COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2022/PUB/jrv/00022

BETWEEN

THE KING

AND

GILBERT KEMP
(In his capacity as ADMINISTRATOR FOR THE HARBOUR ISLAND DISTRICT)
First Respondent

AND

ROCK HOUSE INVESTMENTS LTD.
(doing business as the Rock House Hotel)
Second Respondent

EX PARTE

THE POTLACH GROUP LTD.
Applicant

Before: The Hon. Madam Justice Carla Card-Stubbs

Appearances: Mr. Dwight Glinton and Tonessa Munnings for the Applicant
Mr. Antoine Thompson and Mrs. Sophia Thompson-Williams for the First Respondent
Mr. I.A. Nicholas Mitchell and Ms. Ashla Lewis and for the Second Respondent.

JUDGMENT

Judicial Review- Application for leave pursuant to Rule 54 Rules of the Supreme Court (R.S.C. 1978, as amended) – Decision by Local Government- Island Administrator - whether decision justiciable – whether decision alleged was a decision made – whether Decision is ambiguous

Bars to Judicial review – Delay

Application for injunction pending the determination of the application

Held: Where a decision is unambiguous, it is to be construed having regard to the plain and ordinary meanings of the words used. Where the decision alleged in an application for leave for judicial review is not the decision made, leave to challenge the decision will be refused. An application for interlocutory injunction pending the termination of the trial, is dependent on a successful application for leave to apply for judicial review. Where leave to apply for judicial review is refused, the application for an injunction will be dismissed.

CARD-STUBBS, J

INTRODUCTION

[1.] This is the Applicant's application for leave to apply for Judicial Review pursuant to Section 54 of the *Rules of the Supreme Court (R.S.C. 1978, as amended)* ('RSC'). The application alleges that permission was given by the First Respondent to the Second Respondent for the use of the Applicant's beach frontage on Harbour Island.

[2.] The Applicant also applies for an interlocutory injunction.

[3.] Having heard both applications, the application for leave to apply for judicial review is refused and the application for an interlocutory injunction is dismissed. The decision of the Court is set out below.

BACKGROUND

[4.] On November 10, 2022 the Applicant filed an Application for leave to apply for Judicial Review.

[5.] In the filed application, the decision identified by the Applicant for review is described as "a decision of the First Respondent by letter dated 15th February 2022 to grant the Second Respondent permission to continue usage of the Applicant's beach frontage in the Island of Harbour Island off the northeast coast of the Island of Eleuthera."

[6.]The reliefs and grounds sought by the Applicant are as follows:

a. A Declaration that the Applicant's beach frontage is not a public beach but a private beach;
b. Further or alternatively, a Declaration that the Applicant has an exclusive and private right of natural easement over its beach frontage;
c. A Declaration that the Second Respondent has no right to or interest in the Applicant's beach frontage;
d. A Declaration that the First Respondent ought not to have granted the Second Respondent usage of the Applicant's beach frontage;
e. Further or Alternatively, a Declaration that the First Respondent ought to have obtained consent of or consulted with the Applicant before granting the Second Respondent permission to use the Applicant's beach frontage;
f. Further or Alternatively, a Declaration that the First Respondent's decision to grant the Second Respondent permission to use the Applicant's beach frontage was ultra vires the Local Government Act Chapter 37 of the Statue Laws of the Bahamas (hereinafter "the Local Government Act')
g. A Declaration that the said permission granted by the First Respondent to the Second Respondent is unlawful;
h. An Order of certiorari to remove into this Honorable Court and quash the decision of the First Respondent to grant the Second Respondent permission to use the Applicant's beach frontage;
i. An Order that the Second Respondent do forthwith pull down and remove and all cabanas and other structures and all beach umbrellas, chairs and other chattel items placed on the Applicant's beach frontage either by itself or servants or agents or licensees or otherwise howsoever;
j. An injunction to restrain the Second Respondent whether by itself or by its servants or agents or licensees or otherwise howsoever from entering and/or using the Applicant's beach frontage;
k. Damages;
l. Costs;
m. All necessary and consequential directions to be given;
n. An Order that the said permission be stayed until after the hearing of the motion or further Order.

[7.]The grounds on which relief is sought by the Applicant are as follows:

a. Further or alternatively, the Applicant has an exclusive private right or natural easement or interest in the beach frontage because it abuts the Applicant's land;
b. The Applicant's beach frontage is a private beach that is bound by the Applicant's land so the First Respondent ought not to have granted the Second Respondent permission to use it;

c. The First Respondent was wrong in law by failing to obtain the Applicant's consent or carry out any consultation or any proper consultation before granting the Second Respondent permission to use the Applicant's beach frontage;
d. The First Respondent's decision to grant the Second Respondent permission to use the Applicant's beach frontage is irrational because the Second Respondent's resort does not abut the Applicant's beach frontage nor is it within close proximity thereto. The Second Respondent's resort is on the harbor or western side of Harbour Island whereas the Applicant's land and beach frontage are on the beach or eastern side of the island;
e. The First Respondent's decision was unfair, biased and /contrary to the rules of natural justice. First, the Second Respondent's use of the Applicant's beach frontage is unfair because the Second Respondent has diminished the Applicant's ability to enjoy the benefits of its land because the Second Respondent has been allowed to set up beach equipment and allow its guest to use them on the Applicant's beach frontage. Second, the First Respondent decision to grant the Second Respondent permission to use the Applicant's beach frontage is unfair because it would negatively impact the economic viability of the Applicant's land and decrease the profitability of the Applicant's proposed hotel villas. Third, it is likely to cause the value of the Applicant's land to depreciate. Fourth, the Applicant and Second Respondent own resorts in Harbour Island. The First Respondent's decision to allow the Second Respondent use of the Applicant's beach frontage would give the First Respondent an unfair advantage; and
f. Further or alternatively, the First Respondent was at all material times the Administrator for the Harbour Island and North Eleuthera Districts.

