In The Supreme Court of Bermuda

COMMERCIAL COURT

APPELLATE JURISDICTION

2015: Nos.330 and 392

THE BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE

Appellant

-AND-

THE MINISTER OF HOME AFFAIRS

(in his capacity as Minister responsible for planning)

Respondent

JUDGMENT

(in Court)[1]

Date of hearing: November 9-10, 2015
Date of Judgment: December 9, 2015

Mr. Alex Potts, Sedgwick Chudleigh Limited, for the Appellant ("BEST")
Mr. Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent (the "Minister")

Introductory

1. BEST is a not-for-profit environmental activist group which from time to time files objections in relation to major developments with significant environmental implications. The two conjoined appeals relate to:

[1] The present Judgment was circulated to the parties without a hearing to formally hand down judgment.

(1) the Minister's decision of July 14, 2015 ("Decision 1") dismissing BEST's appeal against the April 1, 2015 decision of the Development Applications Board ("DAB") (published on April 6, 2015) whereby conditional approval was given to applications by South Basin Limited in relation to:

(a) land reclamation in the South Basin,

(b) the Phase 1 development of the reclaimed land as the America's Cup Bermuda ("AC35") Event Village, and

(c) development of a Phase 2 Commercial Marine Facility and Marina; and

(2) the Minister's decision of September 9, 2015 purporting to re-determine Decision 1 ("Decision 2").

2. In my October 27, 2015 Ruling setting out my reasons for making a protective costs order in favour of BEST, I stated:

> "*11. The public importance of the merits or policy-based aspects of the present appeals being fully aired are strengthened rather than weakened by the fact that the national interest in pressing ahead with the development "at all costs" is being advanced in response to these environmental arguments. Broad consensus that a general course of action is necessary in the public economic or financial interest is a potentially intoxicating force likely to impede rather than promote intellectual and procedural clarity and sound public policy decision-making. In the context of proposed large-scale developments involving environmentally sensitive areas, this is par excellence the type of scenario which cries out for heightened rather than diminished judicial scrutiny.*"

3. The tension between pragmatic politically-driven decision-making and quasi-judicial decision making in the context of the Minister adjudicating a planning appeal impacting the development of the facilities for the America's Cup in 2017 at the Dockyard was summed up by an exchange between counsel near the end of the hearing of the present appeals. Mr Adamson, in the face of Mr Potts' highly legalistic and environmentally zealous attack on the Minister's approach to the appeals, protested that the Minister had merely been seeking to achieve a pragmatic result which was fair to everybody. This was a very frank admission. Mr Potts, however, retorted in reply that the Minister's true duty, in entertaining an appeal, was to act as a 'court of law' and to determine the appeal according to law.

4. That 'absolutist' stance notwithstanding, BEST itself in the lead up to the hearing of the present appeals had itself revealed an impressively pragmatic disposition. It crucially entailed agreeing not to deploy the 'nuclear' option of seeking to set aside the grant of planning permission for the land reclamation altogether along with the approval for the interim AC35 Event Village use[2]. In an open September 25, 2015 letter, Sedgwick Chudleigh on behalf of BEST made the following broad settlement proposal:

> "*Finally, without prejudice to the fact or merits of our client's appeals (and without in any way suggesting that our client is not entirely confident of success on those appeals), we are instructed to propose, for the Minister's and South Basin Development Ltd.'s consideration, a negotiated settlement of our client's claims on the following terms, in the hope that this will demonstrate that our client is sincere in its statement that it does not simply litigate for litigation's sake, but with a genuine desire to secure the best possible outcome for Bermuda and its people, and one which complies with Bermuda law and is reasonably justifiable.*"

5. The rejection by the Minister of this broad proposal and the more detailed terms of the proposed Court Order, resulted in these appeals being pursued.

The Minister's July 14, 2015 Decision

<u>The DAB April 1, 2015 Decision ("the DAB Decision")</u>

6. The DAB Decision related to an application by South Basin Development Ltd ("the Developer") to reclaim 11.1 acres of land to support two proposed uses. Phase 1 was the AC35 Event Village. Phase 2 was for (a) Department of Marine & Ports Operations ("M & P") and (b) a Commercial Marine Facility and Marina ("Marina").

