this Court should quash the DAB's decisions on, *inter alia*, natural justice grounds, together with the Minister's decision, or whether the matter should be remitted to the Minister to re-hear the appeal against the DAB's decision.

[1] First Affidavit of Stuart Hayward, paragraph 9.
[2] BR 20/2011.

The DAB decisions

4. The SDO was made by the Minister on March 30, 2011 after it had been approved by both Houses of Parliament. Although subject merely to the affirmative resolution procedure, it was debated in often acrimonious tones and was vigorously opposed by, *inter alia*, BEST. It was common ground that the SDO was required because the proposed residential development adjacent to the facility known as the Tucker's Point Resort would not have been possible under the existing zoning of the land under the governing Development Plan.

5. The SDO granted Castle Harbour Limited, the "*applicant*", "*planning permission in principle*" in respect of the land described in Schedule 2, subject to various matters reserved for the DAB's subsequent approval and conditions (paragraph 3). It also granted "*planning permission for the draft plan of subdivision*", subject to various conditions including the submission of a final plan of subdivision to the DAB (paragraph 4). The SDO further granted separate conditional planning permission for the land described as White Crest Hill.

6. The proposed development, described in Schedule 1 in detail, related to eight areas to be developed into (more or less) individual residential lots, five lots together with one site to be conveyed to the Government, and the White Crest Hill property for the development of 50 residential, amenity and conservation lots. Schedule 2 listed the 11 sites involved. Four applications for final subdivision approval were made to the DAB between about August 2012 and April 2013. BEST objected to each application.

7. The first objection[3], to application #S0026/12 (6 additional lots), (1) argued that paragraph 3 of the SDO applied to a paragraph 4 application, and that the access road was impermissibly steep, (2) expressed concern about the need for proper studies to confirm the accuracy of the belief that there were no caves, (3) identified a risk that excavation on steep hillsides would destroy vegetation to an unacceptable extent, and (4) called for an EIA to determine the environmental impact of the development as a whole rather than on a piecemeal basis.

8. The second objection[4], to application #S0030/12 (10 additional lots) raised similar concerns to (1), (2) and (4) advanced in the first objection. A third (*pro tem*) objection[5], pending a meeting to flesh out concerns, was made in respect of application #S0037/12 (Lots 1 and 2 Harrington Sound Road). A fourth objection[6] was made in respect of application #S0042/12 (21 Stables Lane, St. George's). This was a broad complaint that a steep narrow wooded hillside would be replaced by a dense condo development destroying a bird and plant habitat.

[3] Letter dated August 31, 2012: A1/TAB5, page 27.
[4] Letter dated September 28, 2012, A1/TAB5, page 38.
[5] Letter dated November 9, 2012, A1/TAB5, page 50.
[6] Letter dated December 21, 2012, A1/TAB5, page 62.

9. On April 1, 2013, revised applications were submitted including environmental reports for each parcel. On April 18, 2013, a meeting took place between representatives of BEST and Tuckers Point Real Estate. On May 1, 2013, the Department of Conservation Services ("DCS") recommended to the Director that final subdivision approval be granted[7] on a conditional basis. The basis of the recommended conditions was the following overriding premise:

> "*It is the opinion of DCS that the Tucker's Point site is an extremely important ecological area due to its habitats, presence of flora (endemic, native and specimen ornamentals), fauna, geology (caves and Karst features) and topography; which makes it deserving of its designation as 'Sensitive Environmental Areas' (TPC SDO Section 4, Subparagraph 2 both (e) and (f)).*"

10. The Memorandum then went on to recommend the following approach:

    (a) consideration should be given to amending lot boundaries to keep the clearance of flora to a minimum, as suggested in the Terrestrial Ecology Survey;

    (b) the recommendations made in the "excellent" Terrestrial Environmental Surveys ("TES") should be accepted at the final subdivision and final "'lot by lot'" application process;

    (c) taking into account additional environmental considerations in respect of various sites, including testing for caves using a less intrusive form of technology than the "bore-hole drilling" contemplated by the SDO-electrical resistivity imaging ("ERI"), and re-routing access to Paynter's Hill.

11. On May 3, 2013, BEST supplemented its earlier objections and made the overarching submission that no development should be approved at all without an EIA and a related Environmental Impact Statement ("EIS"). By letter dated May 6, 2013, the Department acknowledged receipt and promised BEST an opportunity to consider and respond to the Department's final position on the applications. BEST was advised that objections would be summarised in the Board Reports and all objection letters would be placed before the Board. On July 2, 2013, the Department advised BEST that it proposed to support the applications[8] and (a) invited the submission of any further comments by July 12, 2013, (b) invited BEST to inspect the file, and (c) advised that

[7] In respect of at least three of the four applications which formed the subject of BEST's subsequent appeal: A1/TAB5, page 79.
[8] Five in total, although only four are relevant for the purposes of the present appeal.

the Department supported the use of ERI instead of borehole drilling as provided for in the SDO as a means of identifying caves.

12. The four applications were considered by the Board at a meeting on July 17, 2013 and approved subject to the conditions recommended by the Department. Separate Board Reports[9] and Minutes[10] were prepared in relation to each application. Attendance appears from the Minutes to have been restricted to DAB members and representatives of the Department. However, unknown to BEST before the DAB granted the applications on July 17, 2013, the Board heard oral submissions at two meetings BEST was not invited to attend:

    (1) on April 24, 2013, the Ombudsman made a presentation to the Board on the legal requirements for an EIA/EIS, based in part on her Report 'Today's Choices-Tomorrow's Costs' (February 2012), which criticised the approval of the SDO without first carrying out an EIA[11];

    (2) on May 15, 2013, the Board received presentations from Bermuda Environmental Consultants Ltd. ("BEC"), the agents of the Applicants, about their supporting studies. After noting that an important part of the EIA concept is public consultation, BEC is recorded as arguing that the SDO approval in principle made an EIA redundant[12].

13. The Board Minutes for May 22, 2013 under "***ANY OTHER BUSINESS***" record the following 'interim' decisions:

> "*Re: Tucker's Point Applications*
>
> *The Board, having heard from the Department of Planning's Legal Representative, and based upon the provisions of the Bermuda Plan 2008, considered that the standing of the UK Environmental Charter 2001 was such that it had no legal obligation to require an EIA and could not vacate the SDO, which is law, in favour of the Charter, which is not law in Bermuda. The Board debated the matter and, taking into all information presented to it on this topic over the last few weeks, resolved that:*
>
> 1. *it will not require an EIA/EIS for the Tucker's Point Club applications; and*
> 2. *it will not require a public meeting.*"

[9] A1/TAB 5, pages 146-193.
[10] A1/TAB 5, pages 194-218.
[11] A2/TAB 8, page 2-3.
[12] A2/TAB 8, pages 2-5 to 2-6.

14. On the face of the record, it seems clear that the DAB rejected BEST's EIA proposal on the basis of an argument advanced by BEC on behalf of the Applicants and supported by the Department's legal adviser which BEST was not given an opportunity to respond to. Indeed, BEST was seemingly not put on notice that this decision was proposed to be formally made as an interim decision before the applications were decided on their merits on July 17, 2013.

15. By way of contrast, and on the face of the record, it appears that BEST was given at least some opportunity to be heard in writing as to the merits of the applications. On the other hand, the record reveals that DAB seemingly heard oral representations from the Applicants' consultants on May 15, 2013 about their reports and matters which went to the merits of the applications. BEST was clearly not afforded an opportunity to respond to these representations.

16. The DAB decisions granted conditional final subdivision approval for each of the four impugned applications. The July 17, 2013 decisions were communicated by the DAB to the Applicants in letters dated July 26, 2013 which were copied to BEST[13]. The conditions varied to some extent based on the particular nuances of each application, and did not merely slavishly follow (or incorporate by reference) the SDO conditions. But some conditions were generic. For instance:

> "*3. Prior to the submission of DAP 1 applications for any of the hereby approved lots, Earth Resistivity Imaging (ERI) shall be conducted for all lots and shall ensure that detection reaches a minimum depth of 26 feet below grade. The results shall be submitted to the Department of Planning for review. If results show that any of the hereby approved lots cannot accommodate development without damage to a cave feature, either boundary adjustments shall be made or approved lots shall be re-described for amenity/conservation purposes via an Application for Revision…*
>
> *7 Prior to the submission of DAP 1 applications for any of the hereby approved lots, topographical field surveys shall be conducted for all lots and used as a basis for designing development for each lot. If results show that any of the hereby approved lots cannot accommodate development without excessive cut and fill, either boundary adjustments shall be made or approved lots shall be re-described for amenity/conservation purposes via an Application for Revision...*"

17. Inherent in the "final" subdivision approval decisions is the notion of an ongoing assessment of environmental concerns and the possibility of the Applicants being required to submit revised applications for final subdivision approval to deal with significant issues which cannot otherwise be resolved.

[13] A1/TAB 5, pages 219-232.

18. Finally, all decision letters were sent to "Tuckers Point Real Estate", although applications were made in different names all or at least some of which were not entities which existed in legal terms. The DAB clearly was not concerned with the precise identity of the Applicants concerned in circumstances where there was seemingly no doubt about the corporate group to which they belonged.