[8.] The Application is supported by the affidavit of Hans Febles-Frank, Director of the Applicant Company, filed on November 10, 2022. That Affiant provided a detailed account of how the Applicant and the Second Respondent came into possession of their respective parcels of land. Attached to the affidavit are diagrams depicting the location of the parcels of land, the area described as the beach frontage and what is said to be the current access to the beach.

[9.] The affidavit also addresses prior permissions given for the use of the beach frontage as well as the proposed plans for the Applicant's development project.

[10.] By Ex parte Summons filed November 10, 2022, the Applicant also sought a stay of the letter of February 15, 2022 and an Interlocutory Injunction "restraining the Second Respondent whether by itself or by its servant or agents or licencees or otherwise from trespassing in the Island of Harbour Island off the northeast coast of the Island of Eleuthera one of the Islands of the said Commonwealth on the area of the beach known

as or called Pink Sand Beach or the Sand Beach, which is land bounded seaward by the mean low water mark or the sea and landward by the eastward boundary of land owned by the Applicant (hereinafter referred to as "the Applicant's beach frontage") or to any portion thereof by building or allowing to be built or continuing to be built any tent or other moveable structure thereon, by constructing or allowing to be constructed or continuing the construction of any building thereon, by placing any chairs, umbrellas, beach equipment or other chattel or items thereon, by clearing or allowing to be cleared any part thereof and from entering or crossing the Applicant's beach frontage whether in exercise of an alleged claim or right or otherwise until after the trial of this action or until further order."

[11.] That Application also relies on the affidavit of Hans Febles-Frank, Director of the Applicant Company, filed on November 10, 2022.

BACKGROUND

[12.] In September 2021, the Applicant sought to purchase land with beach frontage "for the development of a self-catering hotel villa". Subsequently, the Applicant became the owner of property which was the location of the former Sip Sip Restaurant and Lightbourne House, in Harbour Island ('Sip Sip property'). This is evidenced by Deed of Conveyance dated January 19, 2022.

[13.] The First Respondent is the Island Administrator for the Harbour Island District. The Second Respondent is the owner of the Rock House Hotel, Harbour Island.

[14.] In February 2022, the Applicant sought advice on leasing the beach frontage adjacent to the Applicant's property and on February 3, 2022, submitted an application to the Bahamas Investment Authority (BIA), enclosing a Crown Land application and Development/Land Use Form details. Beach frontage, in this context, refers to the beach in front of, and immediately adjacent to, the Sip Sip property.

[15.] On assuming possession of the Sip Sip property, the Applicant noticed that there were chairs, umbrellas etc on the beach frontage. These, the Applicant learnt, were the property of the Rock House Hotel. The Affidavit of Hans Febles-Frank recounts how the previous owner of the Rock House hotel had acquired

permission of a previous owner of Sip Sip to put chairs and umbrellas etc on the challenged beach frontage. That permission did not extend to the current owner.

[16.] When confronted by the Applicant about the use of the beach frontage, the Second Respondent claimed to have a Crown lease and subsequently sought to rely on a letter dated February 15, 2022.

[17.] Notably, the Second Respondent later resiled from both positions. The Second Respondent was not able to produce a Crown lease and the Second Respondent also acknowledged that the February 15, 2022 letter did not give permission for the use of the beach frontage.

[18.] By letter of April 11, 2022, the Applicant learnt that its request for a lease of the beach frontage had been denied.

[19.] By its application, the Applicant seeks to review the decision of the First Respondent as is encompassed in the letter dated 15 February 2022 and addressed to the Second Respondent. The caption is "*Re Beach Access*" and the text reads:

> *"I refer your correspondence dated January 24th 2022 with reference to the above captioned. Please be advised that permission is granted for you to continue to utilize the beach access located in front of Sip Sip Restaurant for your hotel guests.*
>
> *On behalf of the community of Harbour Island I wish to thank you for keeping that area manicured over the years.*
>
> *Sincerely,*
> *Mr. Gilbert Kemp*
> *Administrator*
> *North Eleuthera District"*

LAW AND ANALYSIS

[20.] Judicial Review is the power of the Court to review the decision of statutory bodies and decision makers in determining whether the decision made was, inter alia, lawful and reasonable.

[21.] Order 53 of the RSC sets out the procedure which an Applicant must follow in seeking relief under this regime. The relevant sections provide:

> 1. (1) An application for —
>
> (a) an order of mandamus, prohibition or certiorari;

or

(b) an injunction under section 18 of the Act restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to —

(a) the nature of the matters in respect of which relief may be granted by way of an order or mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2. On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same

matter.

3. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave shall be made ex parte to a judge by filing in the Registry —

(a) a notice in Form A in the Schedule to this Order containing a statement of —

(i) the name and description of the applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the applicant's counsel and attorney (if any); and

(iv) the applicant's address for service; and

(b) an affidavit which verifies the facts relied on.