7. The Developer's application arose in this way. On October 29, 2009 in Florida, the Developer (a partnership between WEDCO[3] and Clark International LLC) and the Ministry of Works and Engineering announced plans to construct Bermuda's first marina for mega-yachts at Dockyard. A June 10, 2010 Scoping Document prepared by Bermuda Water Consultants ("BWC") contemplated the preparation of an Environmental Impact Statement ("EIS"). In paragraph 8.1, it was stated that the "*stakeholder consultation process is an important part*" of the EIS preparation process. Nevertheless, by letter dated December 11, 2013, BEST wrote to the Director of Planning complaining that it appeared that WEDCO was proposing to apply for permission in connection with the Marina "*without engaging/consulting with several key stakeholders*".

[2] A similar proposal was initially made by BEST to the Development Applications Board ("DAB") by letter dated March 25, 2015.
[3] West End Development Corporation.

8. Nevertheless, a Land Reclamation Agreement between Government and WEDCO was approved by the House of Assembly on July 18, 2014. The Minister noted[4]:

> "*We must also bear in mind that all of the plans heretofore discussed will…go before the Planning Department and further public consultation and disclosure will be undertaken as part of that process.*"

9. On December 2, 2014, the Developer applied to the DAB for planning permission in respect of the land reclamation, M & P and the Marina. On December 4, 2014, the Developer advised the Director of Planning that in light of the recent announcement that Bermuda had won the right to host the America's Cup in 2017, that application would be updated. The Bermuda National Trust filed a tempered objection on December 16, 2014. BEST's December 19, 2014 was clearly more 'militant'. The main focus of its objection was the content quality of the EIS and the consultation process which preceded it. In an Addendum to the objection letter of the same date, the following point (which was supported by examples) was made:

> "*In addition to the EIS containing statements without evidence to support them, the document is also rife with declaratory statements expected more from a public relations booster document than from an analytical assessment.*"

10. In a Memorandum dated January 15, 2015 from the Director of the Department of Conservation Services to the Marine Resources Board, the Department indicated that it could not support the application due to the negative impact on various protected species and corals, as well as the adverse impact on a critical roosting area for birds. Further information was identified as required in relation to eight issues and mitigation measures were also recommended, in the event that the development proceeded. The ACBDA organization pledged to give priority to environmental concerns in February 2015. WEDCO responded to concerns raised by BEST in a letter dated March 6, 2015. An Addendum to the BWC EIS was circulated on or about March 7, 2015. By letter dated March 23, 2015, WEDCO formally notified the Ministry that approval was being sought for the AC35 interim use as well. Meanwhile, Bermuda Environmental Consultants ("BEC") on behalf of ACBDA prepared an Addendum dated March 27, 2015 to the BWC EIS. By letter dated March 30, 2015 to the DAB, BEST:

    (a) offered to withdraw its objection to the land reclamation and AC35 interim use if all the recommendations made in the BEC EIS Addendum were incorporated into the permission as conditions; and

[4] Hansard, page 629.

(b) stated (at page 3 of its letter):

> "*BEST maintains the objection to this component of the application as it is premature in light of the temporary use that will tie up the site until after the decommissioning of the site for the America's Cup (possibly late 2017/early 2018); the EIS does not adequately address the complexity of a project of this nature; and no design details have been provided for the marina, let alone evidence of viability or feasibility.*"

11. The Board Report prepared for the DAB meeting at which the Developer's application was approved on April 1, 2015 (in a decision formalised on April 6, 2015) stated that, *inter alia*:

    (a) the main impetus for the project was initially the goal of consolidating the operations of M & P;

    (b) another "driving force" for the project was the opportunity to source fill from the pending dredging of the North Channel by the Royal Caribbean Cruise Line;

    (c) final design for Phase 1 and Phase 2 would be dealt with in separate subsequent applications;

    (d) the 2010 Scoping Report process was never completed and the Developer did not carry out a fresh scoping exercise. Instead, objectors' input was fed into an Addendum to the EIS.

