TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/021

BETWEEN:

QUORUM ISLAND (BVI) LIMITED

Appellant/Interested Party

and

VIRGIN ISLANDS ENVIRONMENTAL COUNCIL

Respondent/Claimant

THE MINISTER OF PLANNING

Respondent/Defendant

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal

Appearances:

Mr. Gerald Farara, QC, with him Ms. Tamara Cameron for the Appellant
Mr. Stephen Hockman, QC, with him Mr. Mark Beard for the Respondent/Claimant
Mrs. Joanne Roberts-Williams, Solicitor General, for the Respondent/Defendant

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2011: January 13,
August 12.

Appeal – Judicial Review – Prerogative relief proceedings – Whether the Attorney General is a necessary and proper party – Section 13 of the Crown Proceedings Act – Section 2 of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act, 2000 - rule 19(3) and Part 56 of CPR 2000 – Whether protected area validly declared – Whether Minister's grant of approval for development project in area purportedly declared a protected area tainted with illegality – Sections 13, 19, 36, 71 and 79 of the Fisheries Act – Regulation 51 of the Fisheries Regulations 2003 – Sections 19(6) and 43 of the Interpretation Act

In January 2007, the then Chief Minister and Minister of Planning ("the Minister") approved an application by the appellant, Quorum Island BVI Limited ("Quorum Island"), for the development of a five-star hotel, marina and golf course at Beef Island, Tortola. The respondent, the Virgin Islands Environmental Council ("the Environmental Council" or "the Council"), applied for judicial review,

eventually by way of *certiorari* to quash the Minister's decision. The Council is a coalition of local fishermen, concerned residents, scientists and environmental activists whose objects include promoting environmental democracy, public participation, access to justice on environmental issues and the enforcement of environmental legislation.

The claim was initially brought against the Minister and the Attorney General's Chambers. The latter was changed to the Attorney General. Subsequently, the Council applied to remove the Minister as a defendant. The application was granted in November 2007 and the Attorney General remained as the sole defendant. The defendants were at all times represented by the Solicitor General and members of her Chambers.

At the trial, the Solicitor General and counsel for Quorum contended, as a preliminary objection, that the claim should be struck out because the Attorney General is not a proper party to claims for prerogative or "Crown side" relief. This submission was premised on the contention that while the Attorney General is the proper defendant in civil proceedings against the Crown by virtue of section 13 of the Crown Proceedings Act, there is no principle or statute by which the Attorney General is required to be a defendant in prerogative or "Crown side" proceedings. The trial judge held that notwithstanding that 'civil proceedings' in the Crown Proceedings Act excludes prerogative type proceedings, the effect of rules 2.2(2) and 56.11(2) of CPR 2000 and section 2(a) of the Eastern Caribbean Supreme Court (Virgin islands) (Amendment) Act 2000 is to render the Attorney General a proper defendant in the present case and it was therefore unnecessary to join the Minister as a defendant. The judge accordingly dismissed the objection and proceeded to hear the claim. Quorum Island appealed against her decision on the preliminary objection.

In her judgment on the substantive claim, the judge held that the Council did not prove that the Minister's decision to approve the Project was impeachable on the ground of procedural impropriety or 'Wednesbury' unreasonableness. She however impeached it on the ground of illegality and quashed the decision. In doing so, the judge held that the Project would adversely affect Hans Creek which was validly declared a fisheries protected area pursuant to regulation 51(1) of the Fisheries Regulations 2003.

The Fisheries Regulations 2003 were made under section 79(1) of the Fisheries Act. Section 79(1) permits the Minister to make regulations for better carrying into effect the provisions of the Fisheries Act and states the type of matters for which such regulations may be made. Regulation 51(1) of the 2003 Fisheries Regulations prohibits any person from carrying out any development which is likely to adversely impact any area declared a marine protected area by Order by the Minister published in the Gazette. Hans Creek was then declared to be a fisheries protected area in Regulation 51(5)(b) of the said Regulations. However, it is section 13(1)(b) of the Fisheries Act that specifically empowers the Minister, by Order published in the Gazette, to declare any area of the fishery waters together with the land area up to the high watermark adjacent to such waters to be a protected area.

Quorum Island also appealed against the judge's decision to quash the Minister's approval.

Held: allowing the appeal on the preliminary issue, and substituting the Minister of Planning for the Attorney General as Defendant/Respondent, with no order as to costs in the High Court or in the

appeal; and also allowing the appeal against the judge's decision to quash the Minister's approval, with costs to be paid by the Minister to the appellant, Quorum Island, with no costs to be paid by the Environmental Council in the appeal or in the High Court:

1. Prerogative or "Crown side" proceedings are not civil proceedings under the laws of the Virgin Islands. There is no provision in the laws of the Virgin Islands that requires the Attorney General to be a necessary or proper defendant in prerogative type proceedings. However, the Attorney General may be a necessary and proper party in civil proceedings against the Crown, by virtue of section 13 of the Crown Proceedings Act. The proper defendant in prerogative proceedings is the person or authority whose decision is challenged; in the present case, the Minister. The trial judge therefore erred when she held that the Attorney General was a proper defendant in the present case.

   Dicta in Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd (1992) LRC (Const), 720 at page. 721(c) (CA) and page 747(e) (PC); Attorney General v Claude Jardim Civil Appeal No. 134/98, page 2, per Bernard C and (2003) 67 WIR 100, page 105; Chandresh Sharma v Attorney General Trinidad and Tobago Court of Appeal No 115 of 2003, per Nelson J.A at paragraph 36; Richard Frederick et al v The Comptroller of Customs and the Attorney General HVCAP 2008/037 (6th July 2009) per George-Creque, JA, as she then was, at paragraphs 29-32; Gairy and Another v Attorney General of Grenada [2002] 1 AC 167, [2001] 3 WLR 779, per Lord Bingham at paragraph 21; and Monica Ross v Minister of Agriculture, Lands and Fisheries et al Saint Vincent & the Grenadines Claim No. 255 of 2001 (Unreported), per Webster J (Ag.) at paragraph 10 and 11, followed.

2. Pursuant to rule 19.2 of CPR 2000, the judge should have removed the Attorney General and rejoined the Minister as the defendant when the issue was raised on the preliminary objection at the trial. The joinder of the Minister as a defendant is facilitated even at this stage of the proceedings. This is because the Solicitor General, who has at all times represented the Attorney General and who represented the Minister when he was a defendant, has stated that the Minister is aware of all aspects of the proceedings from their commencement. Additionally, rule 8.5(1) of CPR 2000 provides that a claim shall not fail because a person who should have been made a party was not made a party to proceedings or that a person was made a party who should not have been added.

   Dictum by Lawrence Collins LJ in Dunwoody Sports Marketing v Prescott [2007] WLR 2343, at paragraph 23 applied.

3. It is a primary tenet of the rule of law that a public authority must make decisions within the bounds of any discretion conferred by law. An administrative decision is illegal if the decision maker contravenes or exceeds the terms of the power which authorized the decision, or if the decision purports an objective which the conferring power did not contemplate. It follows that, in order to determine whether an administrative decision is illegal, the court, as the guardian of legality, must first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against these. Where, as in the present case, statute confers discretion upon the Minister to declare fisheries protected areas, such areas must be validly declared in the manner authorized by

the enabling statute if the Minister's approval of development in such an area is to be impugned for illegality under the *ultra vires* doctrine.