The appeal to the Minister

19. By letter dated August 21, 2013, BEST appealed against the four decisions on 24 grounds, despite fairly commending the DAB for "*its heroic attempts to shore up deficiencies in the SDO with additional conditions*"[14]. The points made in a letter running to over 16 pages can be distilled into the following main categories:

    (1) the broad complaint, substantiated with various detailed supporting arguments, that the TES studies ought not to have been accepted because of a lack of public consultation and because they failed to provide the cumulative and global analysis which an EIA would have assured and which a project on this scale deserved;

    (2) the specific complaint that the DAB failed to have regard to the fact that an EIA was still possible despite the fact that in principle approval had already been granted;

    (3) the specific complaint that the DAB failed to compensate for the "admitted" expertise deficiency of the TES authors as regards cave biology, ecology and fauna by imposing conditions for the involvement of other experts, such as Dr. Iliffe. However, the appeal letter appears to have itself conceded (at page 5) that the TES authors did not admit a lack of expertise on these matters, but a lack of information or data;

    (4) the broad complaint that the TES failed to adequately convey the environmental impact of excavation, site clearance and related impact issues;

    (5) the specific complaint that the TES and the DAB failed to adequately consider the economic viability of the project;

    (6) the specific complaint that the DAB failed to impose two conditions recommended by the Department of Environmental Protection ("DEP"),

[14] A1/TAB 5, page 234.

namely the requirements that ERI data be forwarded to DEP and that DEP be able to observe the test survey;

(7) the specific complaint that the following additional conditions ought to have been imposed:

> "*i. No non-ERI related ground-breaking activities until ERI efficacy is confirmed.*
> *ii. Equivalent woodlands to be created to compensate for those lost.*
> *iii. Encroachment on protected species to be made impact neutral*";

(8) the specific complaint that the TES studies omitted any reference to important and relevant documents authored by Dr. David Wingate.

20. Permanent Secretary (as he then was) Dr. Derrick Binns the day after each appeal was filed acknowledged receipt, advised that the Applicants had been notified of the appeals and confirmed that the permissions granted would be stayed pending appeal pursuant to section 18(3)(a) of the Act.

21. The Applicants responded to each of the grounds of appeal in a separate letter dealing with each application[15]. However, they did not deal with complaints which were directed at the DAB and/or the Department of Planning. They took the position that the SDO did not require an EIA and that this was not an issue for them to address. The Applicants also pointed out that it was they themselves who had proposed ERI testing instead of the bore hole drilling method prescribed in the SDO. They made the following further points in response:

(1) no admissions had been made by the TES authors of any lack of expertise;

(2) the impact of excavation had been clearly identified. It was premature, before the design phase, to evaluate the extent to which restoration would take place after initial site clearance. In light of the SDO, considering loss of land, loss of aesthetic amenity and non-compliance with local laws was irrelevant;

(3) adequate resources (4500 Bermuda-related documents) had been cited in the TES studies;

(4) the Applicants had gone beyond the scope of the conditions imposed by the DAB by inviting DEP to witness the ERI surveys.

[15] A1/TAB 5, pages 262-291.

22. The Director of Planning responded to the grounds of appeal in Memoranda to the Minister, each dated September 13, 2013, on behalf of the Department[16]. It was proposed that the appeal be dismissed. The Department submitted that:

    (1) the TES studies were consistent with the requirements of the SDO, which overrode the 2008 Planning Statement, and did not require an EIA;

    (2) the authors of the TES consulted with the Department on scoping issues before commencing their studies;

    (3) the Department agreed that qualified experts should conduct the ERI. The existing conditions would govern this. Related to this, the Department recommended the Minister impose an additional condition for ERI testing in areas to which paragraph 3(b)(c) of the SDO applies (in relation to applications #S0026/12, # S0030/12);

    (4) the SDO did not require an impact neutral approach. However, the TES recommended landscaping schemes that would utilise local and native vegetation, and the approvals included a related advice note.

23. BEST's Reply submissions were forwarded to the Permanent Secretary on October 7, 2013[17]. The case for an EIA was forcefully reiterated, it being noted that selective reliance was being placed on the SDO with no principled objections to an EIA being advanced. It was also noted that it was surprising that the economic rationale for the development was virtually ignored in the submissions, especially since the Tuckers Point Club was now in receivership. BEST was advised by the Permanent Secretary on October 9, 2013, that the appeal record was complete and would be reviewed by an "*independent inspector*"[18]. Peter Cuming, Planning Inspector, advised the Minister by letter dated December 12, 2013 that the appeals should be allowed and the permissions granted set aside. His Report stated, in salient part, as follows:

    "*7. In my view, the determining issues in these appeals is whether or not there has been sufficient scrutiny sought of the likely environmental impact of the proposals to enable to judge them to be acceptable, and if there has not, whether or not there are extenuating circumstances that justify setting aside such a conclusion.*

    8. Concerning the legal obligations arising from the government's signing the Environmental Charter on 26th September 2001, it seems to me that any suggestions that the provisions of the Environmental Charter were simply aspirational, is unsubstantiated. From my site inspections, and scrutiny of the

[16] A1/TAB 5, pages 292-315.
[17] A1/TAB 5, pages 319 to 316.
[18] A1/TAB 5, pages 327-330.

files, I am of the view that the prescriptive requirement to deploy, inter alia, the geophysical technique of Electrical Resistivity Imaging is indicative of an inappropriately narrow perspective on the environmental impact assessment requirements. The means might be mistaken for the ends itself. The field of Environmental Impact Assessment (EIA) analysis is complex and of growing sophistication. Often as not, it is an iterative activity that informs the town and country planning development control process as the EIA advances. It frequently modifies the 'design brief' as it progresses. Positive and negative feedback arise and the activity should allow scope for development area boundaries (application plan red lines) to be moved and, as the EIA proceeds, to be adjusted. Accordingly, with regard to these three appeals, it appears that a holistic EIA programme including surveys of Karstic geology, and much more, need to be agreed with overt public consultation.

9. Additionally, preliminary studies would benefit greatly from an economic appraisal of the sustainability of the proposals. In a part of Bermuda where the environment is evidently both attractive and vulnerable, it would seem perverse to omit an analysis of the benefits of development, whatever they may be, against the adverse effect of change involving landscape losses. This part of Bermuda is of such a quality that it demands development sensitivity. Development decisions can only be reached after the DAB has all the pertinent information. The 'shopping list' of requirements in the 26 July 2013 approval (planning permission), is insufficient to guarantee the pertinent information of the kind an overarching EIA should supply.

10. Consequently, I share the Appellants' concern that the 4 applications are deficient and if allowed to proceed would risk the charge that the DAB prematurely reached its decision when 'it is essential that the Board has all the pertinent information' beforehand.

11. In my view, there can be little doubt that a comprehensive EIA for all 4 appeal sites and their surroundings should precede any fresh planning applications for their development. Whilst it is incontestable that European practice on the timing of EIA's is flexible; here are cases where no further planning can be advanced sensibly without a 'full blown' EIA of wide scope. Such a study should address the valid concerns of those locally who seek to promote environmental sustainability inside and outside the Ministry and involve public consultation before decisions are solidified...."

24. The Inspector's analysis declined to condescend to a detailed analysis of the pros and cons of each application. Rather, informed by the view that there was a positive legal obligation to conduct an EIA in the context of an environmentally sensitive part of Bermuda, he challenged the adequacy of the information relied upon by the DAB in global terms. On February 28, 2014, the Minister supplied BEST with his decision

together with a copy of the Inspector's Report. His March 12, 2014 revised decision[19] is the subject of the appeal to this Court.

25. Meanwhile, on February 17, 2014, at the Minister's request, representatives of the Receivers and Tucker's Point Resort met at the Minister's offices at the Dame Lois Browne-Evans Building on Court Street. According to the First Affidavit of Daniel Woodhouse, the following interchange took place after an entirely separate new development concept for the resort was discussed:

> "*5. The Minister asked if the permissions to register the approved plans of subdivision pursuant to the SDO were important to the proposed concept. Mr. Hutchinson advised that:*
>
> *(i) The applications were very important, as the development potential represented a source of capital that an eventual purchaser of the resort could use to develop the concept; and*
>
> (ii) *If debt funding was required, the development may be marginal.*"

26. Meeting Notes which were eventually disclosed revealed that the proposed new development, which was said to be dependent upon the planning permissions subject to appeal, was said to potentially involve a very large construction project. In other words, the Minister was told that for reasons unrelated to the merits of the permissions under appeal, there would likely be significant economic benefits if the permissions were upheld. In an attempt to mitigate the effects of this meeting, the Minister arranged to meet with BEST's representatives on February 21, 2014. They met without prejudice to the right to complain that the previous meeting was legally improper. It is common ground that BEST was not given any or any sufficient opportunity to respond to the specific financial arguments advanced by the planning Applicants for dismissing the appeal.

27. Although the Minister very sensibly conceded that his decision was liable to be set aside on natural justice grounds, it is necessary to consider its contents because the question of whether the appeal against the DAB decisions should be remitted to the Minister for re-hearing falls for determination. The Minister rejected the Inspector's Report for the following main reasons:

> (1) the "*SDO was fully debated in the Legislature and is law in Bermuda...the SDO <u>did not</u> require an EIA*" (page 3);

[19] A1/TAB 5, page 344.

(2) the TES were expanded beyond the scope of the SDO and the applications did permit a measure of public consultation through the advertisement/objector processes (pages 2-3);

(3) the Receivers had informed the Minister on February 17, 2014, in effect, that the financial position of the companies had not changed since the SDO was debated and that it would be detrimental to them if the applications were not approved (page 4);

(4) the "*Board's role was to assess compliance with the conditions detailed in the original permission, not debate again, the principle established by the SDO*" (page 5).

28. The most obvious omission from the Minister's decision was the absence of any reasoned rejection of the subtle but central point that the quality of the information which informed the grant of permission was diminished by the alleged 'flatness' of the methods which had been deployed to assess the environmental concerns. This was the core technical thesis of the Inspector's Report, broader and more loudly trumpeted philosophical arguments about the desirability of an EIA apart. The option of deploying EIA techniques because they were desirable, even if they were not required, was also seemingly ignored. This was perhaps, in part at least, because the Minister rejected the Inspector's apparent legal finding that a "full" EIA was positively required and felt that this flawed reasoning undermined the validity of the recommendations made as a whole.

Legal Findings: the requirements of an EIA under Bermudian domestic law (independently of the SDO)

The statutory framework

29. Bermudian law requires planning authorities as a general rule to conduct an EIA when asked to grant planning permission in relation to major projects such as the Tuckers Point development which forms the subject of the present appeals. The legal obligation arises in the following way.