[22.] In this case, leave is sought pursuant to Rule 3.

[23.] The parties are *ad idem* as to the nature of judicial review and I accept that the law in that regard is as set out in **Brian R. Christie v. The Civil Aviation Authority**

(Bahamas Air Navigation services Division) 2017 PUB/jrv/00010. There, *Honourable Madam Justice Indra H. Charles* noted at paragraph 16 that:

> "Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties."

[24.] The threshold for the application for leave is generally said to be a low one. Nonetheless, frivolous applications are to be discouraged. Where an applicant has an alternative remedy available to it, the applicant ought to exercise that option since judicial review is known to be a remedy of last resort.

[25.] In **Sharma v. Brown-Antoine** [2006] UKPC 57, *Lords Bingham of Cornhill* and *Lord Walker of Gestinghorpe* considered the governing principles in applications for leave. At paragraph 14 of the judgment, their Lordships opined that:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as a delay or an alternative remedy…"

[26.] In this case, there is a decision or determination of the First Respondent which is couched as "Beach Access". The Applicant has submitted and maintained throughout these proceedings that the First Respondent granted the Second Respondent use of "the Applicant's beach frontage". It is on this basis that the Applicant seeks certain reliefs, including the following declarations:

a. A Declaration that the Applicant's beach frontage is not a public beach but a private beach;
b. Further or alternatively, a Declaration that the Applicant has an exclusive and private right of natural easement over its beach frontage;
c. A Declaration that the Second Respondent has no right to or interest in the Applicant's beach frontage.
d. A Declaration that the said permission granted by the First Respondent to the Second Respondent is unlawful.

SUBMISSIONS OF THE APPLICANT

[27.] The Applicant submits that the "Second Respondent has been granted permission to place beach equipment on the beach frontage, which is in front of the Applicant's property". In summary, the Applicant's submission is that the decision is irrational, unfair and illegal. The Applicant submits that the First Respondent's decision is ultra vires the Local Government Act and that the "Administrator has no power to grant usage

of the Applicant's beach frontage". It is also the Applicant's submission that since the beach frontage abuts the land owned by the Applicant, that the Applicant then has certain exclusive rights over, if not ownership of, the beach frontage or, at the very least, no decision should have been made in relation to the beach frontage without consultation with the Applicant who had a "legitimate expectation to be consulted in connection with the Second Respondent's application to use the Applicant's beach frontage for its guests." The grounds relied upon are set out in the application and were fully argued by the Applicant. The Applicant submits that such permission (the use of its beach frontage) diminishes the value and use of its property.

[28.] Relying on the case of **Rolle and another v Ferguson** [2011] 1 BHS J No. 10, the Applicant submits that the acts of a Family Island Administrator are subject to judicial review.

[29.] This application for judicial review was made some nine months after the decision under challenge. The Applicant relies on the case of **Bahamas Hotel Catering & Allied Workers Union v The Attorney General and the Bahamas Hotel & Maintenance & Allied Workers Union; West Bay Management v Bahamas Hotel Maintenance & Allied Workers** [2010] 1 BHS J. No. 67 to show that where a good reason is proffered to explain the delay in making an application, then the court is likely to extend the time period within which to apply.

[30.] On the question of delay, the Applicant submitted that the Applicant learnt of the decision late and that considerable preparation was necessary. The Applicant also submits that the issue involved is of significant public interest warranting the court's exercise of a discretion to grant leave.

[31.] The Applicant submits that while the Local Government Act allows for appeals of a decision of the District Council, that there is no "corresponding provision for decisions made by an Administrator".

SUBMISSIONS OF THE FIRST RESPONDENT

[32.] The named First Respondent, Mr. Gilbert Kemp, is sued in his capacity as administrator for the Harbour Island District. The First Respondent submits that the decision was made pursuant to the powers granted to the District Council under the then governing statute, The Local Government Act, Chapter 37, together with those powers granted pursuant to the Bahamas Public Parks and Public Beaches Authority Act, 2014.

[33.] The First Respondent submits that the decision of the Council was communicated to the Second Respondent by the First Respondent acting in his role as secretary of the District Council per section 15(3) of the Act. Section 15(3) provides:

> 15(3) The secretary to a board, Town Committee or Council shall be a Family Island Administrator appointed to that district or any other officer appointed by the Director.

[34.] The First Respondent submits that no decision was made relating to beach frontage and that the letter in question communicated permission to use the beach access.

[35.] The First Respondent submits that the decision was made in accordance with the functions of the District Council and that the statute provides mechanisms for appeals against decisions made.

[36.] The Applicant did not appeal the decision.

[37.] The First Respondent, relying on the case of **Howard-Simpson et al v. Harbour Island District-Council** 2018/PUB/JVR/00031, submits that the Applicant should have availed itself of the alternative remedy of an appeal and therefore should not be granted leave.

[38.] On the question of delay, the First Respondent submits that delay ought to be a bar to leave in this instance.

SUBMISSIONS OF THE SECOND REPSONDENT

[39.] The Second Respondent submits that in this case there is no decision by a body which infringes any rights of the Applicant which ought to be protected and that the application for judicial review is irregular, inappropriate, frivolous and vexatious. The Second Respondent submits that the Applicant cannot meet the threshold test for an application for judicial review. Relying on **Sharma v. Brown-Antoine** [2006] UKPC 57, the Second Respondent submits that the threshold test is whether the application for leave to commence judicial review is "arguable" or has a "reasonable prospect of success".