12. Subject to 10 environmentally-focussed mitigating conditions, the DAB resolved as follows:

> "*1. The development hereby permitted shall be begun before the expiration of 2 (two) years from the date of this permission.*
>
> *2. Final approval is hereby granted for the land reclamation and both Phase 1 (35th America's Cup) and Phase 2 (Marine & Ports Operations and Commercial Marine Facility) Uses. The Board reserves for its further final approval all details, defined as reserved matters, relating to site coverage, siting and layout, building height, building design, external appearance of the buildings, parking provision and operational details. The final design and layout associated with both Phases will be subject of separate DAP1 planning applications.*

3. Final approval is hereby granted for the use and siting of a marina. The Board reserves for further final approval all details, defined as reserved matters, relating to the final design, layout and operational details of the marina which will be subject of separate DAP1 planning applications.

4. For the avoidance of doubt the consent hereby granted is planning permission for the land reclamation. Prior to the commencement of building operations a separate application for a building permit that is in compliance with the applicable Building Code must be made and approved."

BEST's appeal to the Minister

13. BEST's appeal to the Minister was set out in a 16 page letter dated May 27, 2015. The central legal principle relied upon was the following finding of this Court in *Bermuda Environmental Sustainability Taskforce-v- Minister of Home Affairs* [2014] Bda LR 74[5]:

"*41…there is a mandatory obligation for the DAB to obtain the best quality information to enable a 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.*"

14. BEST's grounds of appeal may be distilled into the following complaints:

(a) the BWC EIS was inadequate;

(b) the Addendum produced by BEC only dealt with concerns relating to the land reclamation project, without dealing with Phase 1 or Phase 2;

(c) insufficient regard was paid to recommendations made by, *inter alia*, Departmental consultants (notably the Departments of Environmental Protection and Conservation Services), for example:

(i) DEP's recommendation of further stakeholder consultation on the dredging requirements; and

(ii) DCS' advice that further information be obtained about the business case for the Marina.

[5] Also reported at (2015) 86 WIR 159.

15. The Director of Planning commented on the appeal in a Memorandum dated June 10, 2015 and BEST responded by letter dated June 29, 2015. The Director asserted, *inter alia*, that approving the landfill was difficult to justify "*without an identified end use*". BEST countered that: "*What will be the best end-uses, balanced against properly assessed impacts, has yet to be determined*".

Decision 1

16. The Minister sought advice on the appeal from an Inspector, who reported on July 9, 2015. His key findings included the following:

    (1) an EIA/EIS should be carried out by the Board "t*o enable the best quality information to enable a sound development decision*" (page 12);

    (2) "*there are reasons to support the appellant's third ground of appeal: that the Board lacked a sufficiently detailed and reasoned planning justification for the proposed end uses and land reclamation*" (page 14);

    (3) "*I can only conclude that the Board's decision to approve the land reclamation and interim and end uses constitutes, in practical terms, an acknowledgement of a decision already taken by Parliament in 2014*" (page 16).

17. On this basis, the Inspector recommended that the DAB decision should be upheld. By letter dated July 14, 2015, the Minister forwarded the Report to BEST and advised:

    "*I agree with this recommendation and hereby grant planning permission for the proposal subject to the conditions listed in the Board's decision letter dated 6 April, 2015.*"

BEST's appeal against Decision 1

<u>The Grounds of Appeal</u>

18. BEST appealed to this Court against the Minister's dismissal of its appeal against the Board's April 2015 decision by Notice of Originating Motion dated August 6, 2015. There were two main grounds of appeal:

(1) the Minister erred in law in accepting the findings of the Inspector that Parliament had already approved the land reclamation, interim and end uses so that full Board scrutiny was not required; alternatively

(2) the Minister acted unreasonably in relying on the Inspector's Report and having regard to irrelevant considerations (Parliamentary approval of the Land Reclamation Agreement) and failing to have regard to relevant considerations (the Inspector's finding that there was insufficient information to justify the Board's decision).