4. In determining whether the declaration of Hans Creek, and, by extension, whether the Minister's approval of the Beef Island Project was tainted by illegality, reference must be made to the provisions of the Fisheries Act, which empower the Minister to declare protected areas. The court must consider the intention, object or purpose of the enabling provisions in the Act, and, by that reference, determine whether the declaring regulations have a rational nexus with the intention, object or purpose of the Fisheries Act. The court is not concerned with the policy, wisdom or efficaciousness of the statute.

   Dicta in Maharashtra State Board of Secondary and Higher Education v Kurmarsheth (1985) LRC (Const) 1083, at pages 1091-1092; in McEldowney v Forde (1969) 3 WLR 179, at page 191 and Attorney General v Great Eastern Rly. Co (1980) 5 App Cas 473, at page 478 applied.

5. Hans Creek is a critical fisheries conservation area that should be protected. It does not matter whether Hans Creek is declared a 'protected area' a 'marine protected area' or a 'fisheries protected area'. The title or recital would not render the declaration invalid. The critical question is whether the area was validly declared a protected area by virtue of Regulation 51 of the Fisheries Regulations 2003. This determination depends on whether the declaration falls within the purpose of the statute. The purported declaration of Hans Creek as a fisheries protected area in Regulation 51(5) of the Fisheries Regulations 2003 does not properly fall within the purpose and intention of section 79(1) of the Fisheries Act. The legislature gave specific authority to the Minister to declare protected areas in section 13(1)(b) of the Fisheries Act. This section empowers the Minister to declare not only areas of the fishery waters, but also the area of land adjacent thereto to be protected areas. Section 13(1)(b) permits the Minister to identify and declare marine areas, as well as specific areas of adjacent land. Regulations made under section 79(1) of the Fisheries Act are to provide protection for the areas so declared. The intention of section 13(1)(b) is to facilitate certainty in land use and to identify the exact land area which is to be afforded environmental protection. Hans Creek and such adjacent lands as are to be protected should have been declared protected areas under section 13(1)(b) of the Fisheries Act, not under Regulation 51 of the Fisheries Act. Hans Creek was therefore not validly declared a protected area, and, accordingly, the judge should not have struck down the Minister's approval of the Beef Island Project for illegality.

JUDGMENT

[1] RAWLINS, C.J.: Two (2) issues arise for determination on this appeal. The first is the preliminary issue whether the Attorney General is a proper defendant in judicial review proceedings for the issue of the prerogative remedy, *certiorari*. The second is the substantive issue whether a decision by the Minister of Planning ("the Minister") granting permission to the appellant, Quorum Island (BVI) Limited ("Quorum Island"), to develop a

five-star hotel, marina and golf course at Beef Island, Tortola ("the Beef Island Project"), was tainted with illegality.

[2] The trial judge held that the Attorney General was a proper defendant to the claim and that there was no need to add the Minister as a defendant. On this issue, she awarded assessed costs to be paid equally by Quorum and the Attorney General to the Environmental Council. She also held that the letter which the Minister issued on 31st January 2007 approving the project is void for illegality and quashed it. She ordered the Attorney General to meet Quorum's costs in the sum of $14,000.00. These are the decisions which are appealed. The appeal will be determined against a brief background.

Brief background

[3] For the purpose of this judgment, it would suffice to adopt the background that the judge gave to a great extent.

[4] The respondent/claimant, the Virgin Islands Environmental Council ("Environmental Council" or "the Council") is a coalition of local fishermen, concerned residents, scientists and environmental activists. The Council is established under the BVI Business Companies Act 2000 (as amended) as a company limited by guarantee of its members with no share capital. It is purportedly a non-profit environmental organization whose objects include promoting environmental democracy, public participation, access to justice on environmental issues and the enforcement of environmental legislation.

[5] Quorum Island, a company incorporated in the Virgin Islands, is the developer of the Beef Island Project. On 28th September 2007, the court permitted the company to be joined as an Interested Party in these proceedings. Quorum Island owns 659.2 acres of land on Beef Island which includes the site upon which the Beef Island Project is to be built.

[6] It was on 6th August 2006 that Quorum Island submitted the 2 applications, D267/06 and D268/06, seeking planning approval for the Beef Island Project. At the time when the Approval Letter was issued, Quorum Island was owned by Applied Enterprises Limited, a company incorporated under the laws of Hong Kong. A license was issued by the

Governor of the Virgin Islands to Applied Enterprises, on 24th January 2007, to hold 9,999 shares in Quorum Island.

[7] On 11th August 2006, Quorum Island and Applied Enterprises entered into a Joint Venture Agreement with InterIsle Holdings Limited. The Joint Venture Agreement was subject to certain preconditions. These included obtaining by Quorum Island of planning approval of the master plan for the Beef Island Project. InterIsle Holdings would purchase a 50% interest in Quorum for $21 million and be jointly responsible for obtaining financing for the Project. The said entities entered into a Development and Management Agreement ("the Development Agreement"), whereby, subject to completion of the sale of 50% of Quorum Island to InterIsle Holdings, the latter would undertake and be responsible for the management of the Beef Island Project. The entities took substantial steps to consummate the Joint Venture Agreement, the Governor having granted the necessary license for the shares to be issued.

[8] The Environmental Council instituted the first environmental case in the Virgin Islands on 4th September 2007. It sought judicial review, by way of prerogative relief, initially for *mandamus*, *prohibition* and *certiorari*, to impugn the decision by the Minister of Planning to approve the application by Quorum Island to develop a five-star hotel, marina and golf course at Beef Island. The Council subsequently amended the claim to seek only *certiorari* to quash the decision.

[9] Initially, the Environmental Council applied for leave to apply for judicial review against the Minister and the Attorney General Chambers. Leave was granted *ex parte* on 20th August 2007 and, at the same time, the Council was permitted to amend the application to substitute the Attorney General for the Attorney General's Chambers. Subsequently the Council applied to delete the Minister as a defendant thereby leaving the Attorney General as the sole defendant. On 7th November 2007, with the 3 parties to the claim represented by counsel, the court deleted the Minister as a defendant, so that the Attorney General remained the sole defendant.

[10] The proceedings continued against the Attorney General alone. However, when the trial commenced in April 2009, counsel for Quorum and for the Attorney General urged the court, on a preliminary objection, to dismiss the case. They contended that these are not civil proceedings, in which the Attorney General is the proper defendant, but "Crown side" or prerogative type proceedings in which he is not a proper defendant. The trial judge dismissed the oral application and proceeded to conduct the trial. She provided the reasons for this decision in her written judgment. Quorum Island's appeal against this decision will be considered as the first issue in this judgment.