[40.] The Second Respondent submits that "the Applicant neither has an arguable case, or a case at all." The submission is that the letter in question does not relate to beach frontage or to the Second Respondent's use of any beach frontage. The Second Respondent submits that the letter does not grant the Second Respondent permission to use the beach frontage and that there is a factual dispute as to the nature of the decision and that the judicial review procedure is inappropriate.

[41.] The Second Respondent also submits that the declarations and other relief being sought, largely being declaratory of private law rights, are more appropriate for another form of originating procedure. Relying on **R v Inland Revenue Commissioners, ex parte Preston** [1985] AC 835, the Second Respondent also submitted that the Applicant should first exhaust any right of appeal or other means provided for challenging the decision before making an application for judicial review.

[42.] Citing the case of **R v. Securities Commission of The Bahamas ex parte Petroleum Products Limited et al** 1999 BHS No. 1440 which confirms that the application is to be brought promptly, the Second Respondent also notes the delay by the Applicant in bringing these proceedings and submits that there is no acceptable reason for the delay. The Second Respondent submits that there is no element of public interest present in the Applicant's case as in **Responsible Development of Abaco (RDA) Ltd. and another v Ingraham and other** [2012] 3 BHS J. No. 35, which could provide a good reason for the Court to extend the time for seeking leave.

[43.] The Second Respondent also submits that the application for injunctive relief "must fail as there is no basis in law or in fact to seek interlocutory relief linked to an application for judicial review which is itself an inappropriate means of moving the Court for the relief sought." The Second Respondent posits that the Applicant had not commenced operations and submit that the Applicant could not meet the criteria established in **American Cyanamid Co. Ltd v Ethicon** [1975] 1 All ER 504 with respect to injunctions.

[44.] The Second Respondent also sought to have the Applicant pay costs.

REVIEW OF A DECISION

[45.] The first issue to be considered is whether there is a decision, the nature of the decision and whether it is a decision that is subject to the court's supervisory powers.

[46.] For the court to grant leave to review the decision of a statutory body or decision maker, it must be clear what decision by the relevant authority the Applicant seeks to impugn. The starting point, therefore, is the identification of the decision.

[47.] The Applicant relied on the case of **Bahamas Hotel Catering & Allied Workers Union v The Attorney General and the Bahamas Hotel & Maintenance & Allied Workers Union; West Bay Management v Bahamas Hotel Maintenance & Allied Workers** [2010] 1 BHS J. No. 67 where *Honourable Mr. Justice Longley* addressed the

test for Judicial Review in the instance where the six month limitation period had expired. At paragraph 16, he considered the first step as the identification of the decision:

> "The first is: what is the decision the applicant seeks to impugn?..."

[48.] In this case, the decision that the Applicant seeks to impugn is that communicated in the letter dated February 15, 2022.

[49.] It is useful to reproduce the text of the decision being challenged. The caption in the letter is "Re Beach Access". The relevant portion of the letter reads:

> "I refer your correspondence dated January 24th 2022 with reference to the above captioned. Please be advised that permission is granted for you to continue to utilize the beach access located in front of Sip Sip Restaurant for your hotel guests.
>
> On behalf of the community of Harbour Island I wish to thank you for keeping that area manicured over the years."

[50.] The Applicant submits that "the definition of "beach access" appears to be central to the interpretation of the permission letter." I accept that proposition.

[51.] The Applicant submits that despite the use of the words "beach access", the words are to be construed as meaning "beach frontage".

[52.] The Applicant also submits that the decision is ambiguous as it is clearly used to mean "beach frontage". The Applicant further submits that this court can interpret an ambiguous decision of a government authority in a judicial review application and relies on the cases of **Hall & Co. Ltd. v. Shoreham-By-Sea Urban District Council And Another** [1964] 1 WLR 240 and **Cityhook Ltd v Office of Fair Trading (Alcatel Submarine Networks Ltd and others intervening)** [2007] Lexis Citation 1177.

[53.] The Applicant offers one definition of "Beach Access" as found in "Law Insider website database" and produced as:

> **"**Beach Access means public beach access points, including associated boardwalks, walkways, dedicated parking areas, and the area on the beach beginning at the entrance to the beach."

And another definition as:

> **"**Beach Access means any public beach access points identified by the City Parks and Recreation Department, including associated boardwalks, walkways, and dedicated parking areas, and the area on the beach beginning at the entrance of the beach access point perpendicular with the applicable road right of way to the water's edge."

[54.] The Applicant submits that

"The above definitions are from an independent source and indicate the term "beach access" includes the area on the beach near the entrance of a beach access way. The Applicant's beach frontage is near the entrance way to the beach so it seems the Applicant's beach frontage may be described as being a part of the "beach access" according to the above definitions. Also, the term is defined to include the area perpendicular, meaning at ninety-degree angle, with the right of way. When looking at the map and plans of the subject area in Harbour Island, one would note the Applicant's beach frontage or the area in front of Sip Sip Restaurant is perpendicular to the path or beach access way.