Decision 2

19. By letter dated September 9, 2015, the Minister purported to reconsider his July 14, 2015 Decision. At the hearing of the appeal, Mr Adamson abandoned his attempt to defend the validity of this second purported decision. It is therefore unnecessary to decide this issue. Suffice it to say that it was ultimately common ground that when the Minister decides an appeal under section 57 of the Development and Planning Act 1974 ("the Act"), his decision is final. Section 57 provides:

> "(5) *Subject to section 61*[6] *the decision of the Minister on any appeal under this section shall be final.*"

20. The contents of Decision 2 were understandably relied upon by BEST for the purposes of undermining the original July 14, 2015 Decision. The Minister stated:

> "*I therefore agree that my decision, which was to agree with the Inspector's decision, was… based on an error of law…*
>
> *I agree that the Board proceeded with inadequate information for a grant of final planning permission for all aspects of the application. I am driven to this conclusion by the Inspector's own criticisms of the information provided to the Board….*
>
> *In these circumstances I agree that the Board proceeded with inadequate information in deciding to grant final planning permission for the end uses, although I find sufficient information was available to make a decision on the land reclamation…[various land reclamation conditions imposed by the Board were then considered]…*
>
> *As regards the translocation of corals, I am concerned that this could impact timing. I would impose the following condition in relation to translocation, namely to 'without imperilling the timetable, to take reasonably practicable*

[6] Section 61 governs appeals against the Minister's decision to this Court.

steps to translocate coral in coordination with DEP to an alternative site'. It may be though, that relocation of coral is not reasonably practicable."

In relation to material considerations, I find that the national interest in making AC35 a success is a highly material consideration. Bermuda's reputation is on the line given our international commitments…

In my view there should be planning permission in principle for the AC35 village use. It is in accordance with the Plan and, in any event, the national interest is strongly in favour…

Parliament approved the proposed siting of M & P operations on the South Basin. I believe that this indicates that Parliament considered it, in theory, a sensible idea…

In these circumstances, I have decided that I should give planning permission but only 'in principle', reserving a full assessment of both M& P and the commercial boatyard to a later date.

My understanding is that, in the UK, only certain matters such as access, appearance, landscaping, layout and scale can be reserved. There is no such limitation under the Act. It seems to me that any matter can be reserved, even if the matter reserved involves further consideration of the merits of the development itself…

Accordingly, I grant permission in principle for the intended use as the M & P and boatyard site, reserving the issue of whether the development properly accords with the Plan. I note the Board imposed particular conditions on the proposed end uses which an environmental impact assessment ought to take into account. My understanding is that the public, including the appellant, will be consulted as part of that assessment. The application for final planning permission of this reserved matter will be advertised and objectors can make representations in relation to that application. The appellant can therefore be part of that decision.

I do not consider that a proper planning case for the marina has been set out. I refuse permission…"

21. This was, in content terms, a carefully crafted decision which reflected the Minister's attempt to combine flexible pragmatism in the national economic interest with a technically sound environmentally precautionary approach. It was also productive in terms of generating common ground for the resolution of the present appeal.

22. Despite insisting that this 'decision' was not legally valid, BEST was willing to refrain from launching a full-blooded assault on the land reclamation approval and interim AC35 use, and to embrace the Minister's refusal of permission of any sort for the Marina. This left a narrow strip of territory in controversy: should the long-term M & P operations centre and boatyard uses application be refused altogether, or approved in principle as the Minister proposed?

Findings: merits of disputed elements of appeal

23. It being admitted on behalf of the Minister that both Decision 1 and Decision 2 were legally unsupportable, this Court was tasked with deciding how the Minister ought to have dealt with BEST's appeal.

24. In its September 25, 2015 open settlement letter to the Minister's attorneys, BEST proposed that this Court make the following Order in respect of the Developer's application for planning permission:

> "*1. All of the proposed end uses… be refused planning permission outright (but on the basis that the developer is at liberty, if it sees fit, to apply to the DAB with fresh planning applications in the future, providing that any such planning applications properly follow, and comply with, the EIA, EIS and public consultation requirements of the Department of Planning's own Guidance Note GN106, and all other applicable provisions of the 1974 Act, the 1997 Rules, and Bermuda planning law);*
>
> *2. The proposed reclamation of 11 acres is granted final planning permission subject to the conditions imposed by the DAB (and reflected in Section A of Appendix I of the Minister's Purported Decision dated 9 September 2015), such conditions to be set out in a detailed Appendix or Schedule to the Court's Order;*
>
> *3. The proposed interim use (AC35 Event village) is granted final planning permission (or planning permission in principle, if preferable from the Minister's perspective), subject to the requirement for a further DAP1 application to the DAB by ACBDA (or whichever entity is the developer for these purposes) for final planning approval of any buildings or engineering work, and all reserved matters and operational details (provided that such applications properly follow, and comply with, the EIA, EIS and public consultation requirements of the Department of Planning's own Guidance Note GN106, and all other applicable provisions of the 1974 Act, the 1997 Rules, and Bermuda planning law, and provided that such applications are <u>not</u> made together with, or at the same time as, or connected to, any potential applications relating to the proposed end uses referred to at paragraph 1 above).*"