[11] It suffices to state that the trial judge held that the Environmental Council did not prove any of the pleaded heads of procedural impropriety, to wit, bias and predetermination; breach of natural justice or lack of reasons for the decision.[1] The judge also found that the Council failed to prove *Wednesbury* unreasonableness or irrationality.[2] These decisions were not appealed. However, in holding that the Minister's decision was tainted with illegality,[3] the judge quashed it and remitted the matter to the Minister directing him, pursuant to rule 56.14(2) of CPR 2000, to reconsider the matter and reach a decision in accordance with the relevant terms of her judgment.[4] The judge held that the Minister's decision was void because Hans Creek is a fisheries protected area having been so declared in the Fisheries Regulations, 2003. Quorum Island appealed this decision. Quorum's basic contention is that Hans Creek was never effectively declared a fisheries protected area, and, accordingly, the Minister's approval cannot be illegal. This will be the second issue to be considered in this judgment.

The oral application – the Attorney General as a defendant

[12] The fixed date claim form by which the Council instituted its claim in 2007 shows that it was brought against the "Chief Minister and Minister of Planning and the Attorney General" as the defendants. On 28th September 2007, the court granted leave to Quorum Island to be joined as an Interested Party. We have seen that, on 7th November 2007, the Attorney

[1] See from paragraphs 54 to 118 of the judgment, especially paragraphs 80, 99, 112 and 118.
[2] See paragraphs 156 to 173 of the judgment.
[3] See paragraphs 119 to 155 and 174 of the judgment.
[4] See paragraphs 175 to 178 of the judgment.

General was substituted as the sole defendant. We have also seen that, at the beginning of the trial, the judge ruled that the Attorney General was a proper defendant and that there was no need to add the Minister.

The reasons for this decision

[13] In her reasons for this decision, the judge noted the submission by Mr. Farara, QC, on behalf of Quorum Island, that it is a long established principle that the Attorney General is not a proper party in prerogative claim proceedings because they are not 'civil proceedings' within the meaning of the Crown Proceedings Act.[5] The learned judge noted, further, that section 13(2) of the Crown Proceedings Act provides that "*Civil proceedings against the Crown* may *be instituted* either *against the Attorney General* or *against an authorised officer in his official name*". She stated that this provision is different from section 13 of the Crown Proceedings Act of Jamaica, inasmuch as the latter expressly states that civil proceedings against the Crown must be instituted against the Attorney-General. The judge stated that that section 13(3) of the Crown Proceedings Act, civil proceedings against the Crown may be instituted either against the Attorney General or against an authorised officer in his official name but not against both.

[14] Section 13(3) of the Crown Proceedings Act states as follows:

> "The Governor shall by order publish a list of the official names of authorized officers by whom or against whom civil proceedings by or against the Crown may be brought in relation to a department of the Crown in the Territory."

[15] The judge further noted that the Crown Proceedings Act does not define "civil proceedings". She observed, however, that section 19 of the Crown Proceedings Act provides for the proceedings against the Crown. She noted that section 19(2) states:

> "Subject to the provisions of this section, any reference in this Part to civil proceedings against the Crown shall be construed as a reference to the following proceedings only-
>
> (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Ordinance had not been passed and the Crown Suits Act had not been repealed, might

[5] Cap. 21 of the Revised Laws of the Virgin Islands, 1991.

have been enforced or vindicated or obtained by the proceedings mentioned in paragraph 2 of the Schedule or by an action against the Attorney General under the Crown Suits Act;

(b) all such proceedings as any person is entitled to bring against the Crown by virtue of this or any other Ordinance, or any law;

and the expression "civil proceedings by and against the Crown shall be construed accordingly."

The judge further noted that the type of proceedings mentioned in paragraph 2 of the Schedule is "proceedings against Her Majesty by way of monstrans de droit".

[16] The judge accepted, correctly, in my view, the submissions by learned counsel for the Attorney General and for Quorum Island that 'civil proceedings' in the Crown Proceedings Act exclude "Crown Side" or prerogative relief proceedings. She accepted this on the authority of Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd[6]; Attorney General v Claude Jardim[7]; and Chandresh Sharma v Attorney General[8]; Richard Frederick et al v The Comptroller of Customs and the Attorney General[9], Gairy and Another v Attorney General of Grenada[10] and Monica Ross v Minister of Agriculture, Lands and Fisheries et al[11]. However, the judge opined that the critical question was whether the Attorney General is a proper or necessary party to a claim for judicial review. In this regard she noted the observation of George-Creque J.A. (now Pereira JA) in Richard Frederick et al, supra, that "…CPR 2000 recognizes this peculiar specie of civil proceedings by providing a regime or rules in Part 56 which are applicable only to proceedings of this kind…"[12] The judge then referred to these statements in that case:[13]

> "CPR 2000 does not seek to define "civil proceedings". Rule 2.2(2) says in effect that "civil proceedings" for the purposes of the rules, includes judicial review [emphasis added] … under Part 56. However, it does not follow as a matter of

[6] (1992) LRC (Const), 720 at page. 721(c) (CA) and page 747(e) (PC).
[7] Civil Appeal No. 134/98, page 2, per Bernard C and (2003) 67 WIR 100, page 105 of the judgment.
[8] Trinidad and Tobago Court of Appeal No 115 of 2003, esp. per Nelson J.A at paragraph 36 of the judgment.
[9] HVCAP 2008/037, Judgment delivered on 6th July 2009 [unreported], esp. per George-Creque, JA, as she then was, at paragraphs 29-32 of the judgment.
[10] [2002] 1 AC 167, [2001] 3 WLR 779, per Lord Bingham at paragraph 21.
[11] Saint Vincent & the Grenadines Claim No. 255 of 2001, per Webster J (Ag.) at paragraphs 10-11.
[12] See paragraph 32 of the Richard Frederick, supra note 9.
[13] At paragraphs 31 and 34.

> principle that all proceedings brought against a public officer, such as the Comptroller, are "civil proceedings" for the purposes of the CPA.…
>
> "Once such proceedings are viewed and placed in their proper context under CPR the argument as to whether the Attorney General alone can be a proper party loses force [emphasis added]. By then, it ought to be readily apparent that the CPA has no applicability in such proceedings. What is clear is that a claim form seeking constitutional relief must be served on the Attorney General.[14] This however does not preclude other persons being joined as defendants. This is also clear from the general tenor of CPR 56." [Emphases added by the judge.]

[17] The trial judge then referred to section 2(a) of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act, 2000, which defines "action" as "*a civil proceeding commenced in such manner as may be prescribed by rules of court and includes a claim under the Eastern Caribbean Civil Procedure Rules, 2000, but does not include a criminal proceeding by the Crown.*" She concluded that it was proper to bring a claim against the Attorney General alone. She took comfort for this from rule 56.11(2) of CPR 2000, which empowers the court to allow any person with a sufficient interest in the subject matter of a claim to be heard whether or nor served with the claim form. She held that the Attorney General was a proper defendant and that it was not necessary to join the Minister.