Both of the above definitions support the interpretation that the term beach access refers to the area on the beach east and in front of the Applicant's land, which the Applicant describes as its beach frontage. This is consistent with the area the [Second] Respondent has been using for a long time and for which it sought permission to use from previous owners of the Applicant's land over the years. Also, this appears to be the area for which the Second Respondent sought permission to use from the First Respondent when it requested "to continue to utilize the beach access located in front of Sip Sip Restaurant". The front of Sip Sip Restaurant cannot be reasonably construed to mean the side of that structure where there is no entrance doorway."

[55.] The Applicant submits that there ought to have been use of another term **"**beach access way" if one were to accept the propositions of the First Respondent and Second Respondent that it was merely permission for continued access to the path way that had been granted. The Applicant submits that,

"It appears the term "beach access way" is consistent with the interpretation that the First and Second Respondents have sought to give to "beach access". It seems "beach access way" should have been used in the permission letter given the arguments made on behalf of the First and Second Respondents. If the First Respondent intended for the Second Respondent to only have use of the pathway itself, then it appears "beach access way" would have been the more appropriate term.

Even if the court were to have regard for the circumstances surrounding the issuance of the permission letter and it were to seek to ascertain the First Respondent's intent at the time, one could only reasonably conclude that "beach access" meant or included the Applicant's beach frontage. The Second Respondent had used the Applicant's beach frontage for a very long time and wished to have continued use of that area. It is undenied that the Second Respondent had sought permission from previous owners of the Applicant's land over the years to use that part of the beach that the Applicant has described as its beach frontage. Not knowing whether the Applicant, as the new owners of the property, would allow them permission to use the beach frontage, it appears the Second Respondent sought the First Respondent's permission when the Applicant entered into possession of their land. After the Second Respondent received the permission letter, it appears their employees relied upon that document when they requested that the Applicant's agents desist from using the

beach frontage. The Second Respondent's reliance on that letter was later affirmed by their attorney at the time.

The permission letter refers to the Second Respondent being able to "continue to utilize the beach access" and keeping the "area" clean in the past. This suggests that the First Respondent knew of the Second Respondent's use of the "area" in the past and was fully aware that the Second Respondent had its beach equipment in that part of the beach which its tourist guests occupied during the day. Therefore, it seems most unlikely that the First Respondent was only giving the Second Respondent written approval to use of a public pathway.

[56.] The First Respondent relies on the affidavit of Gilbert Kemp filed on January 12, 2023 to support the submission that permission was sought for use of the beach access and that that is the nature of the permission that was granted. Paragraphs 7 of 10 of that Affidavit read:

> 7. "…on January 24th 2022, the President and General Manager of the Rock House Hotel, Mr. Henry Rolle, wrote to me as Administrator and Secretary to the district Council to obtain permission for beach access to Pink Sand Beach by way of the reservation road leading from the public road known as Court Street to the Public Access beach steps between the Sip Sip Restaurant and Ocean View Club."
>
> 8. In my capacity as Secretary of the District Council, I subsequently brought this request to the attention of the Chief Councilor, Mr. Terrance Davis and it is was subsequently put on the Council's agenda for the next meeting. At the next meeting of the District Council, the request by Rock House Hotel was considered favourably by the Council.
>
> 9. Despite the Applicant's assertion, there was no need for public consultation in regard to the same.
>
> 10. By letter dated February 15th 2022, I wrote to Mr. Rolle, in my capacity as Secretary to the District Council and the Central Government Representative informing him of the District Council's decision. A copy of the letter is attached hereto and marked "Exhibit GK2".

[57.] The First Respondent submitted:

> "It is thus humbly submitted and clear in the language used in the letter of January 24, 2022, that the Second Respondent requested beach access only, and by the letter in reply dated February 15th 2022 to the Second Respondent, the First Respondent simply conveyed to them the decision of the Local Government District Council to

> grant access to the beach only , and did not confer or seek to confer any other proprietary temporary or permanent right to the same.
>
> To be clear, the First Respondent never gave permission for the second Respondent to use the beach frontage in any capacity, but rather, just gave permission for beach access to Pink Sand Beach, by way of the reservation road leading from the public road known as Court Street to the Public Access beach steps between the Sip Sip Restaurant and Ocean View Club."

[58.] The acts that cause the Applicant concern are the acts of the Second Respondent.

[59.] The Second Respondent submits that their request to First Respondent was for permission to continue to use the beach access leading to Pink Sands Beach and that it was that beach access for which permission was received.

[60.] The Second Respondent relied on the affidavit of Henry Rolle filed January 23, 2023. Henry Rolle avers at paragraph 7 that "on the 24th January 2022, we wrote to the Island Administrator…. for continued use of the beach access way leading to Pink Sands Beach." He exhibits the letter of request. The caption of the letter is shown as "RE: BEACH ACCESS".

[61.] The Second Respondent notes that the letter of response from the Island Administrator does not grant the Second Respondent permission to use the beach frontage. On that basis, the Second Respondent argues that "the Second Respondent's usage of the beach frontage as alleged or otherwise is not consequent to any permission given by a public authority seeking to impugn the rights of private land owners. This matter is simply not appropriate for judicial review."

COURT'S ANALYSIS AND DETERMINATION

[62.] On my review of the February 15 2022 letter, there appears to be no evidence on the face of the letter to suggest that the First Respondent granted permission for the use of a beach frontage. Neither does that letter reflect the decision which the Applicant seeks to impugn. The decision said to be under challenge is stated in the application as "a decision of the First Respondent by letter dated 15th February 2022 to grant the Second Respondent permission to continue usage of the Applicant's beach frontage in the Island of Harbour Island off the northeast coast of the Island of Eleuthera." The First Respondent in his evidence maintains that he never granted permission for use of a beach frontage but rather beach access to the Second Respondent. The Second Respondent's

position is that they did not apply for permission to use the beach frontage and received no such permission.