25. Paragraphs 2 and 3 were substantially agreed. Paragraph 1 only engaged the M &P headquarters and commercial boatyard end-use as it was by the end of the hearing common ground that the Marina limb of the application should be refused altogether. It was argued by BEST that the Minister's proposed approval in principle, linked to reservation of the right to decide later whether the development should go ahead at all, was legally impossible and/or factually unjustified in any event.

26. The Minister's argument about the breadth of the Bermudian law concept of approval in principle as compared with its English statutory equivalent seemed inconsistent with the established view of this concept in local planning law and practice. The Department of Planning's own document, '*A Guide to Getting Planning Permission for Development*'[7], describes '*In Principle Approval*' as follows:

> " *An in principle approval means that the DAB agrees with the concept of the application but still requires additional information and details about the project, for example, building elevations showing the design of the building and details on the proposed building materials.*"

27. As I recently observed in the unrelated appeal between the same parties, *Bermuda Environmental Sustainability Taskforce-v- Minister of Home Affairs* [2014] Bda LR 74, in relation to a point that in that appeal was agreed:

> "*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[8]. 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.*"

28. So approval in principle is generally understood not just to embrace approval of the concept of the applicant's proposed development in the abstract but to confer a tangible commercial benefit on the recipient of that permission as well. After all, individual and commercial developers often invest substantial sums in applying for approval in principle with a view to securing funding for their project and preparing more detailed development plans. It is difficult to understand what meaningful approval in principle could in practice ever be given which did not include approval of the development concept itself. The fact that the statutory definition of "*approval in principle*" does not restrict the meaning of an uncomplicated term cannot justify importing into the statutory language a meaning which is inconsistent with the natural and ordinary meaning of the relevant words. Section 23 of the Act provides as follows:

> "(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.*"

29. In my judgment, section 23(8) does not encompass the grant of planning permission for a development which does not in fact approve the basic concept or principle of the proposed development. It is not ordinarily legally open to the Minister to grant in principle approval while expressly reserving approval of the development concept for

[7] GN303, 19 November 2010.
[8] Section 25(3) of the Act.

the final approval stage. I do not exclude the possibility that, in unusual circumstances and at the request of the developer, the Minister might have jurisdiction to craft an unusually narrow permission in principle formula. That option is not fairly open to the Minister here. The Developer sought and obtained final approval from the DAB for the M&P use. The Developer has not taken an active role in the present appeal. But more importantly still, there is no clear rationale for creating such a curious permission 'beast' in all the circumstances of the present case.

30. Bearing in mind the legal obligation to obtain the best possible environmental information, including an EIA, the admitted fact that no adequate assessment of environmental implications of the M & P/boatyard end use has ever been carried out, and the absence of either urgency or compelling national interest dictates, what rational basis is there for granting approval in principle at this stage? Mr Adamson prayed in aid two considerations.

31. Firstly, the Director of Planning, before the DAB considered the application made the cogent planning point that it made no sense to approve the land reclamation project without also approving the ultimate end-use which justified the reclamation in the first place. That seems to me to reflect the orthodox position. However, here, the reality is manifestly that the AC35 interim use tail is wagging the end-use dog. As the Inspector found, and the Minister implicitly agreed, there was insufficient environmental data to justify the land reclamation or any of the proposed uses, interim and long-term. But for the compelling national economic interest of the AC35 interim use, the application ought to have been refused altogether. There are no compelling national interests justifying the approval in principle of an end use which has yet to be properly justified, applying the modern policy-making standards which form part of the philosophical underpinning of the formal legal framework of the Act.