30. Bermudian planning law is primarily found in the Development and Planning Act 1974 ("the Act"), and rules made under it. It also incorporates two other species of subsidiary or delegated legislation. The Minister is obliged by section 6 of the Act to prepare a development plan. Section 11 of the Act provides:

"*(8)The Legislature may, by resolution of each House, approve a development plan, or proposals for the amendment of such plan either as originally prepared or as modified so as to take account of any objections or representations made under this section and the report of the Minister thereon.*

(9)The approval of a development plan, or of proposals for amendment of such a plan, by the Legislature shall be published in the Gazette by the Minister and in at least one daily newspaper and copies of any such plan or proposals as approved by the Legislature shall be available for inspection by the public at the offices of the Minister and at such other places as the Minister may determine.

(10)Subject to section 10, a development plan, or an amendment of a development plan, shall become operative on the date on which it is approved by the Legislature or on such subsequent date as may be specified in such plan or amendment."

31. Section 15 of the Act provides as follows:

"***Development orders***
15. (1) The Minister may by order (in this Act referred to as a "development order") provide for the granting of planning permission.

(2)A development order may either—

(a)itself grant planning permission for development specified in the order, or for development of any class so specified; or

(b) in respect of development for which planning permission is not granted by the order itself, provide for the granting of planning permission by the Board on an application in that behalf made to the Board in accordance with the order.

(3)A development order may be made either as a general order applicable (subject to such exceptions as may be specified therein) to all land, or as a special order applicable only to such land as may be so specified.

(4)Planning permission granted by a development order may be granted either unconditionally or subject to such conditions or limitations as may be specified in the order.

(5)Without prejudice to the generality of subsection (4) where planning permission is granted by a development order for the erection, extension or alteration of any buildings, the order may require the approval of the Board to be obtained with respect to the design or external appearance of the buildings.

(6)Any provision of a development order whereby planning permission is granted for the use of land for any purpose on a limited number of days in a

period specified in that provision shall (without prejudice to the generality of references in this Act to limitations) be taken to be a provision granting planning permission for the use of land for any purpose subject to the limitation that the land shall not be used for any one purpose in pursuance of that provision on more than that number of days in that period.

(7)Orders made under this section are subject to the affirmative resolution procedure."

32. Section 13 empowers the Minister by order to change the designation of any land as a conservation area or special study area. Section 15 in broad terms empowers the Minister by order to either grant permission or provide for the grant of permission on the terms of the order, either generally or as regards the specific land identified by the relevant order. A 'general' development order is accordingly a means of modifying the provisions of a development plan generally. A 'special' development order is a means of modifying the provisions of a development plan as they would otherwise apply to the special case to which the order applies.

33. Absent an order under section 15, however, it is clear that the development plan has legislative force. Section 17(1) provides that the DAB in considering applications for planning permission:

"*(a) shall not grant planning permission which would result in development at variance with this Act, a development plan, the regulations, a zoning order, a municipal bye-law or other statutory provision, to the extent that the same may be relevant to the application*…"

34. On the other hand, the Judicial Committee of the Privy Council has held, upholding the decision of the Court of Appeal for Bermuda which reversed the contrary finding of Meerabux J at first instance, that the Minister may authorise departures from a plan when entertaining an appeal from the DAB. The Minister's appellate function under section 57(7) of the Act requires him to:

"*...have regard to the provisions of the development plan for the area where the land in question is situated, in so far as those provisions are material to the development of that land, and to any material consideration.*"

35. In *Barber-v-Minister of Environment and Scarborough Property Holdings Ltd.* [1997] UKPC 25, Lord Slynn (delivering the advice of the Board) held as follows:

"*23. The Minister must have regard to the prohibition in the limitation (and the more precise the restriction and the more limited the area to which it relates may lead him to observe the limitation or prohibition as one having been carefully worked out as a statement of intent in a particular area) but he may still say that on a particular application he will depart from or modify it. This would be so even if there were no reference in section 57(7) to other material considerations. But the Minister is required to have regard not merely to the development plan but also to 'any material*

consideration'. Other material planning considerations may point in a different direction to those in the plan. If so the Minister must decide between them so that he cannot be rigidly bound by the provisions of the development plan."

36. In my judgment, this decision cannot be construed as holding that the Minister can, by executive fiat, modify the terms of a planning statement (or, by logical extension, a development order as well) without seeking the Legislature's approval. The Judicial Committee's analysis of the Minister's appellate powers merely signifies that the Minister when hearing an appeal is not required to slavishly follow the terms of the planning statement, as the DAB is required to do. His statutory duty to formulate planning policy confers on him a certain margin of appreciation to adjudicate planning applications in a broad and purposive manner having regard to "*material planning considerations* [which]*... point in a different direction to those in the plan*". It remains to be determined on a case by case basis the extent to which any decision made by the Minister to depart from the strict requirements of the development plan falls within the ambit of that executive margin of appreciation.

37. Having regard to the way in which local and international environmental law has developed since 1997, however, I regard the instincts of Meerabux J in seeking to construe narrowly the extent to which the Minister could depart from the development plan in *Barber* to be fundamentally sound in broad principle terms.

EIA requirements in the development plan

38. Chapter 6 of the 2008 Development Plan provides, so far as is relevant for present purposes, as follows:

> "...*The environmental objectives and policies of this Plan reflect and complement the goals and recommendations of other Government environmental initiatives including the Environment Charter, the Sustainable Development Strategy and Implementation Plan and the Biodiversity Strategy and Action Plan. The valuable information collected as part of these and other initiatives will be used to ensure sound decision making regarding development proposals.*"
>
> *ENV. 4 The Board may require the submission of an Environmental Impact Statement for development projects which, because of the characteristics of the site or the particulars of the proposal, justify the Board carrying out a careful examination of the potential impacts of the development prior to the determination of the application including but not limited to such development projects as:-*
>
> *(a) large scale residential developments comprising 20 or more dwelling units;*
>
> *(b) large scale subdivisions of land comprising 10 or more lots;*

(c) major hotel and resort developments;

(d) power plants and water supply systems;

(e) sewage treatment and disposal systems;

(f) solid waste disposal systems;

(g) any other major utility development;

(h) major quarrying operations or major quarry development;

(i) major commercial developments;

(j) major industrial developments;

(k) major port infrastructure, airport or transport developments;

(l) reclamation projects; and

(m) marinas.

ENV. 5 An Environmental Impact Statement shall include the appropriate plans, information and data in sufficient detail to enable the Board to determine, examine and assess the potential environmental impacts of the proposal, including but not limited to:-

(a) the information specified in policy ENV.3;

(b) a detailed description of the proposal from inception through the site preparation, construction and operational phases;

(c) the data necessary to identify and assess the main effects the proposal is likely to have on the natural and built environment;

(d) a description and quantification of the likely significant effects, direct and indirect, on the site and surrounding area, explained by reference to the proposal's possible impact on:-

(i) humans;
(ii) flora and fauna;
(iii) soil;
(iv) water, including the ocean, inshore waters and ground water;
(v) air;
(vi) climate;
(vii) landscape; and
(viii) cultural heritage including historic protection areas, listed buildings and areas of historical and archaeological interest;

(e) a description of the measures to be implemented to avoid, reduce or remedy any adverse effects during the site preparation, construction and operational phases;

(f) the arrangements to be made for securing an adequate supply of water and the safe and efficient disposal of sewage;

(g) a summary in non-technical language of the information specified above; and

(h) any other information detailed in the Department of Planning's Environmental Impact Statement guidance notes…"[20]

39. The dominant principle in seeking information about planning applications is "*to ensure sound decision making regarding development proposals.*" The discretion to engage the EIA/EIS process is simply one means to achieve that end. This conclusion is supported by Section 1 of the Department of Planning's November 19, 2010 Policy Document, '*Environmental Impact Assessments and Environmental Impact Statements.*' Section 2.4 states that that the process is "*usually required*" for major developments, developments in sensitive areas and developments with complex and/or potentially adverse environmental effects. The elements of the process are spelt out in some detail; it is clear that while it is desirable to engage the process prior to the approval in principle phase, the concepts are sufficiently fluid to be deployed at a subsequent stage in the planning application process. For example, it is stated in sections 3.3.2, 3.3.7 of the Policy Document:

> "…*On occasion, the Department of Planning may give a pre-application opinion that an EIA/EIS is not required, only to consider it necessary to reverse that decision when the planning application is formally submitted and more information indicates that there is in fact a need for an EIA/EIS...An EIS should ideally be submitted with an in principle planning application as opposed to a final planning application*…"

40. In my judgment, it is clear that whether or not to conduct an EIA is discretionary or optional rather than mandatory. As Mr. Adamson pointed out, when the public were consulted on a draft of the Plan, BEST's express submission that the draft Plan be amended to make an EIA mandatory was opposed by the Department and rejected by the Tribunal and, ultimately, the Minister[21].

Summary: principal domestic law principles governing the EIA concept

41. There is no express mandatory statutory obligation to conduct an EIA under the Act as read with the Development Plan, as Mr. Potts contended. Rather there is a mandatory obligation for the DAB to obtain the best quality information to enable a

[20] Pages 50-52.
[21] Draft Bermuda Plan 2008 Tribunal Report, Volume 2: PC Ref No. 402/2/6/6/0042.

sound development decision to be made in relation to major proposed developments. Depending on the facts, this will usually require an EIA to be carried out (in relation to applications such as the Tuckers Point development), unless there is some rational basis for deciding that an EIA/EIS is not required.

42. There is no ambiguity in the relevant provisions which gives rise to any need to consider the international instruments to which counsel for BEST referred.

Findings: did the SDO by its terms exclude the need for an EIA at the final subdivision application stage and/or the final planning stage?

43. I can find no proper basis for construing the SDO as excluding the need for the DAB to consider the desirability of an EIA/EIS at the final subdivision application stage (most clearly) and/or prior to the final application stage. However, to the extent that the SDO granted planning permission in principle without an EIA having first been carried out, by necessary implication it excluded recourse to this procedure at the 'in principle' stage.