[63.] It is my finding that the letter did not make the decision said to have been made and which the Applicant seeks to impugn. I find that there was no permission granted for the use of "beach frontage" or for any other description that would pertain to the use of the beach adjacent to the Applicant's land. The permission provides for "beach access". The wording, as used, is plain and I have discovered no ambiguity in them. There is no ambiguity or uncertainty in the language requiring this court to impose a meaning on the words used other than their plain, ordinary and natural meaning.

[64.] I am satisfied that the permission sought by the Second Respondent, and given by the First Respondent, was permission to ensure continued access to the reservation path known to be used as the beach access and to give permission for the Second Respondent to continue acts of maintenance. I note that acts of maintenance fall within the domain of the town committee and the District Council under the relevant legislation and therefore the inclusion of that acknowledgement, in these circumstances, does not serve, to my mind, to enlarge the area of permission.

[65.] Counsel for the Applicant went to great lengths to show that the "permission letter" could only mean permission to encroach on what is argued to be the Applicant's beach frontage. He argues that the term in the letter is ambiguous and that it could be taken to mean the Applicant's beach frontage. I find that his reliance on the definition of Beach access does not demonstrate that it obviously includes beach frontage.

[66.] On the Applicant's own finding, "beach access" means Beach Access means public beach access points, including associated boardwalks, walkways, dedicated parking areas, and the area on the beach beginning at the entrance to the beach." This is an inclusive definition. From the Applicant's submissions, the term would have to be enlarged and so construed to include a reference to the beach frontage. The Applicant offers that the term used ought to have been "beach access way". That term still includes the use of the words "beach access" and while that term may be the preference of the Applicant, that term does not appear to be a technical term that had to be used in these circumstances. This court's duty is not to speculate but to construe the words used.

[67.] Tellingly, the Applicant's affiant avers at paragraph 35 of the affidavit of Hans Frans-Keble that

> "It is not clear to me whether the beach access mentioned in the permission letter is the same as the Applicant's beach frontage. A road reservation or beach right of way that connects with the beach runs along the southward boundary of the Applicant's land. This area has beach chairs that do not belong to the Rock House Hotel…. Since the permission

letter indicates the Rock Hotel had continued usage of the beach in front of the Sip Sip restaurant, it appears the letter is referring to the Applicant's beach frontage, which is the subject of this dispute.

[68.] At paragraph 43 of his affidavit, Hans Frans- Keble also avers
"Inasmuch as the Applicant is desirous of staying the effect of the permission letter and restraining the Second Respondent from using the Applicant's beach frontage, I am informed by the Applicant's attorney and verily believe that possible anticipated defences by the First Respondent, may be on the premise that the beach frontage is Crown land and/or the First Respondent had authority to issue the permission letter. As for the Second defendant, it is likely that they would rely on the permission letter as authority for them to use the Applicant's beach frontage.

[69.] The Applicant's affiant says that he is unclear as to whether beach access is the same as beach frontage. The Applicant explains why and this is because of the history of usage of the area that is of concern to the Applicant. The evidence is also that Rock House hotel had enjoyed an arrangement with the previous owner of Sip Sip as to the use of some of that area of the beach that the Applicant has referred to as its beach frontage. I find that the Applicant's uncertainty does not make the decision uncertain. Whether that area in use by the Second Respondent is to be considered the Applicant's beach frontage is a matter to be determined elsewhere and cannot be the subject of a challenge to a decision that does not purport to address such usage. Nor can the Applicant cause the letter to be construed as a reference to "beach frontage" because of the nature of the Second Respondent's acts or because of his own uncertainty.

[70.] It does not escape me that both the decision-maker (the First Respondent) and the holder of the decision (the Second Respondent) both contend that the decision, as alleged by the Applicant, was never made. They are agreed that the only communication and determination made was in relation to "beach access". On the plain words of the request made (for 'beach access') and the response ('re beach access'), permission is only given in relation to beach access. The Second Respondent has acknowledged that they were not given permission for use of the beach frontage. There is force in the submission by Counsel for the Second Respondent that "the Second Respondent's usage of the beach frontage as alleged or otherwise is not consequent to any permission given by a public authority seeking to impugn the rights of private land owners."

[71.] The purpose of judicial review is to review the nature of the decision that was actually made. This Court must consider what the position would be if this court were

to quash a decision where the First Respondent's position is that the decision was in response to an application for use of the road reservation and where the Second Respondent does not found its actions committed on beach frontage on the permission given for beach access. If there is no decision referring to "beach frontage" that is being relied on by the Second Respondent, and if there is no such decision that appears to exist, then what is the court's jurisdiction for quashing the decision that was actually made? This Court must also consider how an order for certiorari would avail the Applicant if the Second Respondent is not relying on the interpretation of the decision as advanced by the Applicant as authority for the acts that it, the Second Respondent, is said to be committing. In essence, the First Respondent has declared that they have given no permission concerning the use of the beach frontage. The Second Respondent does not attribute its actions to some interpretation of that decision that would give it permission to use beach frontage. I accept that this is so.