Submissions on behalf of Quorum

[18] In the court of Appeal hearing, Mr. Farara, QC, submitted that the judge should have dismissed the claim at the commencement of the trial or, at least, at the end of the hearing and upon delivery of her judgment. His arguments in support of this submission may be summarized as follows: the claim for judicial review against the Attorney General was misconceived and bad in law because the claimant could not obtain the relief sought against the Attorney General. The judge was correct when she stated that the Richard Frederick case is authority that judicial review proceedings involving prerogative relief are not 'civil proceedings' within the meaning of the Crown Proceedings Act. She then fell into error when she decided that it is proper to bring such a claim against the Attorney General alone. This latter statement is based on a misunderstanding of paragraphs 31 and 34 of

[14] CPR 56.9(2).

the judgment of George-Creque JA in Richard Frederick. George-Creque JA said that the type of proceeding brought by the Crown determines whether they are 'civil proceedings', falling under the Crown Proceedings Act, in which event the Attorney General could be the sole defendant. In the event that a claim is for prerogative relief proceedings, the decision maker, and not the Attorney General, is the proper party. In any event, to conclude otherwise, is to go completely contrary to the historical status of such proceedings and against the weight of Privy Council authority in Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd;[15] Gairy and Another v Attorney General of Grenada;[16] as well as the authorities of the House of Lords in Factortame Ltd. v Secretary of State for Transport[17] and In re M.[18]

[19] Mr. Farara submitted, additionally, that the reference which the judge made to CPR 2.2(2) merely confirms the correct legal position that, "for the purpose of the rules", civil proceedings include judicial review proceedings. This, he contended, is because rule 56 of CPR sets out the procedure to be followed when applying for judicial review, just as its predecessor, order 44 of the Rules of the Eastern Caribbean Supreme Court, 1970. He contended that this, however, should not be construed as a change in the substantive law to make judicial review proceedings 'civil proceedings' within section 3(2) of the Crown Proceedings Act, so as to make the Attorney General a proper party to judicial review proceedings. Mr. Farara insisted that the judge also wrongly relied on section 2(a) of the Eastern Caribbean Supreme Court (Virgin Islands) (Amendment) Act.

[20] Mr. Farara further submitted that when the judge reviewed the 'history' of the proceedings, she failed to appreciate that it was not for the defendants to advise the Environmental Council as to whom it should make parties to the proceedings in order to obtain effective relief. He insisted that it was the Council who asked the judge to remove the Minister. It was not for the defendants to have objected to the change of parties. It was for the claimant and the court to have ensured that all necessary and proper parties were before the court, having regard to the type of action and the reliefs sought. He insisted that the

[15] Supra, note 3.
[16] Supra note 6.
[17] [1989] 2 WLR 997, per Lord Bridge at pages 1017F-1018F and 1021B.
[18] [1994] 1 AC 377, per Lord Woolf at pages 425E-426B and 427D-F.

Council voluntarily had the Minister removed as a party and substituted the Attorney General as the sole party. He noted that all submissions made by the Solicitor General were expressly on behalf of the Attorney General as the sole defendant. They were not made on behalf of the Minister who would have been entitled to be separately represented, if he so chose.

Submissions on behalf of the Council

[21] Mr. Hockman, QC, submitted that it was proper for the Attorney General to be named the sole defendant. I do not agree for reasons which will be stated later in this judgment.

[22] Alternatively, Mr. Hockman submitted that the Minister could be re-joined as a defendant, even at this stage of the proceedings. The learned Solicitor General supported this with submissions which I find attractive.

Submissions on behalf of the Attorney General

[23] The Solicitor General conceded that the Attorney General should not be the sole defendant. She stated, correctly, in my view, that the submissions on the issue whether the Attorney General is the proper defendant do not affect the final outcome of this case. She pointed out that it is where the Crown is vicariously liable, under the Crown Proceedings Act, for the action or decision of a public authority in a civil action that the action is usually brought against the officer and also against the Crown vicariously. She insisted, correctly, in my view, that it is in that event that the Attorney General is to be joined as defendant in a representative capacity of the Crown.

[24] The Solicitor General submitted, again correctly, in my view, that in prerogative type or 'Crown side' proceedings, the court is concerned with the legality of the decision of the particular public authority or officer. The outcome of the challenge to that decision affects the decision-maker whom the court often directs to reconsider the decision in accordance with the law. It would be highly irregular for the court to quash the decision of a person who is not a party to the proceedings and direct that person to take certain actions. She therefore conceded, correctly, in my view, that it would be highly irregular for a court to

entertain a challenge to a decision that is not made by a person or authority who is not a party to proceedings. In the present case the trial judge impugned the decision of the Minister when he was not a party to the proceedings because he was earlier removed.

[25] I also agree with the further submission by the Solicitor General, that if the Attorney General were to be the sole defendant, and not an authority whose decision was impugned, there could be unacceptable practical consequences. For example, the Attorney General could determine what evidence, if any, he or she wishes to advance. The decision-maker could be denied the right to be heard because that right would depend on whether the Attorney General leads evidence from the decision-maker. The decision-maker would not have the opportunity to explain the reasons for the impugned decision.

[26] Having made the foregoing concessions, the learned Solicitor General suggested that justice would be best served if the Minister of Planning is rejoined to replace the Attorney General as the defendant even at this stage of the proceedings. She cited as authority the following statement by Lawrence Collins LJ in Dunwoody Sports Marketing v Prescott:[19]

> "Since Mr Prescott did not apply for the order to be set aside, the question whether the order could be made after judgment did not arise. There appears to be no decision of the Court of Appeal on that question in relation to the CPR. It was held under the former RSC, Ord 15 that substitution could be effected after judgment: *Ord v Belhaven* Pubs Ltd [1998] BCLC 447; cf *Stroud and Swindon Building Society v Stalp* (unreported) 27 March 1997 (a decision of Phillips LJ on a leave application in relation to the former County Court Rules, Ord 5, r 11) and *Mercer Alloys Corpn v Rolls Royce Ltd* [1971] 1 WLR 1520 (a decision on the inherent jurisdiction of the court to order substitution). It has been doubted whether there is a similar power in relation to joinder under CPR r 19.2 because the power is in relation to "matters in dispute in the proceedings" and there are no such matters following judgment: *Kooltrade Ltd. V XTS Ltd* [2002] FSR 764. In my judgment the power under CPR r 19.2 in relation to joinder and substitution exists after judgment as well as before: see also C *Inc plc v* L [2001] 2 All ER (Comm) 446*; The Selby Paradigm* [2004] EWCH 1804 (Admlty)." [My emphasis]

[27] This reasoning is attractive and I adopt it, particularly since Order 15 of our former 1970 rules was similar to the former English RSC, Ord 15. Further, our present rule 19.2, for the substitution of parties, is similar to the present English CPR 19.2. In the premises, it is open to this court to rejoin the Minister even at this stage, since it is his decision that is

[19] [2007] 1 WLR 2343, at paragraph 23 of the judgment.

challenged. In fact, it seems to me that the trial judge should have rejoined the Minister when the issue was raised at the commencement of the trial. That course of action, and in fact the rejoinder of the Minister even at this stage is facilitated, in my view, because the Solicitor General, who represented the Minister when he was a defendant, indicated that the Minister is aware of the proceedings from the outset to the present time.