44. In reaching this conclusion, I accept BEST's broad submission that the EIA requirements are too fundamental to be excluded, as it were, by a side-wind. On the other hand I accept the Minister's submission (supported by the Applicants) that the EIA concept does not contain such rigidly defined content that the SDO's conditions can be read as incompatible with this fluid concept. Finally, I reject the Minister's contention, supported by the Applicants, that the SDO conditions should be construed so narrowly as to deprive the DAB of the discretion to view them as essentially minimum requirements which can be fleshed out as the planning process evolves.

<u>Final planning permission</u>

45. Paragraph 3 of the SDO most crucially provides as follows:

> "*(1)Subject to the reserved matters specified in subparagraph (2) and the conditions specified in subparagraph (3), planning permission in principle is granted by this Order for the development of the lands outlined in Schedule 2 for a period of 10 years from the date this Order comes into operation.*
>
> *(2) The reserved matters referred to in subparagraph (1) are as follows – building siting and layout, site coverage, building heights, building lines, parking provision, design and layout of all access roads and parking areas, building design, external appearance and materials of all buildings and structures, and landscaping.*"

46. Approval in principle is only granted to facilitate the development of the lands to a point which falls short of deciding where buildings are to be located, how buildings are to be designed and even how the access roads are to be laid out. "[R]*eserved matters*" is defined as follows in paragraph 1 of the SDO:

"*…matters reserved for approval by the Development Applications Board in accordance with section 23(8) of the Act in relation to the planning permission in principle granted by paragraph 3(1)…*"

47. Section 23 of the Act ("*Duration of planning permission*") prescribes a general rule that any application for final permission must take place within two years of the grant of permission in principle, although the DAB may modify this time period (section 23(4),(5)). The SDO expressly modifies this standard by substituting 10 years (paragraph 3(1)). However, it does not by its terms disapply the Act and the Plan as regards the application for final planning permission as regards the extensive range of reserved matters for which approval in principle has *not* been granted. The reserving of such matters is in my judgment clearly a route back into the normal planning regime in this respect. Section 23(8) must, in my judgment, be read with section 23(7):

> "*(7)In the exercise of their powers under this section the Board shall have regard to the provisions of the development plan and to any other material considerations.*
> *(8)In this section "planning permission in principle" means planning permission granted with the reservation for subsequent approval by the Board of matters (referred to in this section "reserved matters") not particularized in the application or which are specified by the Board when granting such permission.*"

48. It makes no sense to construe the SDO as envisaging an application in respect of the reserved matters by reference to section 23(8) read in isolation from the section as a whole. Because section 23(8), standing by itself, merely defines "planning permission in principle" for the purposes of section 23 as a whole. The reference to section 23(8) in paragraph 1 of the SDO (itself a definition clause) cannot sensibly be read as merely adopting the Act's definition of "permission in principle". The SDO, simply read, requires applications for final planning permission to be made, as regards the reserved matters and save where a contrary intention is manifested, pursuant to section 23 of the Act.

49. Do the conditions displace the operation of section 23(7) of the Act and the general requirements of the Plan? In my judgment, the conditions upon which approval in principle is granted, read in a straightforward way, are designed to delineate the content of studies required to support an application for final approval as regards the reserved matters. Paragraph 3 of the SDO provides as follows:

> "(3)*The conditions referred to in subparagraph (1) are as follows—*
>
> *(a)applications for final planning permission shall be accompanied where relevant by the following supporting studies—*

(i)a woodland vegetation (trees, grasses, ferns) assessment retention/ replacement/removal programme for each area/site;

(ii)a habitat survey;

(iii)a geotechnical assessment to determine existing caves/voids and cave features involving exploratory borehole surveys for locations of building sites, access driveways, and trenching works over 4 feet in depth. For building sites a minimum of 5 boreholes to a 26 foot depth in each corner of the proposed structure footprint and one in the centre; and

(iv)a land use impact analysis if any of the Sites infringe on, or are within the setback from nature reserve zoning.

(b)all existing or newly discovered cave features will require a subterranean topographical survey be completed by a qualified cave survey specialist to geo-reference the cave voids for terrestrial development potential considerations. All mapped caves, cave features and new caves will require a minimum setback buffer of 30 foot for all structures and excavation;

(c) all development must be designed with shallow tanks of minimum below existing grade depths of no greater than 3 foot depth finished level and 4 foot maximum excavation grade. No excavation should exceed 4 feet due to potential contact and impact with known or unknown cave systems. Any required sewage trenching deeper than 4 feet must rely on test boreholes to demonstrate that such trenching works will not compromise an undiscovered cave;

(d)no development should utilize wells for water or deep sealed boreholes for sewage, other effluent or grey water disposal;

(e)any identified critical habitat or existing mature specimen endemic, native or ornamental plants must be recorded; and these sites and plants must be protected and provided with an adequate setback buffer;

(f)all access roads and junctions with the public roads and sidewalks shall be sited, designed and laid out in accordance with the requirements of the Ministry of Public Works;

(g)all hard-surfaced roadways and junctions of the access roads with public and private estate roads shall be designed and graded to drain, retain and dispose of all stormwater run-off within the curtilage of the site and to avoid any stormwater

run-off onto the roadways, any neighbouring properties and conservation areas;

(h)all sewage treatment requirements for the residential lots to be created shall generally be met using the existing Tucker's Point Club sewage treatment facility with cesspits and septic tanks not permitted. If in any case, connections to the sewage system are infeasible, a three-chambered semi-septic tank system will be permitted;

(i)all utility cables, including cable television relay cables, shall be placed underground, in trenching no deeper than 3 feet;

(j)an application for final planning permission shall be accompanied by a comprehensive landscaping scheme in which particular attention shall be given to the types of plantings adjacent to woodland and nature reserve areas to ensure invasive plant types are avoided. A landscape principle of 40% endemics, 30% natives, 20% non-invasive ornamentals and 10% of any combination of endemics, natives or non-invasive ornamentals will be applied to each proposed lot; and

(k)Sites 1, 2, 7, 8, and 11, as described in Schedule 2, subject to this Order will require a Conservation Management Plan prepared on an area wide basis. The relevant area Conservation Management Plan must be filed with any application for final planning permission for development in that area."

50. Having regard to the fact that the SDO also grants "in principle" approval for subdivision, it is not immediately clear whether it is envisaged that the applications for final planning permission in relation to any of the reserved matters (i.e. building related matters) are intended to be made on a collective basis pre-sale of individual lots or on an individual basis post-sale of individual lots. Or, to put it another way, does the SDO contemplate that immediately post-sub-division, the Applicants (or their successors in title) would be free to sell off the lots, leaving individual owners to apply for final planning permission pursuant to the SDO? Alternatively, is it envisaged that the Applicants would be required to apply for final planning permission in respect of all the lots, so that subsequent purchasers would either purchase residences which have been built according to a comprehensive plan or to build in conformity with a comprehensive plan?

51. Paragraph 3(3)(k) expressly requires "*a Conservation Management Plan prepared on an area wide basis*" as regards Sites 1,2, 7, 8 and 11 in Schedule 2. The sites are defined by Schedule 2 as follows:

"*ALL THOSE lots of land, in St. George's Parish and Hamilton Parish, shown outlined on the following drawings—*

Architectural drawing:
1011.A.100B Key Plan
1011.A.101A Site 01: Glebe Hill
1011.A.102B Site 02: Paynter's Hill
1011.A.103A Site 03: Paynter's Road
1011.A.104A Site 04: Paynter's Road
1011.A.105A Site 05: South Road
1011.A.106B Site 06: Harrington Sound Road
1011.A.107A Site 07: Harrington Sound Road
1011.A.108A Site 08: Stables Road
1011.A.110A Site 10: Mangrove Lake
1011.A.111B Site 11: White Crest Hill…"

52. The nine Sites described in Schedule 2 appear to correspond to the "Development" described in ten paragraphs set out in Schedule 1. A "*Conservation Plan prepared on an area wide basis*" is accordingly required for:

    (a) paragraph 1, Glebe Hill, 3.279 acres to be divided into three single dwelling residential lots (Site 1);

    (b) paragraph 2, Paynter's Hill, 2.758 acres to be divided into nine single dwelling residential lots (Site 2);

    (c) paragraph 7, Harrington Sound Road, 0.421 acres, 0.799 acres, two single dwelling residential lots (Site 7);

    (d) paragraph 8, The Stables at Tucker's Point, three lots, one for ten residential housing units, one single dwelling lot, and one residential and mixed use up to 24 units (Site 8);

    (e) paragraph 11, White Crest Hill, 40.53 acres, 50 residential and amenity lots (Site 11).

53. There are therefore nine listed Sites, one of which is proposed to be donated entirely to Government, and eight of which form part of the Development proper. An area wide Conservation Management Plan is required for five of these eight Sites, and not required for the three Sites (3, 4 and 5) which consist of one single dwelling residential lot each. These three sites cover about 1.5 acres with the rest of the Development apparently covering more than 45 acres, 40 of which are at one Site (White Crest Hill). The final sub-division applications in the present case relate to Site 1 (#S0026/12); Sites 2 and 4 (#S0030/12); Site 7 (#S0037/12) and Sites 3, 5 and 8 (#S0042/12). Each application concerns a Site for which the SDO requires a Conservation Plan to be prepared on a Site basis rather than on a lot basis.

54. On the face of the SDO as a whole, therefore, the clear intention appears to be that final approval will be sought by the applicant (or its successors in title) before

individual residential lots are sold off to the ultimate resident owners. The area wide Conservation Management Plans mandated for the final approval application stage could not conceivably be intended to be prepared by multiple unconnected applicants. This view is reinforced by the fact that the SDO clearly envisaged the subdivision application to be made by one applicant, as Mr. Potts rightly submitted, and the fact that any of the studies mandated for the final planning approval phase by paragraph 3(3) may be required by the DAB at the earlier final subdivision application phase (paragraphs 4(2)(f) and 5(2)(d)).