[72.] The Second Respondent represented that they can conduct certain activities on the beach frontage without reference to the letter because they received no authority to do so as a result of the letter. If that is so, then it seems to me that their conduct could not be laid at the feet of the First Respondent nor be said to be attributable to any decision made by the First Respondent.

[73.] It cannot be correct that, as a general principle, the nature of a decision is to be determined by the conduct of the person in whose favour the decision is made. There may be instances where a person's conduct is helpful in determining the meaning of a decision, such as where the decision is ambiguous and its meaning becomes discoverable usually by reference to practice or a course of conduct. However, I do not think that this case is such a case. As I have already found, the words used in the February 15, 2022 letter are plain and unambiguous. The words used in the letter are to be accorded their natural meaning, which I find in this case is a reference to a road reservation that allows passage to the beach.

[74.] I am satisfied on the evidence of the parties, that there has been confrontation between them. That confrontation may very well have triggered an application made by the Second Respondent, admittedly subsequent to the acquisition of Sip Sip by the Applicant. The Applicant suggests that this is the case. One must juxtapose, against that, that the Applicant also made an application (by virtue of applying to the Crown for a lease) for use of the beach frontage. It is apparent, by virtue of the Applicant's own application for use of the beach frontage, that permission for use of the beach frontage lies in someone or somebody other than the Applicant. The question of who is entitled to use of the beach frontage has yet to be determined.

[75.] Having considered the nature of the relief being sought, it seems to me that the Applicant is effectively seeking to establish certain private law rights without engaging the usual mechanism for the establishment of such rights, namely procedure appropriate for private law remedies. This application appears to be a misuse of the judicial review procedure.

[76.] Judicial Review serves to invoke the supervisory jurisdiction of the court. The Applicant ought to have sufficient interest in the decision in order to challenge it. The occupation of property adjacent to beach frontage may, in an appropriate case, be sufficient to ground standing for a decision concerning the use of beach frontage where the owner of the adjacent property claims that they ought to have been consulted before a decision was made. However, to my mind, it is a misuse of judicial review proceedings where the aim of the owner of the adjacent property is to acquire a legal or vested interest in the beach frontage. It seems to me that this is the true aim of these proceedings i.e. to declare and confer a legal interest on the Applicant. As is apparent from Counsel's submissions, much of the resolution of this matter would include the resolution of the issues of whether the beach frontage is a private beach and of the Applicant's right to same. Those issues appear to overtake and dwarf any challenge to a decision-making process. In this case, I find that the pursuit of the Applicant's private rights and legal interest ought to be conducted elsewhere and that the judicial review procedure is not the proper forum.

[77.] In this case, I find that the decision alleged was never made i.e. there was no decision made by the First Respondent that granted permission to the Second Respondent to use the beach frontage adjacent to the property purchased by the Applicant. I will refrain from referring to it as the Applicant's beach frontage since, on the Applicant's own evidence, they sought permission to lease the beach frontage and were denied same. The recognition that permission to use the beach frontage lies elsewhere (in the Crown) serves to convey that the Applicant is aware that the ownership of the beach frontage has not been a matter determined in their favour. This court will not facilitate the use of judicial review proceedings, in the given circumstances, for the resolution of such a matter.

[78.] In any event, I find that the decision made did not concern the "beach frontage" as alleged by the Applicant. That finding ought to be dispositive of the matter.

[79.] Having found that the alleged decision was never made, the Applicant has no arguable case and the application for leave to pursue judicial review is denied.

INJUNCTIVE RELIEF

[80.] The Applicant's application for an injunction can be dealt with summarily. The application for injunctive relief hinges on the Applicant's complaint that permission was given for use of beach frontage that is to be treated as "the Applicant's beach frontage." Given my findings above, there is no basis for injunctive relief pending a determination of an application for judicial review. The application for an injunction is denied.

THE DELAY

[81.] The Court, having determined that the decision which the Applicant sought to challenge was non-existent, will still address the issue of delay as it is a factor which which could serve as a bar to an Applicant obtaining leave for Judicial Review.

[82.] **Order 53 Rule 4** of the **RSC** provides a six (6) month limitation period during which an Applicant may apply for judicial review. This section provides:

> 4. (1) An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.
> (2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

[83.] The Applicant delayed commencing this application by some nine (9) months. The evidence is that the permission for beach access to the Second Respondent from the First Respondent was dated February 15, 2022.

[84.] In **West Bay Management v Bahamas Hotel Maintenance & Allied Workers** *Longley J* further expanded on the test for judicial review stating:

> "…Second, when did the applicant first become aware of the decision it seeks to impugn? Third, did it act promptly in seeking leave to make an application for judicial review once it became aware of the decision? Fourth, as an alternative question to three, if the applicant did not act promptly in making the application to challenge the decision it seeks to impugn has it otherwise proffered good reason for the entire period of delay?..."

[85.] The Applicant proffers as a reason for the delay that they became aware of the decision "on or about the 22nd July 2022' - some 5 months after permission was granted and thereafter, "the applicant had survey plans prepared of the Applicant's land and carried [sic] investigations in preparation for an action against the permission letter. Given the nature of the investigation, that related to land rights, the preparation was very time consuming."