[28] Additionally, rule 8.5(1) of CPR 2000 states the general rule that a claim shall not fail because a person who should have been made a party was not made a party to proceedings or that a person was made a party who should not have been added. The Attorney General should be removed as a party, and I would do so, because there is no challenge to any decision that he made. The result is that I would allow this ground of appeal, and, accordingly, substitute the Minister for the Attorney General as respondent/defendant. I would accordingly reflect this in the heading of this judgment. I would set aside the judge's costs order on this issue. However, in light of the reasons for allowing this ground of appeal, I would make no order as to costs on this issue either in the High Court or in this appeal.

[29] Finally, I note, in passing, the assertion by Mr. Farara that, except for Parts 25 to 27, no other provision of CPR 2000 is applicable to Part 56 of CPR 2000. These are the case management rules. I am not aware of any authority for this assertion. It is possibly premised on rule 56.11(1) of CPR 2000, which specifically provides that Parts 25 to 27 apply for the purpose of directions on a first hearing of a Part 56 claim. However, I see nothing in CPR 2000 that exempts the application of other Parts of CPR 2000 from consideration in Part 56 claims. Specifically, there is no provision that exempts Parts 8 and 19 from such consideration. Given the pleadings and the evidence; given that the issues in this case turn mainly on the operation of law; given the involvement of the Solicitor General on behalf of both in this case, I do not think that it is necessary to provide any consequential directions for the rejoinder of the Minister as defendant/respondent and the removal of the Attorney General.

Illegality - the basic principles

[30] It is a primary tenet of the rule of law that a public authority must act or make decisions within the bounds of the power conferred on it by law. An authority that acts outside of that power acts *ultra vires* its discretion or illegally. Illegality may result from doing that which is unauthorized by law or by refusing or omitting to do that which the law mandates. It may also result where a public authority purports to act under a discretion but acts on irrelevant considerations or bad faith, or for an improper purpose. In other words, an administrative decision is illegal if the decision maker contravenes or exceeds the terms of the power which authorized the decision, or if the decision purports an objective which the conferring power did not contemplate. It follows that, in order to determine whether an administrative act or decision is illegal, the court, as the guardian of legality, must first construe the authorizing power; determine its terms, scope and purpose, and measure the decision or action against this.[20]

[31] I must hasten to add that Hans Creek is undoubtedly a critically important area for fisheries conservation and development. The scientific reports indicate that it is a primary nursery ground in the Caribbean for juveniles of commercially important species. In his affidavit in support of the claim, Dr. Quincy Lettsome stated that after Hans Creek was purportedly declared a Fisheries Protected area in June 2003, a 2005 study showed that there was an almost four-fold increase in the mean density of commercial fish stock in the area and a doubling of non-commercial stock density after the declaration. The study also showed that there was also a more balanced distribution throughout the trophic levels in the fish stock in Hans Creek. Dr. Lettsome further stated that the surrounding areas, to wit, the Beef Island wetlands, were given a Ramsar code at UK 4002, which designation identify them as wetlands on a global scale of international importance. He further deposed that the Environmental Council is concerned that throughout the Caribbean, such wetlands are being replaced by coastal developments, so that they are now considered one of the most threatened habitats on earth.[21] One can easily understand why the Environmental Council was moved to institute its claim. However, the critical question is whether Hans Creek was

[20] See de Smith, Woolf & Jowell on Judicial Review of Administrative Action, 6th Edition, 2007,)
[21] In paragraphs 12 to 18 of the affidavit.

validly declared a protected area. It is only if it was validly so declared that the decision by the Minister to approve the Beef Island Development could be tainted with illegality.

Invalidity and illegality

[32] It is trite principle that in order for regulations, rules by-laws, in short, subsidiary legislation, to be validly made, they must meet the conditions and procedures laid down for their making by the enabling statute. Additionally, the substance of the subsidiary legislation must be within the scope and purpose of the enabling statute. The task of the court in determining this has been described in various cases. In McEldowney v Forde,[22] for example, the House of Lords stated as follows:

> "… the discretion entrusted to the Minister to make regulations for the preservation of peace and the maintenance of order in Northern Ireland is a very wide power and his discretion will not lightly be interfered with. The court will only interfere if the Minister is shown to have gone outside the four corners of the Act or has acted in bad faith."

[33] In Attorney General v Great Eastern Rly. Co Lord Selbourne LC stated as follows:[23]

> "It appears to me to be important that the doctrine of ultra vires….should be maintained. But I agree……that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Lord Blackburn stated:[24]

> "… where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited… those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

[34] In Maharashtra State Board v Kurmarsheth[25] the enabling Act conferred power upon the State Board to make regulations for the purpose of carrying into effect the provisions of the

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[22] (1969) 3 WLR 179, at page 191.
[23] (1880) 5 App Cas 473, at page 478, and approved by the House of Lords in Akumah v Hackney LCB (2005) 1 WLR 985.
[24] At page 481.
[25] (1985) LRC (Const) 1083.

Act. It also conferred the power to make by-laws regarding what the court called procedural matters to be followed by the Divisional Boards at meetings. The court rejected the argument that the Regulations ought to be treated as by-laws on the ground that it was clear that the legislature intended the Regulations to have the force of law. In determining whether the impugned regulation was *ultra vires,* the court stated as follows:[26]

> "… the question whether a particular piece of delegated legislation - whether a rule or regulation or other type of statutory instrument – is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the court to substitute its own opinion for that of legislature or its delegate as to what principle or policy would best serve the objects and purposes of the Act and to sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the regulation-making body and declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provisions will not help to serve the object and purpose of the Act. So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the Statute, the court should not concern itself with the wisdom and efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute." [My emphasis]

The parties' basic contentions

[35] In its pleaded case, the Environmental Council claimed that the Minister acted illegally when he approved the development of the Beef Island Project, because the Project is likely to impact on the Hans Creek fisheries protected area, which was so declared by Regulation 51(1) of the Fisheries Regulations. Dr. Quincy Lettsome stated, in the affidavit in support of the claim, that in December 2005, the successor Minister of Planning and the developer of the Project entered into a Development Agreement. He alleged that,

[26] At pages 1091–1092 of the judgment.

in the recital of the agreement, the government agreed to waive all breaches and non-compliance with the conditions of the developer's Land Holding Licence. He further noted the statement by Mr. Bertrand Lettsome, the Chief Conservation Officer, that the Agreement was signed without the advice of the Planning Authority being sought, in contravention of section 32(1) of the Planning Act.[27]

[36] Quorum insisted that the purported declaration of Hans Creek as a protected area was not legally effective, and, accordingly, Hans Creek was not validly declared a protected area. Quorum contended that the judge erred in holding that Hans Creek is a fisheries protected area pursuant to Regulation 51 of the Fisheries Regulations, because section 79(1) of the Fisheries Act, under which the Fisheries Regulations 2003 were made, confers no such discretion. The result, Quorum insisted, is that the approval cannot be void for illegality.

The judge's reasons for finding illegality

[37] The trial judge found, from the evidence, that the proposed development will, in part, involve development within the area of Hans Creek.[28] She identified the critical issue for determination to be whether Hans Creek is a protected area.[29] She found that Hans Creek was validly declared a protected area in Regulation 51 of the Fisheries Regulations 2003. She therefore held that by approving the application for the Beef Island Project the Minister acted illegally because the Project would adversely affect the protection which the valid declaration affords to Hans Creek.