32. Against this very distinctive background, in my judgment it is impossible to fairly rely on a general planning rule to authorise a further incursion on the legal principle that developments should not be approved without the best possible environmental impact data collated with the assistance of the widest possible public consultation. As Mr Potts persuasively pointed out, there will always be some potential justification for the Planning authorities to depart from the general legal requirement that proper environmental assessments be carried out in relation to large-scale developments with significant adverse environmental impacts. Although the reclamation project has been approved on the basis that the M&P headquarters and commercial boatyard is the ultimate rationale, this end-use in my judgment cannot realistically be viewed as being the substantive foundation of the approval.

33. I accept entirely Mr Adamson's plea in mitigation on his client's behalf. In effect, through Decision 2, the Minister was attempting to achieve a just and practical result by balancing conflicting economic and environmental considerations. Against this difficult background, the material placed before this Court in the present appeals reveals an impressively robust approach by the Department of Planning and the DAB, who were likely also motivated by the desire to achieve similar objectives. However, it is blindingly obvious that before the application was even considered, America's Cup fever swept across Bermuda and all decision-makers became infected with an obsession about facilitating an event which would hopefully stimulate a national economic recovery. The Minister has already in relation to this one planning

application made two decisions within a mere two months which he was forced to admit were wholly invalid. Against this background, the margin of appreciation which the courts would normally afford the Minister to make policy judgments, must necessarily be far narrower than it would otherwise be.

34. The second point Mr Adamson raised, more gingerly, was the concern recently communicated by WEDCO about the financial importance of the Developer obtaining 'in principle' approval. Although this issue was never articulated before the Board or by the Minister as a basis for conferring approval for the end use, the Court was invited to take this into account. This point only has to be stated to demonstrate that it cannot form a basis for granting even limited planning permission for a concept which has yet to be justified. Mr Potts rightly submitted that the Minister can only take into account material planning considerations under the following provisions of section 57:

> "*(7)In the exercise of his functions under this section the Minister shall 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. BEST's counsel was unwilling to concede that economic considerations would qualify as "*material*" for section 57(7) purposes. In my judgment it is obvious that economic considerations are potentially relevant whenever any 'commercial' development is being approved. One of BEST's main criticisms of the Marina end use limb of the application, which has been implicitly accepted by the Minister, is that the business case was never clearly analysed. However, it is a bridge too far to suggest that the desire of the Developer (in this case now solely a public entity with implicit 'insider' connections) to protect its own financial interests can qualify as a "*material consideration*", justifying a departure from the general legal and policy requirement to make planning decisions only on the best possible information.

36. The position might well be different if, as in the case of the Tuckers Point Special Development Order considered in *Bermuda Environmental Sustainability Taskforce -v- Minister of Home Affairs* [2014] Bda LR 74, preserving jobs for an imperilled medium-size employer formed an explicit and transparent part of the application process from the outset. The crucial evidential consideration which makes it irrational in the legal sense for the Minister to approve in principle the M & P end use simply because ordinarily a land reclamation project is only approved in relation to an identified end use is this. The Minister accepts the advice of his Inspector that there was insufficient data to fairly approve the land reclamation, interim uses and end uses. He has identified a compelling national interest rationale for approving the land reclamation together with the interim use, notwithstanding an otherwise fatal information deficit. However, no correspondingly compelling justification for approving the M & P and commercial boatyard end use has been identified. The umbrella legal principle articulated in last year's case, which was not appealed by the Minister, it bears repeating, was as follows:

> "*41…there is a mandatory obligation for the DAB to obtain the best quality information to enable a 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.*"

37. For these reasons, I find that it was not open to the Minister to lawfully grant in principle approval in respect of the M & P end use.

Conclusion

38. In summary, BEST's appeal against the Minister's July 14, 2015 Decision is allowed in part. Ultimately by consent, its appeal against the September 9, 2015 Decision is also allowed. That decision is set aside altogether. The approval granted by the DAB for the end uses is set aside, and as regards the Marina, by common accord.

39. The appeal against the approval granted in respect of the land reclamation and the AC35 Event Village interim use is refused. This limb of the appeal was never vigorously pursued.

40. The terms of the permission granted shall be embodied in the final Order drawn up to give effect to the present Judgment. I will hear counsel on the precise terms of that Order, which can hopefully be substantially agreed, and (if required) as to costs.

Dated this 9th day of December, 2015 _____
IAN RC KAWALEY CJ