55. The mere fact that the SDO contemplates a mandatory Site-based environmental assessment for certain Sites at the final planning permission stage, and does not expressly provide for a Development-based environmental assessment, in my judgment merely demonstrates that the Minister elected not to mandate an EIA for the Development as a whole. This was entirely consistent with the approach adopted in the Development Plan, which makes an EIA desirable in certain circumstances, rather than obligatory. It does not demonstrate an intention to abrogate the discretion the DAB generally has in large developments to require an EIA at any stage, albeit that:

    (a) the content of any EIA would be to some extent shaped by the content requirements of the SDO;

    (b) planning permission in principle has already been granted, thus narrowing the scope of inquiry any EIA could reasonably be expected to embrace.

56. In this regard it is noteworthy that although the main political case advanced in support of the SDO appears to have been economic, the SDO itself appears to be silent on the economic theme. It is impossible to sensibly construe the SDO as excluding, by necessary implication, the ability of the DAB, at the final planning permission stage, to take into account any material change in circumstances of an economic or financial nature.

Final subdivision permission

57. Because the final subdivision application is an even earlier phase of the planning application process, in my judgment it is far more straightforward to conclude that the SDO did not envisage that the applicant (or its successor in title) would, pre-final subdivision approval sell off the new lots to residential owners. This would only be practically feasible after final subdivision approval had been obtained.

58. I further find that paragraphs 4 and 5 of the SDO do not, by necessary implication, deprive the DAB of the option of requiring a global EIA/EIS at that stage. Obviously, the same *caveats* (as regards the implications of prior approval in principle and the content specifications applicable to final planning approval under the SDO) would also apply. Mr. Adamson cited the following persuasive extract from the British Columbia Court of Appeal decision in *Pollard-v-Surrey* [1993] Can LII 2764 (Proudfoot, J), which provides general support for this conclusion:

"*31Counsel for Surrey explains the process in paragraph of his factum which reads as follows:*

> *Although Surrey required an E.I.A., it expressly and deliberately did not do so as part of the rezoning or land use decision. Surrey undertook the environmental review in two stages. The first stage was a preliminary environmental overview where a consultant was retained to advise if there were any environmental issues sufficiently serious to convince Surrey that the project should not proceed. If, as ultimately happened, the preliminary review did not preclude development, the E.I.A. would then be utilized in the second stage, being the development permit stage, as to how the course should be built, rather than whether it could be built.*

32 I can see no criticism of that approach. In any event, it is not for the courts to interfere with the functions of local government carrying on its ordinary course of business; barring bias, procedural unfairness or dishonesty being established, it is entitled to go about its business free of the court's scrutiny. In the case at bar, it was a decision that council was entitled to make, at what stage it would have an environmental impact assessment done. It is not for the courts to make that decision."

59. Mr. Martin in the Applicants' Skeleton Argument submitted that the pre-SDO phase of the Development had occurred on the following basis in the present case:

> "*26. The detailed 'scoping' of the parameters of the development was in fact conducted by representatives of the department of Planning and the Department of Conservation along with experts employed by the developers who prepared the TES which was reviewed and ultimately approved by the DAB as meeting the requirements of the SDO.*"

Summary

60. I consider the terms of the SDO are in the above respects unambiguous and that no need to resolve competing constructions by reference to extraneous material arises. However, in case I am wrong, I will consider whether there are any extraneous materials which support the conclusion that the SDO did not exclude by implication the DAB's discretion to require a global EIA/EIS for the entire Development.

Findings: relevance of international legal obligations relating to the EIA/EIS concepts to resolving any ambiguities in the terms and effect of the SDO

Introduction

61. In the Ombudsman's Special Report to Parliament dated May 2013, '*Diligent Development-Getting It Right: Update on Legal Status of UK ENVIRONMENT CHARTER*', the Ombudsman for Bermuda opined (at page 2) as follows:

> "*By signing the UK Environment Charter in 2001 Bermuda legally bound itself to conduct EIAs before approving major projects…*"

62. Mr. Potts relied upon these findings (and earlier reports critical of the way the SDO was made) in relation to the Charter, and also argued that the Aarhus Convention extended to Bermuda. The application of the Charter to Bermuda was uncontroversial; the application of the Convention was contested.

The UK Environment Charter

63. On September 26, 2001, Bermuda (Dame Jennifer Smith) and the United Kingdom (Baroness Valerie Amos) signed an Environment Charter. Bermuda's Government made the following commitment:

> "*4. Ensure that environmental impact assessments are undertaken before approving major projects…*
>
> *5…ensure that environmental impact assessments include consultation with stakeholders…*
>
> *11. Abide by the principles in the Rio Declaration on Environment and Development…* "

64. This was a bilateral agreement creating an international legal obligation on Bermuda's part, albeit one only enforceable by the United Kingdom Government. The Government is subject to a positive international legal obligation to carry out an EIA "*before approving major projects*". The precise form and content of the requisite EIA is not spelt out, save that it must include public consultation. Less tangibly still, BEST's counsel also relied upon the Overseas Territories' Joint Ministerial Council Communique of December 5, 2012 which memorialised Bermuda's commitment to "work together":

> "*…to ensure that where commercial use of natural resources take place, it is carried out in the most sustainable and environmentally responsible way (including through the use of environmental impact assessments…*)"

65. These are both very general commitments, although I tend to agree with the Ombudsman that it is diluting their legal status unduly to describe these obligations as being merely aspirational in character. Mr. Adamson nevertheless correctly submitted that there is no comprehensive international legal definition of an EIA; what the term means is subject to more detailed definition both (a) in national legislation, and (b) in the context of a nuanced application to the facts of specific cases. He supported that by reference to extracts from the judgment of the International Court of Justice ("ICJ") in a case concerning obligations under the Statute on the River Uruguay.

According to the ICJ in a *Case Concerning Pulp Mills on the River Uruguay (Uruguay-v- Argentina)* (2010):

> "*204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 (a) and (b) of the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment…*
>
> *In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.*
>
> *205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment… Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.*"

66. These observations, made in the specific context of the management of transboundary stocks, apply with equal force to the broader international obligations BEST relies upon in relation to the conduct of EIAs in relation to any environmentally significant commercial developments. Through the Environment Charter, Bermuda agreed to abide by the Rio Declaration, which in addition to articulating the need for a precautionary approach provides as follows in very broad and nonspecific terms:

> "*Principle 17*
>
> *Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.*"

67. The cumulative effect of all of these international commitments, despite their generality, on the construction of the SDO is as follows. If it is possible to fairly choose between two interpretations of the SDO, one excluding any need to even consider the desirability of an EIA at any point in the final planning application status, and the other preserving the DAB's right to require an EIA, the latter interpretation must be preferred. Construing the SDO as excluding the need to even consider the desirability of an EIA would be inconsistent with international obligations assumed by Bermuda which emphasise the importance of conducting an EIA in relation to major commercial projects likely to impact significantly on the environment. Clear legislative words would be required to justify the conclusion that the Minister intended to abrogate such an important international legal obligation.

68. I accept, contrary to the provisional view I expressed at the hearing, that the requirement to conduct an EIA <u>of some sort</u> in relation to major environmentally impactful development projects is now probably a general principle of international law. I rely, in particular, on the passages in the *Pulp Mills* case reproduced above and upon which BEST relied. Mr. Potts correctly submitted that general principles of international law become automatically incorporated into our domestic common law: *Trendtex Trading Corporation-v- Central Bank of Nigeria* [1977] 1 Q.B. 529 at 553B-554H (Lord Denning, MR). However, as Bermuda legislation has expressly dealt with the same topic of EIAs in non-mandatory terms, this finding becomes academic in the sense that it cannot be contended that a common law rule can override primary or subsidiary legislation.

69. However, I do place reliance on the high status of the principle that an EIA will be conducted whenever it is environmentally desirable, as a general principle of international law, as further fortifying the presumption that Bermudian legislation does not intend to override Bermuda's international legal obligations.

<u>The Aarhus Convention</u>

70. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was adopted at Aarhus, Denmark, on June 25, 1998. It contains more detailed prescriptions on the procedural and content elements of an EIA, and articulates principles of public participation in environmental decision-making. The United Kingdom ratified the Convention on February 25, 2005, without limiting the territorial application of the Convention. Mr. Potts submitted that the effect of this was that the Aarhus Convention extended to Bermuda, applying the following principles contained in the Vienna Convention on the Law of Treaties:

> "*Article 29*
> *Territorial scope of treaties*
>
> *Unless a different intention appears from the treaty <u>or is otherwise established</u>, a treaty is binding upon each party in respect of its entire territory*." [emphasis added]

71. That is the classical international legal principle, but it is subject to modification by state practice. Mr. Adamson aptly relied upon the United Nations '*Final clauses of*

Multilateral Treaties Handbook' (2003),which (at page 82) describes the United Kingdom practice in terms of signifying the territorial scope of its treaty obligations as follows:

> "*When expressing consent to be bound, the United Kingdom may declare in writing to the depositary to which, if any, of its territories the treaty will extend. If the instrument expressing consent to be bound refers only to the United Kingdom of Great Britain and Northern Ireland, it applies only to the metropolitan country*."

72. The United Kingdom of Great Britain and Northern Ireland is recorded as a party to the Convention. There is no suggestion that there has been any express extension of the Convention to Bermuda. This practice is a longstanding one, and is a reflection of the autonomous nature of the domestic legal systems of British territories like Bermuda. As noted in Ian Hendry and Susan Dickson's '*British Overseas Territories*'[22]:

> "*If the instrument states that the treaty is being ratified in the name of 'the United Kingdom of Great Britain and Northern Ireland, it is the practice of the United Kingdom, in the absence of any contrary indication, to regard the treaty as not applying to any of its territories. This approach to treaty ratification has been applied consistently since 1967, and thus in the United Kingdom Government's view meets the requirement in Article 29 of the Vienna Convention to establish a different intention, and is one with which international organisations and other States seem content.*"

73. I find that the Aarhus Convention does not extend to Bermuda.

Summary

74. Bermuda has committed itself in various international agreements to use EIAs (fluidly defined) before approving major commercial projects with significant environmental implications. To the extent that the SDO is ambiguous as to whether it ought to be read as either excluding EIAs altogether or retaining the regulatory power to conduct an EIA, I would resolve such ambiguity in favour of construction which is most consistent with Bermuda's international treaty obligations.