[86.] The court does not accept this as an adequate reason for delay. Prior to receiving notice of the letter, the Applicant treated the Crown as the legal owner of the "beach frontage" which was evident by the Applicant's lease proposal to the Bahamas Investment Authority. It is therefore unclear what "investigations" concerning land rights would have delayed an application concerning a challenge to a decision framed as a decision "granting permission to continue usage of the Applicant's beach frontage". I note that the survey plan attached to the lease proposal existed prior to the Applicant becoming aware of the February 15, 2022 letter of the Second Respondent.

[87.] The Applicant further submits that the court, when addressing delay in bringing judicial review applications, must consider the public interest and importance of the decision made by the First Respondent. The Applicant also seeks to elevate the present application to an application "of significant" public interest for the determination of "the rights of persons who own property where there is and or a beach between the high water mark and their property".

[88.] The Applicant cited **Responsible Development of Abaco (RDA) Ltd. and another v. Ingraham and others** [2012] 3 BHS J. No. 35**, GC Claims Adjusters Ltd. v. The Insurance Commission of the Bahamas [**2017] 2 BHS J. No. 127**, Re S (Application for Judicial Review)** [1998] 1 FCR 368 and argued that, in the present case, there existed a public interest factor in having this matter proceed and that such a consideration would outweigh the delay in bringing the application.

[89.] The case of **Responsible Development of Abaco (RDA) Ltd. and another v. Ingraham and others** concerned a decision to allow the construction of a power plant in Wilson City, Abaco – a power plant that would generate electricity by means of a heavy fluid oil. The Applicants in that case contended that there had been no adequate or meaningful consultation re the construction of the power plant and that that was a

breach of their constitutional rights. The Applicants were out of time in filing an application for Judicial Review. Leave was granted to pursue judicial review but the learned judge hearing the application, found, inter alia, that the application for leave had been filed out of time. The Application for judicial review was dismissed. The Applicants appealed. The Appeal against the learned judge's decision to refuse the judicial review application on the basis of delay was allowed.

[90.] The judgment of the Court of Appeal was delivered by President Allen. The learned judge in considering the question of delay also considered the effects of the power plant operations in Abaco, how the residents would be affected and the effects of property valuation if the construction of the plant continued. The court found that the issue was one of vital public interest.

[91.] At paragraph 38 of the judgment, President Allen considered the matter of public importance as found in the case of **R v Home Secretary ex p Ruddock** [1987] 1 WLR 1482. She observed:

> 38 In **R v Home Secretary ex p Ruddock** [1987] 1 WLR 1482, Taylor J. took a similar approach to that of Nicholls LJ. In that case, the applicant was challenging the order of the Home Secretary to tap his phone which was unknown to him for two years. After becoming aware, he delayed his application for more than three months. The learned judge found that notwithstanding the applicant had not satisfactorily explained the delay after he obtained knowledge of the challenged decision, he would allow the applicant to proceed with his challenge in view of the general importance of the issue of intercepting private telephone calls by the Home Secretary.

[92.] The court found that for a project of the magnitude of the power plant and given the possible implications for the community in Abaco, the public had a legitimate expectation of consultation. At paragraph 53, President of Appeal Allen opined:

> 53 This too was a project which was possibly going to transform Wilson City, in that it was a project from which there was likely to be some environmental and other impact on that community; and in as much as it was the standard practice to require an EIA in respect of such projects beforehand, it is my view that in the absence of the submission of an EIA on the project before the decision was made to locate and construct the plant at Wilson City, there was a legitimate expectation of consultation on the part of the public. Fairness dictated a duty to consult and to hear the concerns of those likely to be affected before the decision to locate and construct the plant was made.

[93.] I am of the view that the instant case is not one of public interest or importance in the manner discussed in **Responsible Development of Abaco (RDA) Ltd. and another v. Ingraham and others**. While the issue of the determination of the beach frontage as

a public or private beach may be interesting to the public, the determination of the issue in this case is not a determination of an issue of public importance.

[94.] Having heard the reasons proffered by the Applicant, this Court is not satisfied that there is a good reason for the delay per Rule 4 (1) of the RSC which would cause this Court to exercise a discretion in favour of the Applicant.

COSTS

[95.] The First and Second Respondents were heard on the Applicant's application. While applications for judicial review may be made ex parte, it is often useful to hear the intended Respondents at the leave stage. It also saves costs and time to hear responses and challenges at the leave stage and not subsequently on an application to set aside leave. On this application for leave, the Applicant was unsuccessful. There is no reason why costs should not follow the event. Costs are awarded to the First Respondent and Second Respondent.

CONCLUSION

[96.] This Court finds that the decision which the Applicant is seeking to review was never given by the First Respondent. There is no decision as to beach frontage. The decision given pertained to beach access. This finding is determinative of the application. This is not a case fit for judicial review.

[97.] In any event, the Applicant's delay in bringing the application would constitute a bar to being granted leave in all the circumstances.

[98.] This Court makes no finding as to the existence of an alternative remedy for the consideration of same as a bar to leave being granted.

[99.] The application for leave to apply for judicial review is dismissed.

[100.] The application for injunctive relief is dismissed.

[101.] Costs are awarded to the First and Second Respondents.

ORDER

[102.] The order and directions of this Court are as follows:

1. Application for leave for judicial review is refused.
2. Application for an injunction is refused.
3. Costs of this application are awarded to the First and Second Respondents, such costs to be taxed if not agreed.

Dated the 29th Day of January 2025

Carla D. Card-Stubbs

Justice