[38] The judge noted that section 13(1)(b) of the Fisheries Act states as follows:

> "13(1)(b). The Minister may, by Order published in the Gazette, declare any area of the fishery waters together with the area of land up to the high watermark adjacent to the fishery waters to be a protected area."

She also noted that section 13(2) of the Fisheries Act provides that an Order made under section 13(1)(b) may prohibit fishing within the protected area.

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[27] In paragraphs 35 and 36 of the Affidavit.
[28] In paragraph 121 of the judgment.
[29] In paragraph 121 of the judgment.

[39] The judge further noted that section 79(1) of the Fisheries Act, under which the 2003 Regulations were made, permits the Minister to make Regulations for better carrying into effect the Provisions of the Fisheries Act. She noted that section 79(1) lists, from (a) to (x), the types of matters for which the Minister may make such Regulations. The judge opined that section 79(1)(j) was relevant inasmuch as it permits the Minister to make Regulations regulating or prohibiting the entry, including entry by vessel, into a protected area. The Minister may also prescribe any activity which may not be undertaken in such an area.[30] She concluded that the 2003 Regulations were made pursuant to section 79 of the Fisheries Act, for better carrying into effect the Fisheries Act and the Regulations further this purpose.

[40] The trial judge then referred to the terms of Regulation 51(1), which states as follows:

> "No person shall carry out any development activity, whether terrestrial or otherwise which may or is likely to adversely impact on a marine protected area declared as such by the Minister by Order in the Gazette." [emphasis added by trial judge]

She further noted that Regulation 51(5) expressly provides:

> "Without prejudice to sub-regulation (1), the following areas identified in the maps in Schedule 5 are hereby declared to be fisheries protected areas
> (a)…
> (b) Hans Creek, Beef Island;
> (c)…"

[41] The judge referred to 3 grounds on which the validity of the declaration of Hans Creek as a protected area was challenged.

[42] The first is that section 13 of the Fisheries Act speaks to an Order published in the Gazette, by which the Minister is to declare an area as a protected area. The ground states that Hans Creek was never declared a protected area because no such Order was published in the Gazette.[31] Quorum contended that the inclusion of a declaration in the

[30] See paragraph 124 of the judgment.
[31] A good example of an "Order", says Dr. Barnett, is the Physical Planning (Reference of Application to Minister) Order 2006, which was expressly made pursuant to section 39(1) of the Planning Act.

Fisheries Regulations that Hans Creek is a protected area is ineffective and contrary to the powers granted to the Minister under the Fisheries Act to declare protected areas.

[43] The second ground of challenge was that section 79 of the Fisheries Act confers no power to declare fisheries protected areas. This section authorizes the Minister to make Regulations "for the better carrying into effect" of the provisions of the Act. One such matter relates to regulating or prohibiting fishing in a protected area "declared as such under the Act", but Hans Creek was not so declared.

[44] In the third place, counsel for Quorum had contended that 'Orders' are different from 'Regulations', even though they are both, by definition, types of subsidiary legislation. He noted that section 43 of the Interpretation Act[32] defines 'subsidiary legislation' to mean:

> "any regulation, rule, by-law, proclamation, order in council, order, direction, notice, form, or other instrument made under any law or other instrument and having legislative effect".[emphasis added]

The trial judge noted Quorum's submission that an "Order" is different from "Regulations", by-laws, proclamations and orders in council. She referred to the further submission that when section 13(1)(b) of the Fisheries Act states that the Minister may "declare any area of the fishery waters ..." by 'Order' published in the Gazette, this was not done because the Regulations did not derive their validity by reference to the specific provisions of the enabling statute, which is section 13(1)(b). Counsel relied on Maharashtra State Board of Secondary and Higher Education v Kurmarsheth.[33]

[45] In Maharashtra, the Supreme Court of India determined the validity of Regulation 104(3) of the Maharashtra Secondary and High Secondary Education Boards Regulations 1977, which were made under an Act. In particular, counsel relied on the following statements by Balakrishna Eradi J, at page 1095:

> "The legislature has thus maintained in the Senate in question a clear distinction between 'by-laws' and 'regulations'. The by-laws to be framed under section 38 are to relate only to procedural matters … More important matters affecting the rights of the parties and laying down the manner in which the provisions of the Act are to be carried into effect have been reserved to be provided for by regulations

[32] Cap. 136 of the Revised Laws of the Virgin Islands, 1990.
[33] Supra note 25.

> made under section 36. The legislature, while enacting sections 36 and 38, must be assumed to have been fully aware of the niceties of the legal position governing the distinction between rules/regulations properly so called and by-laws. When the statute contains a clear indication that the distinct regulation-making power conferred under section 36 was not intended as a power merely to frame by-laws, it is not open to the court to ignore the same and treat the regulations made under section 36 as mere by-laws in order to bring them within the scope of justiciability by applying the test of reasonableness."

Balakrishna Eradi J continued, at pages 1096-1097:

> "In light of what we have said above, the constitutionality of the impugned regulations has to be adjudged only by a three-fold test, namely (1) whether the provisions of such regulations fall within the scope and ambit of the power conferred by the statute on the delegate;(2) whether the rules/regulations framed by the delegate are to any extent inconsistent with the provisions of the parent enactment and lastly (3) whether they infringe any of the fundamental rights or other restrictions or limitations imposed by the Constitution."

[46] The trial judge noted the concluding submission by counsel for Quorum that Regulation 51(5) does not constitute an "Order" of the Minister and the Minister does not purport to make such an Order under section 13 of the Fisheries Act. Further, to the extent that Regulation 51(5) of the Fisheries Regulations purports to declare Hans Creek a fisheries protected area, that Regulation does not fall within the provisions, scope and ambit of the power conferred by and under the Fisheries Act, and is therefore *ultra vires* and of no effect as subsidiary legislation.

[47] The trial judge expressly preferred the submissions by counsel for the Environmental Council. He had contended that section 79(1) of the Fisheries Act gives the Minister wide power to make regulations "*for the better carrying into effect of the provisions of this Act*". The judge noted counsel's further contention that by making the Regulations, the Minister intended that they be enforceable and valid. She agreed with counsel that the Minister was entitled to make the Fisheries Regulations 2003 under section 79(1) and within those Regulations, to declare protected areas, which includes Hans Creek, as he did in Regulation 51(5) of the Regulations. The judge further agreed with the submission that any declared protected area within the Fisheries Regulations 2003 becomes a protected area in accordance with the Fisheries Act. The judge further agreed that this was consistent with section 19(6) of the Interpretation Act, under which a statutory instrument is to be

construed subject to the enactment under which it was made, and also consistent with section 56 of the Fisheries Act which equates Orders, Regulations or by-laws.

[48] Section 56 of the Fisheries Act states as follows:

> "Any Order, Regulation or by-laws made under this Act may provide that a breach of or non-compliance with any provision of the Order, Regulations or by-laws shall constitute an offence and may provide for penalties on summary conviction by way of a fine not exceeding one thousand dollars."