Legal Findings: relevance of legislative history of the SDO to resolving any ambiguities in the terms and effect of the SDO

75. The Parliamentary debate, and in particular the pronouncements of then Minister the Honourable Walter Roban is less clear in terms of supporting a construction of the SDO which either excludes or preserves the right of the DAB to conduct an EIA. The debate can be read as supporting the proposition that an EIA of sorts had already been carried out, and that the SDO conditions, the product of a consultation exercise driven

[22] (Hart Publishing: Oxford and Portland, 2011), pages 255-256.

by the Ministry's technical officers, constituted a comprehensive pathway for environmental assessment of the balance of the development process. For instance, in a passage upon which Mr. Martin relied, Minister Roban on February 28, 2011[23] stated:

> "*This Order has been crafted specifically towards this case, Mr. Speaker. There is nothing generic about it, because there is a clear understanding of the sensitivities of the land spaces that is being considered, and it has been crafted to appeal to those issues...the conditions have been determined after full consultation with the advice from the technical officers...*"

76. On the other hand, other pronouncements by the then Minister support my above findings that the Applicants (or a similar developer) were expected to develop the various Sites before sale to individual lot owners and that the general planning rules would still apply. For instance[24]:

> "*Again, Mr. Speaker, what is being required here is for <u>them</u> to be exposed to the same planning regime that everyone else is-it is not allowing <u>them</u> to jump over it. <u>They</u> are going to be specifically exposed to it and have to follow it in order to realise whatever opportunity is being afforded through the applications under this Order.*" [emphasis added]

77. Those general rules embodied an element of public consultation through the advertisement and objector mechanisms; they also incorporated optional but recommended EIA procedures. Mr. Potts relied on the latter statement, and (amongst other passages in Hansard) referred the Court to the following interchange during the debate, which was set out in his Skeleton Argument:

> "23.2.2 '*Now, correct me if I am wrong (the Minister can whisper in my ear), but **I believe we have not had an environmental study done yet – the full study – am I right? … Before anything can happen, a full environmental impact study is required, am I right Minister?***': Terry Lister **[A3/19/867]**;
>
> 23.2.3 '***We could find that the environmental impact,** the conservation plans and other things, **once their applications are filed after all that is done, makes it … it shows that it is not appropriate to develop some of those areas. That could still happen. I am not trying to predict the future, but the Order itself creates those parameters, it creates those potential restrictions which I believe should provide comfort to people who have environmental concerns … we are not giving away anything. We are merely creating an opportunity to be exercised***': Walter Roban **[A3/19/868]**.

[23] Official Hansard, page 814. On March 28, 2011 (page 1570), the Minister trumpeted the fact that "*the public took full advantage of the opportunity that this Government enabled for full and public open debate on the merits of the Order.*"
[24] Official Hansard, February 28, 2011, page 815.

78. The Minister ducked, somewhat, the adroit query as to whether or not "*a full environmental impact study* [was] *required*". He neither confirmed nor denied that a full study was required, or might be undertaken, but gave the distinct impression that the planning process would respond to the information generated by the studies prescribed by the SDO, and not simply rubber stamp the final applications. This statement implicitly left open the possibility, in my judgment, that the planning process might give rise to the need to consider a full EIA, even if it was not contemplated at the SDO promulgation stage. Most significantly, this admittedly off-the-cuff statement acknowledged that, although the SDO had granted approval in principle, it had done so without a full environmental assessment being carried out. Accordingly, depending on the information generated by the prescribed studies, some areas might not be developed after all.

79. Obviously, an attempt had been made to identify the most significant environmental considerations, by providing for certain areas to be donated to Government and for others to be subject to an area wide Conservation Management Plan. But the conditions were designed to require further research to be done before final development approval would be given.

80. Bearing in mind that the SDO is not primary legislation and can be amended by the Minister with only perfunctory Parliamentary approval, the Minister's statements are pertinent in shedding at least some light on how any ambiguities in the construction of the SDO ought to be resolved. On balance and somewhat marginally, I would find that the pronouncements of the Minister support the view that the SDO was not intended to preclude the DAB from conducting, in its discretion, an EIA at the final subdivision and/or final planning stage. The conditions relating to studies were clearly intended to open the doors to a free flow of pertinent environmental information; not to serve as an iron curtain which scientific and regulatory enquiries could not pierce.

81. Although how the DAB interpreted the SDO in practice is not strictly relevant to its interpretation, I am fortified that this conclusion is not a purely abstract and/or wholly artificial one by the fact that the DAB and the Applicants subsequently adopted just such a fluid and precautionary approach when progressing the final subdivision applications. Most notably, the Applicants themselves proposed the more environmentally friendly cave-identifying approach of ERI which the DAB readily agreed should be substituted for the bore hole drilling mandated by the SDO.

Legal findings: did BEST have a legitimate expectation that an EIA would be carried out?

82. Based on the content of the international treaty obligations assumed by Bermuda and the Parliamentary statements made by the Minister, as I have found them to be above, there is no sufficient basis for finding that BEST enjoyed a legitimate expectation that an EIA would be conducted at the final subdivision application stage.

83. Based on my construction of the SDO as preserving the general discretion for the DAB to require an EIA at any time, it is only necessary to consider whether a correspondingly narrower legitimate expectation existed in case my primary construction findings are wrong. The content of that legitimate expectation would

merely be that the DAB was required to consider the need for an EIA the scope of which was broader than the studies expressly prescribed by the SDO in the course of processing the final approval applications.

84. No legitimate expectation that the need for an EIA of broader scope than the studies mandated by the SDO would be kept under consideration by the DAB and/or the Minister can be extracted from the various apparently *ex tempore* pronouncements made by Minister Roban in the course of Parliamentary debate. None of these statements gave any considered express undertaking in relation to an EIA broader than the SDO's explicit requirements at all. As Scott Baker JA held (delivering the judgment of the Court of Appeal for Bermuda) in *Commissioner of Police –v-Allen* [2011] Bda LR 14:

> "*A legitimate expectation may arise from an express promise given on behalf of a public authority (see Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 401B). As is said in the 6th Edition of DeSmith's Judicial Review 12-016, an obvious example is where an express undertaking is given which induces expectation of a specific benefit or advantage. That is what happened here. The form of the express representation is unimportant as long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow.*"

85. On the other hand, the treaty obligations assumed, despite the fact that the content of the EIA concept lacked specificity, were considered, express and unambiguous general assurances that an EIA would be carried out in relation to environmentally-sensitive major projects. It is common ground in the present case that the Development contemplated by the SDO was major and related to such environmentally sensitive land that re-zoning (the primary function of the Order) was required. As the Judicial Committee of the Privy Council held in *Higgs and Mitchell-v-Minister of National Security (Bahamas)* [1999] UKPC 55[25] (Lord Hoffman), upon which BEST's counsel relied:

> "*12.…the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see Minister for Immigration and Ethnic Affairs v. Teoh (1995) 183 C.L.R. 273. In this respect there is nothing special about a treaty. Such legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow. And, as the High Court of Australia made clear in Teoh's case, the legal effect of creating such a legitimate expectation is purely procedural. The executive cannot depart from the expected course of conduct unless it has given notice that intends to do so and has given the person affected an opportunity to make representations.*"

86. Mr. Adamson referred the Court to the Scottish Court of Session decision of *Re Khairandish* [2003] Scots CS 116 and the helpful articulation of Lord Drummond

[25] Reported at [2000] 2 AC 88; [2000] 2 WLR 1368.

Young on the limitations on the doctrine of legitimate expectations based on international treaty obligations:

> "*11.Nevertheless, the ability of an international treaty to give rise to legitimate expectations is subject to three major qualifications. The first of these is described in the second paragraph of the passage quoted above from Minister for Immigration and Ethnic Affairs v Teoh: even when a legitimate expectation exists, the decision maker is not compelled to act in accordance with it; if there are valid reasons to the contrary, he may decline to do so. That is because a legitimate expectation is not a binding rule of law. The second qualification is also mentioned in Minister for Immigration and Ethnic Affairs v Teoh: even if a legitimate expectation might otherwise emerge from the fact that the executive has concluded a treaty, it may be negatived either by statute or by a contrary indication issued by the executive. The notion that a legitimate expectation may be negatived by statute requires no comment. The possibility that a legitimate expectation may be negatived by a declaration by the executive arises out of the fact that it is not a rule of law. The underlying basis for the recognition of legitimate expectations is the principle that government and public administration should be carried on in a reasonable manner, and that that involves consistency of decision-making. If the executive makes a public statement that it will act in a particular way in a particular category of cases, the principle of consistency requires that it should act in that way unless there are valid reasons to the contrary. That is what creates a legitimate expectation. If, however, the executive makes a statement that in future it will act in a different way, the principle of consistency is not infringed; the executive has simply exercised its right to alter the basis on which it acts, in a situation where it is not bound by legislation or the common law. The treaty itself, of course, is not binding in domestic law unless it is incorporated into legislation.*
>
> *12.The third qualification on the principle that entering into an international treaty may give rise to legitimate expectations is this: not every treaty will have that effect, and the particular treaty relied upon must be examined to discover whether its nature is such that it can reasonably be supposed to give rise to legitimate expectations on the part of individuals or other legal persons. International treaties and conventions cover a vast range of subject matter. Some are clearly intended to affect the rights or status of individuals; the Geneva Convention relating to the Status of Refugees is a good example. In such cases it will usually, although perhaps not invariably, be appropriate to draw the conclusion that the treaty gives rise to a legitimate expectation that the government, and its ministers, officials and agencies, will act according to its terms. Other treaties are clearly not intended to affect the rights of individuals, but rather to regulate the relations of states or governments among themselves; military, naval and defensive treaties are obvious examples of this category. Treaties of the latter sort will not give rise to legitimate expectations on the part of individuals, because they are concerned with acts of the state or government acting as such at an*

international level, and acts of that nature are beyond the scope of the domestic law. In yet other cases, a treaty may have some bearing on the rights or status of individuals, but its subject matter or objectives or terms may be such as to negative any implication that it gives rise to legitimate expectations on the part of those individuals. In every case, the terms and objectives of the treaty in question must be examined, and the court must decide the category into which it falls."

87. It is not suggested that the nature of the environmental commitments made by Bermuda are not capable of giving rise to legitimate expectations. Rather, it was contended that the Minister effectively communicated his intention of departing from the international commitments contended for. I accept counsel for the Minister's submission that having regard to the way in which the EIA concept is defined in the Development Plan, and the terms in which the SDO is expressed, any positive commitment to conduct a "full" EIA at the approval in principle phase has effectively been departed from. I also accept that the terms of the SDO, of which the public was given due notice through the Parliamentary debate which went beyond the minimum affirmative resolution requirements, effectively negative any expectation that a global EIA would necessarily be conducted at the final subdivision and/or planning approval stage.

88. Whether BEST can enforce a legitimate expectation must be analysed on the hypothesis that my primary view as to the meaning of the SDO is wrong, and the Order is properly to be read as effectively excluding the need to even consider broader environmental assessments beyond those explicitly spelt out in the Order. I would in these circumstances be bound to find that the overarching commitment to obtain the best possible information about the overall impact of a major project such as the Development had effectively been departed from, by the Minister's promulgation of the SDO.

89. BEST's attempt to place reliance on the legitimate expectation doctrine, even if the scope of the expectation were to be more narrowly defined than BEST contended for, would still fail.

Legal findings: is the SDO invalid on procedural or substantive grounds?

Procedural invalidity

90. Mr. Potts rightly submitted that the SDO as a statutory instrument could not be amended by Parliament and could only be amended and re-submitted by the Minister himself: *McKiernon-v- The Secretary of State for Social Security* (unreported), Court of Appeal Civil Division, judgment dated October 26, 1989. It is clear from the Hansard records that the SDO was affirmed by the House, that an amended version was affirmed by the Senate and that the amended version was re-submitted to the House.

91. There is no or no credible evidence that the SDO, rather than being tabled by the Minister in amended form, was purportedly amended by the Senate itself, as if it were primary legislation.

92. An entirely different point of order under House Rules was taken by John Barritt MP, which was resolved by the Speaker. Although BEST did not expressly challenge the validity of the SDO on this distinct ground, Mr. Martin submitted that it would be inconsistent with the privileges of Parliament for this Court to challenge a ruling of the Speaker. There is considerable force to that argument, but no need to decide the point arises in all the circumstances of the present case.

93. The procedural challenge to the validity of the SDO fails.

Substantive invalidity of the SDO

94. BEST's counsel submitted that the SDO was *ultra vires* the 1974 Act properly construed. I have found that the Act does not mandate an EIA in all major projects, as Mr. Potts contended it did. This invalidity complaint must also be rejected.

Legal findings: is the DAB's decision to grant the applications liable to be set aside on natural justice grounds?

Was there a breach of the rules of natural justice during the application process before the DAB?

95. I find that a clear breach of the rules of natural justice occurred before the DAB when it met with representatives of the Applicants and the Department on May 15, 2013, and entertained arguments on one side of the dispute between the Applicants and BEST as to the need for a full EIA and public consultation, before deciding on May 22, 2013 that an EIA and public hearing in relation to the applications were not required.

96. On April 24, 2013, the DAB had previously received a presentation from the Ombudsman about her views of the legal requirements for an EIA; to the extent that she was a neutral party and her position was broadly supportive of the BEST position, in my judgment little turns on this communication.

97. The Development and Planning (Application Procedure) Rules 1997 confers no absolute right to an objector to attend the hearing of an application. The Rules provide for objections to be made in writing. The Rules are made by the Minister under section 78 of the Act. Rule 24 provides: "*The Board may establish guidelines as to the cases and circumstances in which a hearing will be held.*" Where a hearing does take place, an applicant and an objector have a right to appear (rule 27). The DAB must not decide an application on the basis of information received after the hearing without affording the parties an opportunity to be heard (rule 28). So statutory rules of natural justice apply where a hearing takes place. Although the decision as to whether or not there should be a hearing is clearly an important one, it cannot be suggested that the common law rules of natural justice do not apply simply because a statutory "hearing" does not take place.

98. Mr. Adamson, unsurprisingly, was unable to advance any meaningful response to the complaint that the rules of natural justice had been infringed by the DAB hearing representations by the Applicants' agents on the main plank of the objection in one private meeting (which the objector did not attend), and then deciding the point against the objector and dispensing with a hearing at a subsequent private meeting which BEST also did not attend. By way of explanation, however, the Minister's counsel referred the Court to the DAB's December 14, 2011 '*Guidelines for Hearing Procedures in the Planning Application Process*'. Paragraph 2.1 provides as follows:

> "*The need for a hearing will be at the discretion of the DAB following advice by officers of the Department of Planning on the issues raised by an application. Generally, a hearing will be considered where applications are particularly contentious and have attracted a number of objections (usually in excess of 10 but not necessarily so) or where the application raises unusual issues which would benefit from a verbal presentation either by applicants or the agents or objectors.*"

99. The present applications were both highly contentious and, by the DAB's own account, required a verbal presentation by the Applicants' agents. According to its own Guidelines, a hearing ought to have been held. Of course, it would have been open to the DAB to have invited all parties concerned to the May 15, 2013 meeting where the need for an EIA was discussed. Had that occurred, it would reasonably have been open to the DAB, and entirely consistent with the rules of natural justice, to dispense with a subsequent 'hearing'. Because in substance, the fairness requirements in relation to a hearing would have been fully met by giving all parties interested in the applications an opportunity to be orally heard. The DAB's function is a complex and multifaceted one. Much of its work is undoubtedly administrative in nature and more policy-laden and, perhaps, investigative than quasi-judicial. But the present hotly contested applications, on the cusp of making the actual decisions at least, required the DAB to adhere to the rules of natural justice. This they signally failed to do as regards the May 22, 2013 decision that an EIA was not required. However, this finding is based merely on the obvious conclusion that justice was not seen to be done. It is far less obvious, in light of the fact that full written submissions on the EIA issue had already been received, that depriving the objector of an oral hearing resulted in substantial prejudice.

100. Establishing a breach of the rules of natural justice by a public body is rarely, if ever, about technicalities. Whether they have been breached or not usually engages consideration of whether justice has either not been done or has not been seen to be done, in the particular factual and statutory context in which the complaint is raised. As Lord Bridge famously observed in *Lloyd-v-McMahon* [1987] UKHL 5 (at page 10); [1987] AC 625:

> "*My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends*

on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

The legal principles governing deciding whether the impugned decisions should be quashed on natural justice grounds alone?

101. The Minister's core appellate powers when hearing an appeal from a decision of the DAB are defined by the following subsection of section 57 of the Act:

"(3) *The Minister, subject to this section, may allow or dismiss the appeal, or may reverse or vary any part of the decision of the Board, whether the appeal relates to that part or not, and may deal with the application as if it had been made to him in the first instance.*"

102. This Court's powers are defined by section 61 of the Act as follows:

"61(1) *The Director or any party to proceedings before the Board—*

(a) which have been the subject of an appeal under section 57;

(b) where the decision of the Board in the matter has been varied by direction of the Minister in accordance with the powers vested in him by section 30, 48 or 60,

who is aggrieved by the decision or direction of the Minister in the matter may appeal to the Supreme Court on a point of law within twenty-one days or such longer period as the Supreme Court may allow after receipt of notification of such decision or direction.

(2)On any appeal under this section the Supreme Court may make such order, including an order for costs, as it thinks fit."

103. Mr. Potts submitted that in light of the Minister's concession that his own decision on BEST's appeal from the DAB should be set aside on natural justice grounds, it would be unsatisfactory to accede to the Minister's request that the matter be remitted to the Minister to rehear the appeal according to law. He invited me to follow the same approach I followed in *BEST-v-Minister of the Environment* [2010] Bda LR 52 where I concluded a fair re-hearing before the Minister would be difficult to achieve, and to quash both the Minister's and the DAB's decisions.

104. In my judgment, considering whether this Court should, in effect make the Minister's decision for him, engages the application of the Minister's broad appellate powers under section 57 of the Act. It is uncontroversial that this Court's discretion under section 61(2) to "*make such order…as it thinks fit*" includes the power to affirm or set aside the underlying DAB decision which in most cases will form the foundation for an appeal. At the end of the hearing, I asked BEST's counsel whether, in the present case, it was open to this Court to find that a breach of natural justice had occurred in connection with the May 15, 2013 DAB meeting but that this did not vitiate the subdivision permissions subsequently granted. Mr. Potts submitted in effect that any such decision would be perverse, because the only finding properly open to this Court would be that the substantive decisions were tainted by any procedural defect which had occurred.

105. Implicit in this submission was an acknowledgment of the fundamental principle that a decision is only impeachable on natural justice grounds if the procedural defect complained of undermines the impugned decision to such an extent that justice requires it to be set aside. In addition, I accept Mr. Martin's submission that this Court's appellate jurisdiction, which is limited to reversing the Minister himself on questions of law, is very narrow indeed. This must be borne in mind when the Court is considering exercising by way of proxy, as it were, the Minister's own much broader appellate powers to either affirm or reverse a decision made by the DAB. This Court ought as a matter of general principle to be astute to avoid a situation where it is usurping the overarching policy guidance role conferred on not just the Minister, but also on the DAB, by the statutory development and planning scheme. On the other hand, the law also clearly requires certain decisions to be set aside when they are tainted by procedural fairness. These two considerations are intertwined.

106. Mr. Martin referred the Court to authority for the proposition that a finding that the rules of natural justice have been infringed should not be made "*unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made*": per Lord Denning MR in *George-v-Secretary of State for the Environment* (unreported), Court of Appeal Civil Division, judgment dated January 30, 1979. However, it is also true that a finding that the rules of natural justice have been infringed at one adjudicative level can be made at an appellate level, yet not result in the underlying decision being quashed, because it has been or may be cured by a full re-hearing on appeal. This was the result in *Lloyd-v-McMahon* [1987] AC 625, where an abbreviated extract from the following *dictum* of Lord Wilberforce in *Calvin-v-Carr* [1980] AC 574 at 593 (Privy Council) was cited by Lord Templeman with approval:

> "*Although, some of the suggested inconsistencies of decisions disappear, or at least diminish, on analysis, their Lordships recognise and indeed assert that no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be 'cured' through appeal proceedings. The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so.*"

107. The present statutory framework provides, potentially, for a full rehearing before the Minister on appeal. When an oral hearing is appropriate, one presumes the Minister will appoint another person for this purpose under section 57(4), which was referred to in the course of argument. Breaches of natural justice occurring before the DAB can potentially be cured by a rehearing on appeal to the Minister. The statutory scheme does not mandate a fair hearing at the DAB level without the option of any procedural flaws being cured on appeal.

108. In *BEST-v-Minister of the Environment and Sports* [2010] Bda LR 52, the DAB had seemingly refused a planning application and the Minister had granted planning permission, overturning the decision of the DAB. In the course of an Ex Tempore Ruling on relief, the Minister conceding there that his unreasoned decision was liable to be set aside on procedural grounds, I observed as follows:

> "*Firstly, it seems to me that the statutory framework in which an appeal goes to the Minister is one in which a member of the Executive is being asked to perform a judicial function, which in and of itself is problematic requiring a Government Minister to make a judicial decision. And in those circumstances, the burden on the Minister to be seen to act fairly and judicially in an appellate context is so high that, where a decision made has been reversed on the basis of no sufficient reasons being given against a background of allegations of lack of impartiality, it seems to me that justice would not be seen to be done if the matter where to be remitted back to the same Minister to be dealt with again.*"

109. The result there was that the underlying DAB decision was affirmed with the result that the planning applicant, if he wished to pursue his application, would have had to reapply. No need to consider whether a procedural flaw made by the DAB vitiated a substantive planning decision arose in that case. Because the Minister had given no reasoned decision suggesting that legitimate policy considerations had been taken into account, this Court showed deference to the underlying reasoned DAB decision. It must also be noted, moreover, that I failed to consider in my ex tempore remarks in that case the Minister's power to appoint a hearing adjudicator under section 57(4).

Should the impugned decisions be quashed on natural justice grounds alone?

110. I find that the decisions under appeal are not vitiated on the grounds of procedural unfairness alone. This is because:

(1) I reject the submission that the decision to grant final subdivision approval without first conducting a full EIA was unreasonable in the *Wednesbury* sense. In summary, it is far from clear that the impugned decisions are tainted by the procedural irregularities complained about to any sufficient and material extent. The Board adopted a procedure that had significant elements of an EIA and considerable efforts were clearly made by the Department to address all identifiable environmental concerns. Most notably, the conditions the DAB imposed when granting final approval

demonstrate a willingness to require revised applications to be made to resolve any as yet unidentified environmental concerns;

(2) although BEST was deprived of the opportunity to respond to the oral representations made by the Applicants' scientific agents on May 15, 2013, the DAB had already received comprehensive written submissions from BEST setting out its case on why there should be a full EIA. It would have been reasonably open to the DAB, had it considered whether or not to exercise this discretion (as opposed to wrongly concluding there was no discretion to exercise), to grant subdivision approval without conducting a fuller EIA;

(3) the crucial decision, whether there should be a "full" EIA and what its constituent elements ought to be, is highly policy-laden and fact-sensitive and one which it is neither appropriate nor necessary for this Court to make on behalf of the Minister. It is fact sensitive both in terms of assessing the competing scientific arguments, and in terms of assessing the extent to which weight should be given to the potentially adverse impact from an economic perspective of quashing the subdivision approvals which the Applicants contend are commercially valuable;

(4) it is still possible for a fuller EIA to be conducted in relation to the final planning approval applications in any event, and for the Minister and/or the DAB to require appropriate revisions to be made to the existing subdivisions even if the permissions granted are not immediately set aside. As Mr. Martin most significantly pointed out, major physical development on the proposed Sites is still some time away.

111. As Mr. Adamson requested the Court in remitting the matters back to the Minister for rehearing to give some guidance as to the further conduct before him of the appeals, a few brief further observations appear to be warranted.

112. In my judgment, due consideration must be given to a full "EIA" (either before or after final subdivision approval), and the issue ought to be decided by way of a rehearing of the appeals before the Minister, because both he and the DAB erred in law by concluding that the SDO eliminated this as an option. The Development Plan creates a general policy rule in favour of an EIA for major projects, Bermuda has assumed various international commitments to positively conduct EIAs for major projects and no convincing reason for not conducting a fuller EIA was ever advanced in the course of the present appeals. Save for the fact that any EIA must provide some global overview of the impact of the Development as a whole, and that at a minimum public consultation must afford specialist interest groups such as BEST an opportunity to provide input (in addition to the Applicants), what form the EIA/EIS should take is quintessentially a technical policy matter which ought properly to be decided upon by the Minister, or his appointee.

113. In light of the way in which the initial appeal unravelled, and the DAB proceeded, serious consideration should be given to the Minister appointing someone to hear the present appeals. Indeed, this is a procedure which should perhaps be considered as standard practice to enhance the independent character of the appellate

process and immunize the Minister from the infinite variety of complaints that his personal interaction with the parties will potentially generate. When the appeals are being considered, it ought also to be borne in mind that, as BEST pointed out, the SDO is not primary legislation, and can always be amended by the Minister himself, albeit subject to the affirmative resolution procedure.

114. Further, as the Minister and the Applicants pointed out, it must be remembered that approval in principle has already been granted and this may legitimately impact upon the scope of any EIA which might be formulated. An important consequence of approval in principle is that permission once validly granted cannot be revoked without triggering statutory compensation rights for the applicants in respect of any wasted costs[26]. On the other hand, section 25(1) of the Act does empower the Minister to revoke any permission which has been granted, in fairly broad terms.

115. Finally, the complaint that the economic viability of the Development required some reassessment in light of the post-SDO receivership seemed to me to have considerable force. It may be self-evident that preserving a tourism resort and local employment are laudable public policy goals. It may also be self-evident that the Applicants have a legitimate common cause with the Government in ensuring the economic survival of the Tucker's Point Resort. Despite the absence of cogent direct evidence on these matters, I accordingly reject the complaint that the survival of Tucker's Point Resort was an irrelevant consideration, together with the complaint that the DAB ought to have refused the applications because they were filed in the names of non-existent entities[27]. Nevertheless, BEST is right to raise concerns about the risk of any significant physical development actually commencing in an environmentally sensitive area without any proper assessment of the prospects that the development will likely be a financial success and be likely to achieve the economic objectives which form the basis for the rezoning the SDO controversially effected.

Conclusion

116. I find that under the Development and Planning Act 1974 as read with the Development Plan, there is a discretionary rather than mandatory requirement for conducting an EIA before planning approval is granted for major projects. In respect of major projects likely to have a significant environmental impact, this assessment technique should be deployed as a general rule.

117. Because at the international treaty level Bermuda has committed to use EIAs, and their use is so widely accepted as to form a general principle of international law, clear statutory language would have been required to justify construing the SDO as excluding the need for an EIA at any stage of the development project. Clearly, the Minister adopted the SDO without first conducting a comprehensive or full EIA. But the conditions upon which "in principle" approvals were granted, in particular the specification of various studies, neither expressly nor by necessary implication

[26] Section 25(3) of the Act.

[27] There was no dispute whatsoever about the identity of the corporate group behind the applications, and these sorts of details can always be sorted out later in the planning process. The use by corporate groups of informal trade names appears to be a common practice which often results in legal confusion. BEST's consternation as to why such an odd way of applying was adopted was, accordingly, understandable.

negatived the general statutory duty of the DAB to obtain the best quality information to inform its decisions under the Act as read with the SDO. The DAB and the Minister erred in law by construing the SDO as excluding the option of requiring information in support of the applications to be presented in a manner which was not spelt out in the SDO.

118. I also find that the SDO is valid and is not liable to be set aside on the grounds that either (a) it was substantively ultra vires the Act, or (b) procedurally invalid.

119. The Minister conceded that his decision dismissing BEST's appeal against the decision of the DAB to grant final subdivision approval in each of the four cases was liable to set aside because it was procedurally invalid. The central issue in controversy revolved around the relief the Court would grant ancillary to allowing the appeals against the Minister's decision. He invited the Court to remit the appeals to him to be reheard according to law. BEST invited the Court to quash the DAB decisions as well (based on procedural and substantive unfairness at the DAB level). This would have required the Applicants to submit fresh applications, with the obvious risk that their efforts to preserve the Tucker's Point Resort and related local employment might be undermined.

120. While BEST's complaints about the fairness of the process before the DAB were justified, it was far from clear that a different decision would have been reached by the DAB had it proceeded more fairly and on a correct view of the law. Moreover, whether or not there should be an EIA and what form it should take are heavily policy-laden questions which the statutory scheme envisages will be resolved by the Minister and not this Court. I accordingly find that BEST's appeals against the DAB decisions should be remitted to the Minister for rehearing, ideally by a person appointed by him under the provisions of section 57(4) of the Act[28].

121. I will hear counsel if necessary on the terms of the final order to be drawn up to give effect to this Judgment.

Dated this 6th day of August, 2014

IAN R.C. KAWALEY CJ

[28] For the avoidance of doubt the option of appointing a person for the rehearing of the appeal is only mentioned in this Judgment by way of suggestion, and is not intended to be a mandatory direction to the Minister as to how he should exercise his discretion under section 57(4) in the present case.