[49] The judge also agreed with the submission that although Regulation 51(1) includes the word 'marine' before the phrase 'protected area', the prohibition in that regulation was intended to apply to Hans Creek under Regulation 51(5) of the Fisheries Regulations because:

a) The enabling legislation provides for "protected areas" without qualification: See section 2 of the Fisheries Act;
b) Hans Creek is a protected area declared as such by the Minister by Order published in the Gazette on 19th June 2003;
c) It is clear from the wording of Regulation 51 as a whole that the protected areas listed in Regulation 51(5) were intended to be covered by the prohibition in regulation 51(1), the words "*Without prejudice to sub-regulation (1)*" mean that, without prejudice to the generality of regulation 51(1), the areas listed in regulation 51(5) were clearly to be protected by the prohibition; and
d) Otherwise, it was pointless for Hans Creek and the other sites mentioned in Regulation 51(5) to have been declared as protected areas.

[50] The judge thereupon concluded that the Minister's decision to approve the development was illegal as it was made in contravention of Regulation 51(5) of the Fisheries Regulations read in conjunction with the applicable statutory provisions. The judge further agreed with Mr. Hockman's alternative submission, that given the clear intention to protect the fisheries of Hans Creek and the terms of Regulation 51(5), which is to prohibit development approval which "*may or is likely to adversely impact on the protected areas*", the Minister had to determine whether there may be an adverse impact on Hans Creek, and, if so, to refuse permission. I have seen no evidence, however, that the Minister considered an impact assessment prior to approving the project.

Quorum's submissions on appeal

[51] Quorum's submissions on this appeal mirror the submissions before the trial judge. Mr. Farara, QC, submitted that none of the matters prescribed in section 79(2) of the Fisheries Act in respect of which the Minister may make Regulations, includes the power to declare part of the fishery waters to be a 'protected area'. He noted that sub-paragraph (j) provides for the Minister to make Regulations regulating or prohibiting entry into a 'fishing priority area' or 'protected area' which has been "declared as such under this Act." He argued that the power granted to the Minister to make regulations under the Fisheries Act, does not include the power to declare an area of the fishery waters a protected area. He concluded that regulations made under the Fisheries Act may only restrict or prohibit entry into a fisheries protected area which has been declared as such by the Minister in exercise of the power to do so under section 13(1)(b) of the Fisheries Act, by means of an Order published in the Gazette.

[52] Mr. Farara noted that the Minister passed the Fisheries Regulations 2003 expressly in exercise of the powers conferred on him by section 79 of the Fisheries Act. Mr. Farara submitted that in Regulation 51(5), which was made under section 79, the Minister purported to declare Hans Creek a 'protected area'. However, he insisted that no Order to that effect has ever been made by the Minister or published in the Gazette, notwithstanding that Regulation 51(1) prohibits development activity which may or is likely to adversely impact on a marine protected area declared as such by the Minister by Order in the Gazette. Thus, argued Mr. Farara, the very Regulations themselves, and the specific regulation creating the prohibition against development activity, which may or is likely to adversely impact such an area, reiterates and recognizes that such areas are to be declared 'protected areas', not by or under the Regulations themselves, but by Order of the Minister published in the Gazette, as permitted under and by virtue of section 13(1)(b) of the Fisheries Act.

[53] Mr. Farara asked us to note the definition of 'subsidiary legislation' in the Interpretation Act.[34] He submitted that while the various instruments included in the definition are all subsidiary legislation, they are each different types of subsidiary legislation or legislative mechanisms through which certain laws are promulgated or brought into effect. He insisted, however, that Regulations made under a parent or enabling Act are not an Order made under a power granted by virtue of that Act. He referred again to the statements in Maharashtra State Board of Secondary and Higher Education v. Kurmarsheth as authority that a clear distinction must be maintained between 'by-laws' and 'regulations'.[35] Mr. Farara submitted that it was not open to the court to ignore that distinction and treat them as the same, in order to make the regulations made under section 79 effective in law. He insisted that the purported declaration of Hans Creek as a 'protected area' in regulations made under section 79 of the Fisheries Act, does not fall within the provisions, scope and ambit of section 79. He argued that those regulations are not an Order made under section 13(1)(b), and that accordingly, the declaration of Hans Creek is ultra vires, void and of no effect.

[54] Mr. Farara further noted that the trial judge also found that the declaration of Hans Creek as a protected area was consistent with section 19(6) of the Interpretation Act and section 56 of the Fisheries Act. He contended that, in fact, these provisions do not enlarge the ambit of the Minister's power to make regulations under the Fisheries Act beyond those conferred by section 79. He argued that neither do they confer on the Minister the power to declare 'protected areas' through the instrumentality of regulations made under section 79. He further argued that the trial judge wrongly concluded that Hans Creek was declared a 'protected area' under the Fisheries Act by virtue of the Fisheries Regulations made by the Minister under section 79 of the Act because section 79 confers no such power on the Minister. He insisted that such power is only conferred by section 13(1)(b) of the Fisheries Act. He insisted that it follows that the judge's conclusion that the approval of the Beef Island Project, based largely on 'legislative intent', was flawed, illegal and runs contrary to the clear and unambiguous wording or intention of section 13(1)(b) of the Fisheries Act. He submitted, in conclusion, that it was contrary to the

[34] See paragraph 44 of this judgment.
[35] The relevant extracts are already reproduced in paragraph 45 of this judgment.

intention of section 13(1)(b) of the Fisheries Act, which requires the Minister to declare 'marine protected areas' by Order published in the Gazette, for the Minister to have made Regulations declaring protected areas and then go on to declare Hans Creek to be a 'protected area'.

Decision and reasons

[55] It is my view that the trial judge correctly considered the intention of the enabling statute. Mr. Farara's analysis does not appear to take into consideration the intention and purpose of the Fisheries Act. It seems obvious that the intention is to provide environmental protection to important and fragile ecosystems in the Virgin Islands. Additionally, with respect, I do not agree with Mr. Farara's submissions that the declaration of Hans Creek is invalid because Hans Creek was declared a 'protected area' rather than a 'marine protected area' or a 'fisheries protected area'. The title variation would not render the declaration invalid. This seems to accord with the decision of the Privy Council in Joachim and Stewart v the Attorney General and Georges.[36] In this case, it was held, in effect, that where a power to make subsidiary legislation exists but in its exercise, improper recitals are used, the subsidiary legislation will not be held to be invalid. The case was concerned with the validity of an Instrument of Appointment of a Commissioner under the Commissions of Inquiry Act of St. Vincent & the Grenadines. The challenge to the validity of the appointment was made on the ground that the recitals quoted the provisions of the repealed rather than the current amended Act. The Privy Council stated[37] that the Instrument could not be impeached because of its inappropriate recitals. Since the existence of the Governor-General's power to set up this inquiry was not in doubt or disputed, the error was immaterial and did not render the instrument unlawful.

[56] I have noted the submissions by Mr. Hockman, QC and the learned Solicitor General that the Minister was at liberty to declare Hans Creek a protected area as he did in the Fisheries Regulations 2003. They contended that it did not matter whether the intention accorded strictly with the actual statutory procedural and wording requirements so long as

[36] [2007] UKPC 6.
[37] At paragraph 22 of the judgment.

the declaration fell within the purpose of the statute. I agree. I also agree with their submission that the Minister has the power to declare protected areas, by Order; that he also has the power to make Regulations and that each of these instruments is to be published in the Gazette. I also agree that these are both subsidiary legislation of the same force and that the power to make either of them rests with the Minister. I also agree with their contention that what is critical in the present case is that the subsidiary legislation, by whatever title, should be in accordance with the object or purpose of the Act. This is to "make provision for the promotion, management and conservation of fisheries and fisheries resources and other matters connected therewith".[38] To effect that purpose, certain powers have been conferred upon the Minister, one of which is to declare protected areas. He was also given the power to make regulations to give effect to that purpose.

[57] I have pause, however, with the submissions by Mr. Hockman, QC, and the learned Solicitor General that the Minister is empowered under the Act to prohibit development in a protected area in the same regulations in which he also declared areas, including Hans Creek, protected areas. It is not clear, as they contended, that the difference is only in the procedure and in the title of the document in which the declaration is made. With respect, I do not agree that to hold otherwise would frustrate the clear intent and purpose of the Act.

[58] The legislature gave specific authority to the Minister to declare protected areas in section 13(1)(b) of the Fisheries Act. It is noteworthy that this empowers the Minister to declare not only areas of the fishery waters, but also the area of land adjacent thereto to be protected areas. This is very significant, in my view. While the purpose of the Fisheries Act is to promote good management and conservation of fisheries and fisheries resources and the matters connected therewith, section 13(1)(b) is intended to permit the Minister specifically to declare the areas that are to benefit from the management and conservation and to declare them by publication in the Gazette. The significance, in my view, is particularly evident in the present case in which Quorum applied for approval for the development of land, some of which borders Hans Creek. Section 13(1)(b) permits the Minister to identify and declare marine protected and also to identify and declare specific areas of adjacent land that are to be protected as well. This in turn is intended to provide

[38] See the preamble to the Act.

certainty as to the exact areas that are to benefit from protection. Regulations made under section 13(1)(b) of the Act are to achieve these purposes and regulations made under section 79 of the Act are to enable the Minister to regulate activities in the protected areas.

[59] It appears to me that by conferring on the Minister the power to declare fishery waters and land adjacent thereto protected, the State, as well as an owner of land that borders on a protected fishery waters, would know what area of that land is protected and may not be available for development that could adversely affect the fishery waters. The intention for the protection is not to prohibit development of all of the lands of an owner that borders protected fishery waters even where that land stretches, for example, for miles away from the fishery waters. The intention, in my view, is to have a rational system of protection of critical fishery waters, such as Hans Creek, and such areas of adjacent lands as are declared to be protected areas. Such lands that are not declared to be protected would be available for such development as is compatible with the country's development policy and impact assessments. In the context of the present case, all stakeholders and Quorum would have known, with certainty, the actual area of Quorum's lands that is under the protection for the conservation of the Hans creek fisheries. The Fisheries Act is intended to protect critical conservation areas and fragile ecosystems and certainty of land use.

[60] It is against this background that I am constrained to agree with Mr. Farara's submission that section 79(1)(j) of the Fisheries Act, which permits the Minister to make Regulations regulating or prohibiting the entry, including entry by any class of vessel, into any fishing priority area or protected area, does not enable the Minister to declare Hans Creek a fisheries protected area in Regulation 51(5) of the Fisheries Regulations 2003. I discern no other provision in section 79 which enabled the Minister to do so. I am therefore confirmed in the view that the legislature intended the declaration of protected fishery waters and lands adjacent thereto to be effected under section 13(1)(b) of the Fisheries Act and not under section 79 of the Fisheries Act.

[61] Section 79 of the Fisheries Act permits the Minister to make regulations to regulate activity in declared protected areas. He may prohibit development activity in such areas. It is apparent that this was partly the intention of Regulation 51(1) of the Fisheries

Regulations. However, it went further to repeat the power already conferred by section 13(1)(b) to declare a protected area by Order in the Gazette.

[62] I take it that the words 'which may or is likely to adversely impact on' a declared protected area in Regulation 51(1) of the Fisheries Regulations refer to the 'land up to the high watermark adjacent to the fishery waters' referred to in section 13(1)(b) of the Act. It seems to me, however, that while the words in section 13(1)(b) would mostly require a declaration of the adjacent land which is to be protected, the words contained in Regulation 51(1) point to an impact assessment of land that adjoins protected fishery waters prior to the approval of an application for development. These are only passing observations, however, as these matters did not arise for determination in this case.

[63] In the foregoing premises, I find that Hans Creek was not validly declared to be a protected area. By extension, the decision of the Minister to approve the development of the Beef Island Project was not illegal as infringing that declaration. I would therefore allow the appeal and set aside the decision and order of the learned trial judge.

[64] In allowing the appeal and setting aside the decision of the trial judge, I hasten to add that this does not signal the commencement of the Project, without more. I note that the Minister approved the Beef Island Project subject to specified conditions. The approval letter stated that final planning approval of the detail design drawings would be contingent upon the project requirements set out in an accompanying document. In effect, the conditions appear to require impact assessment studies to be carried out. My decision does not override the conditions laid down in the terms that were communicated with the letter of approval.

Costs in the substantive case

[65] CPR 56.13(6) provides that no order for costs may be made against an applicant for judicial review unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the case. A successful applicant is however

entitled to costs against the State.[39] The trial judge ordered the Attorney General to pay costs to the Environmental Council pursuant to CPR 65.5(1) and (2)(b)(ii) and Appendix A, which costs she calculated to be $14,000.00. Since the Environmental Council has not now prevailed they would not be entitled to that costs, but would not be ordered to pay costs in the appeal because they did not act unreasonably in bringing the case or in their conduct of it. The judge ordered Quorum to bear its own costs in the substantive proceedings. Quorum would now be entitled to their costs, $14,000.00 in the High Court and two thirds of that sum or $9,333.33 in the appeal from the Minister. For the avoidance of doubt, the State shall pay that costs on behalf of the Minister, who was acting in his official capacity.

Summary of order

[66] In summary, the order that I would make on this appeal is as follows:

(1) The appeal against the judge's decision that the Attorney General is a proper or necessary party in this case is allowed, and accordingly, the Minister of Planning is substituted for the Attorney General as Respondent/Defendant in the High Court and in the appeal proceedings.

(2) The costs order which the judge made on the issue whether the Attorney General was a necessary and proper party is set aside and there is no order as to costs on that issue either in the High Court or in this appeal.

(3) The appeal is allowed against the decision of the judge in which she held that Hans Creek was validly declared a protected area, and, by extension, that the Minister's approval of the Beef Island Project was void for illegality.

[39] See the decision of the Privy Council in Randolph Toussaint v The Attorney General of St. Vincent and the Grenadines [2006].

(4) The Minister of Planning shall pay to Quorum $14,000.00 costs in the High Court and two thirds of that sum, or $9,333.33.00, in the appeal, which costs are to be met by the State. The Virgin Islands Environmental Council shall meet its own costs in the High Court and in the appeal.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal