



**[2023] JMSC Civ 122**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU 2022CV00892**

<b>BETWEEN</b>	<b>STEVEN SYKES</b>	<b>1<sup>ST</sup> CLAIMANT</b>
	<b>LYNDEN NUGENT</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>KINGSTON &amp; ST. ANDREW MUNICIPAL CORPORATION</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>THE NATURAL RESOURCES CONSERVATION AUTHORITY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>THE TOWN AND COUNTRY PLANNING AUTHORITY</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

**Messrs Gavin Goffe & Matthew Royal instructed by Myers, Fletcher & Gordon for the Claimants**

**Mrs Rose Bennett-Cooper & Ms Sidia Smith instructed by the Bennett-Cooper Smith for the First Defendants**

**Mr Matthew Ricketts instructed by Morjorn Wollock for the Second and Third Defendants.**

**Mr Maurice Manning K.C. and Ms Allyandra Thompson instructed by Nunes, Scholefield, DeLeon & Co for the Interested Party.**

**Heard: December 20, 2022, March 3 & July 10, 2023**

**Judicial Review - Whether amended fixed date claim filed without leave permissible at trial – Whether building permit granted during COVID-19 considered emergency– Whether grant of conditional planning and environmental permits ultra vires – Whether conditional grant of environmental and planning permits subject to judicial review - Interpretation of section 20 Building Act 2018 - Kingston and St. Andrew Building (Notices and Objections) Regulations 1938 - Town and Country Planning Act 1958 - Natural Resources Conservation Authority Act 1991 - Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order 2017**

**Civil Procedure Rules (2002) rules 26.3(1), 56.3(1), 56.4(6), 56.6(1)**

**Wint-Blair J**

## **Background**

**[1]** The claimants are residents of Aylsham Heights, Kingston 8, St. Andrew. They seek judicial review of the decisions of the Kingston and St. Andrew Municipal Corporation ('KSAMC'), the Natural Resources Conservation Authority ('NRCA') and the Town and County Planning Authority ('TCPA'), to grant building permission, planning permission and environmental permits, to Digicel Jamaica

Limited ('Digicel') to construct a cellular tower in Aylsham Heights, St. Andrew. The claimants, filed a fixed date claim form<sup>1</sup> seeking the following orders:

- (1) *"An order of certiorari to quash the 1<sup>st</sup> defendant's building and planning permission granted to Digicel Jamaica Limited to erect a Cellular Transmission Tower at 1 Aylsham Heights, Kingston 8, in the Parish of Saint. Andrew.*
- (2) *An order of certiorari to quash the 2<sup>nd</sup> Defendant's environmental permit granted to Digicel Jamaica Limited to erect a Cellular Transmission Tower at 1 Aylsham Heights, Kingston 8, in the Parish of Saint Andrew.*
- (3) *The grant of permission shall operate as a stay of the permits issue[sic] by the Defendants.*
- (4) *Costs to the Claimants."*

## **The Evidence**

### *The Affidavit of Stephen Sykes*

**[2]** The first claimant Steven Sykes, in his affidavit<sup>2</sup> in support of the fixed date claim, depones that he is a businessman and the president of the Durie Drive and Aylsham Heights Citizens Association ('the association'.) He lives within 200 yards of 1 Aylsham Heights, the proposed location for the construction of the cellular

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<sup>1</sup> Filed on April 14, 2022

<sup>2</sup> Filed on April 14, 2022

tower. The second claimant, lives at 10 Aylsham Heights and is also a member of the association.

- [3] The first claimant depones that a notice dated November 10, 2021, was posted to the gate of 1 Aylsham Heights with the title “*Take notice of intention to carry out Building Works*”. The notice, marked SS1, stated that anyone wishing to object should do so in writing within 14 working days of its stated date. 1 Aylsham Heights is located at the end of a cul de sac. Assuming that the notice was indeed placed on November 10, 2021, the deadline for objection would have been on November 30, 2021.
- [4] The first claimant said that the second claimant, wrote to the Chief Executive Officer of the KSAMC, Mr. Robert Hill, seeking information in relation to Digicel’s application. In response<sup>3</sup>, Mr. Hill confirmed that Digicel’s application had been submitted to the KSAMC on November 9, 2021 along with a favourable community survey and that the application had been approved by the Building & Town Planning Committee on November 17, 2021.
- [5] The affiant says that he could confirm that none of the members of the association had been contacted in relation to Digicel’s application. This application was not the first, as a previous application by Digicel in 2005, was objected to by the residents of the community upon consultation. In respect of the current application, a total of 50 residents, including himself, have signed a letter of objection. Digicel clearly either failed to conduct a survey or did it in a different community. Therefore, to rely on the findings from another community as the basis on which to approve the application for the erection of the cell tower on November 17, 2021, was irrational.

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<sup>3</sup> Letter dated December 28, 2021 marked SS 2

**[6]** The first claimant depones that based on the advice of his attorneys, he believes that although, the Kingston and St. Andrew Building Act has been repealed, that the Kingston and St. Andrew Building (Notices and Objections) Regulations 1938, remains in force and the effect of it is that:

*i. The period for filing an objection is 30 days and not 14 working days;*

*ii. The notice ought to be served on the owner and occupier of every holding adjoining the proposed site; and*

*iii. That the first defendant “shall not approve the erection of re-erection of any such building [to which the notice refers] until the expiration of thirty days from the service or posting of the last of such copy notices.”*

**[7]** Further, based on the advice of his attorneys, in accordance with **section 18 of the Building Act**, Digicel is required to place the notice of intention to carry out building work at the police station and post office nearest to the proposed site which in this case would be the Grants Pen Police Station and the Constant Spring Post Office respectively. However, no notice was posted at either location. The claimants acknowledge that the KSAMC, may not require proof of the posting or service of the notice of intention before considering applications for building or planning permission.

**[8]** On or about November 16, 2021, just four days after the notice was allegedly posted, the NRCA granted Digicel conditional approval of the application for an environmental permit. Mr Peter Knight on behalf of the NRCA stated that the approval of Digicel’s application was supported by the findings of the community survey that had accompanied the application for the verification which was being undertaken and that an update would be provided on completion.

- [9] The first claimant depones, that the claimants' attorneys-at-law, wrote to the first defendant on January 20, 2022, seeking a meeting to discuss their concerns, to which the first defendant's attorneys replied in a letter dated February 15, 2022, asking that no further steps be taken until instructions were obtained.
- [2] In a subsequent virtual meeting held on March 4, 2022, the first defendant's attorneys maintained that there was no error in considering and granting Digicel's application before the objection period had expired. No further update was received from the second defendant with regard to the verification of the community survey.
- [3] As a result of the foregoing, the claimants are all adversely affected by the decisions of the defendants, as their close proximity to 1 Aylsham Heights means that they would be within radius of the microwave radiation emitted from a cellular tower placed there. He further depones that there are no other remedies available which are suitable to the claimants who bring this action on behalf of the members of the Association.

*The Affidavit of Xavier Chevannes*

- [10] In his affidavit<sup>4</sup> in response to the claimants' fixed date claim form, Mr. Xavier Chevannes, depones that he is the City Engineer.<sup>5</sup>

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<sup>4</sup> Filed on May 17, 2022

<sup>5</sup> Civil engineer employed since April 8, 2021, with a Bachelor of Engineering Degree in Electrical Engineering and also a master's degree in construction management from the University of Technology. Prior to becoming the City Engineer, he was a Deputy Superintendent (which is deputy to the Chief Engineer) from February 2016 to April 2021.

- [11]** In executing his duties as City Engineer, he is tasked with making recommendations to the Building and Town Planning Committee for the approval, conditional approval or refusal of applications made to the KSAMC for building permission. He is also responsible for post approval monitoring to ensure compliance with the relevant permits during construction. This is usually done via routine inspections carried out by building officers who report their findings to the City Engineer's Department/Building Department.
- [12]** Upon receipt of an application for building approval and planning permission, the file is assigned to a building officer and a planning officer in each respective department at the KSAMC. Assignment of these applications, to building officers are based on established zones and are reviewed in accordance with existing building laws. Since January 2019, applications for building approval are generally reviewed having regard to the Building Act, 2018.
- [13]** Once a plan is reviewed by the building officer and the planning department, the recommendations of both departments are sent to the Building and Town Planning Committee, with either a recommendation for refusal, for approval or for approval subject to conditions.
- [14]** Mr. Chevannes depones that, he was advised by the Director of Planning, Ms. Andrine McLaren, that the application for planning permission in this matter, was forwarded to the TCPA for its assessment and approval. He also depones that he is familiar with the application for building permission granted to Digicel, to erect a cellular transmission tower at 1 Aylsham Heights, Kingston 8 in the parish of St. Andrew.
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- [15] He depones that since the onset of the COVID-19 pandemic and the government policy, which encouraged work from home and online schooling, the KSAMC treated the application for the construction of cell towers as emergency applications.
- [16] The KSAMC, reasonably considered applications for the construction of cell towers in the Aylsham Heights area and other areas to be necessary for the protection of the health safety and welfare of persons as it facilitated the work from home policy. This policy, aimed to slow the spread of the COVID-19 virus. Based on this, the KSAMC did not require evidence of service of a notice of intention to carry out building works in respect of the construction of the cell tower at 1 Aylsham Heights.
- [17] Mr Chevannes denies that the Kingston and St. Andrew Building Act was repealed and that the Kingston and St. Andrew Building (Notices and Objections) Regulations of 1938 with effect to the necessary changes by virtue of section 86 of the Building Act 2018 are applicable in the instant case.
- [18] Mr Chevannes also denied that the Notice of Intention was to be placed at the nearest Police Station and Post Office to the proposed site and denies that he recommended that the *Notice of Intent to Build* must accompany all applications. His evidence is that KSAMC did in fact grant conditional approval of Digicel's application. However, he neither admitted nor denied that a survey was never conducted or that if it was done, it was conducted in a different community.
- [19] He depones that the KSAMC granted conditional approval of Digicel's application on November 16, 2021. Further, that he was in attendance at the virtual meeting on March 4, 2022 and that to the best of his recollection, the first claimant through his Attorney-at-law, was invited to state his objections to the tower's construction but the invitation was refused. Mr. Chevannes stated that the building approval

granted by the KSAMC, was granted in accordance with all relevant and applicable building laws and regulations.

*The Affidavit of Sarah Dawson*

**[20]** Ms. Sarah Dawson, in her affidavit<sup>6</sup> in response to fixed date claim form, deposes that she is a Planning Officer at the KSAMC. Her duties as a Planning Officer include assessing and reviewing applications for planning permission to develop land and to determine and make recommendations, on whether planning permission should be granted unconditionally or be refused subject to conditions.

**[21]** All applications for planning permission in relation to cell towers are submitted to the Town and Country Planning Authority ('TCPA') for assessment and approval pursuant to directives from the Town and Country Planning Authority. An application for the construction of a cell tower in the Aylsham Heights community was submitted to the TCPA who communicated the grant of approval to the KSAMC by way of a letter dated November 16, 2021. The KSAMC then notified Digicel by letter dated December 1, 2021 that the TCPA had approved their application. As a result, her evidence is that it was the TCPA that granted planning permission to Digicel and not the KSAMC.

*The Affidavit of Peter George Knight*

**[22]** Mr. Peter George Knight, Chief Executive Officer of the National Environment and Planning Agency ('NEPA') in his affidavit<sup>7</sup>, deposed that he is the Government Town Planner and an *ex-officio* member of the Town and Country Planning

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<sup>6</sup> Filed on May 17, 2022

<sup>7</sup> Filed May 27, 2022

Authority pursuant to the Town and Country Planning Act, 1958. Additionally, he is a member of the Natural Resources Conservation Authority (“NRCA”).

- [23]** NEPA, is an executive agency of the Government of Jamaica which provides technical and administrative support to the NRCA, the TPCA and the Land Development and Utilization Commission (‘the LDUC’). The NRCA is empowered to grant environmental permits and licences for enterprise, construction, or development in prescribed areas under the NRCA Act. Pursuant to the Town and Country Planning Act, the TPCA, is empowered to make decisions, grant approvals, planning permission and make recommendations for orderly development.
- [24]** On November 15, 2021, Mr Knight deponed that the NRCA/NEPA received an application from Digicel,<sup>8</sup> for an environmental permit for the construction of a telecommunications tower and any such facility at 1 Aylsham Heights, Kingston 8, St. Andrew. The KSAMC submitted Digicel’s application to the TPCA for planning permission by letter dated November 15, 2021<sup>[1]</sup> requesting comments and recommendations within twenty-one days.<sup>9</sup>
- [25]** The application was considered for planning permission on November 16, 2021, and approval was granted by the TPCA. In addition, the NRCA also considered the application for environmental permit on the same date and granted approval subject to the verification of the community survey.

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<sup>8</sup> This application is marked PK 1. Reference number 2021-02017-EP00308

<sup>9</sup> This is marked PK 2.

- [26]** The TCPA by letter to the KSAMC<sup>10</sup> dated November 16, 2021, to the first defendant, indicated that the approval for planning permission was granted subject to conditions and the favourable comments of certain government agencies.
- [27]** In addition, the NRCA advised the KSAMC, by letter<sup>11</sup> dated November 16, 2021, that the environmental permit was approved subject to conditions and the favourable comments of certain government agencies.
- [28]** The planning permission which the first defendant referred to the TCPA, was properly considered under section 12(1) of the Town and Country Planning Act. The TCPA was guided by the provisions of Appendix 14 of the Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order 2017, specifically Paragraph 2, which outlines the process for consultation which was strictly followed.
- [29]** Mr. Knight deponed that at the time of his affidavit, the environmental permit and planning permission had not been issued to Digicel and/or their agents, as the matter remained pending discussion and review, with respect to the results of the verification of the community survey. Digicel was advised in an email<sup>12</sup> dated February 7, 2022, of the issues and concerns encountered during the verification of the community survey and a follow up letter<sup>13</sup> dated February 23, 2022, was

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<sup>10</sup> Marked PK 3

<sup>11</sup> Marked PK 4

<sup>12</sup> Marked PK 6

<sup>13</sup> Marked PK 7

subsequently sent. He further deponed that Digicel responded by email<sup>14</sup> indicating inter alia, that “*action is in progress to address the concerns*”.

**[30]** Mr. Knight stated, that both instruments remain in the possession of the second defendant and the TCPA, respectively. Notwithstanding the approval of both instruments, they have remained in the possession of the NRCA and the TCPA to allow for administrative and accountability matters which are important to the issuance of the instruments to be settled.

**[31]** Subsequent to a meeting of the NRCA and TCPA on December 29, 2021, Mr Knight’s evidence is that he received an email<sup>15</sup> from Charmalyne Shaw, on which 3 persons were copied, including the first claimant, Steven Sykes. This email outlined the associations objections to the development. Mr Knight responded on December 30, 2021, advising that the NRCA that the TCPA had already approved the development on November 16, 2021 subject to the verification of the findings of the community survey.

**[32]** While deliberations are still ongoing, Mr Knight maintains that the NRCA and the TCPA have acted rationally, legally and fairly and within the administrative and legal framework in place to determine applications of this nature.

### **The approach of the court**

**[33]** The court intends to deal with the submissions of counsel solely under the issues identified and to only cite those cases which are directly relevant to those issues. This approach is by no means intended to disregard the very extensive materials

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<sup>14</sup> Dated March 22, 2022 and marked PK 8

<sup>15</sup> Marked PK 9

filed by all counsel which has been considered and was very helpful in determining the claim.

**Issue 1: Whether the amended Fixed Date Claim Form is permissible at the trial stage**

[34] Mr Goffe for the claimants submitted that the court granted leave to challenge the grant of planning permission. The KSAMC then filed evidence which said that it was not the body to have done so. The grant of leave having already been obtained, the claimant substituted the TCPA for the KSAMC as it was the former who had made the grant and not the latter. The amendment was made before the case management conference. In addition, a defendant who wishes to have a statement of case disallowed has 14 days to do so. The defendants having made no application to the court on this issue, cannot now raise it at trial. The court would not wish to embark upon the hearing of a claim only to have to hear submissions at this stage when it is late and would ultimately fail.

[35] Mrs Bennett-Cooper for the KSAMC referred to Rule 56.6 to strongly contend that the amended Fixed Date Claim Form is not permissible on the basis that at first instance the claimants did not seek leave to apply for judicial review in respect of the decision of the TCPA. It was upon the filing of the amended Fixed Date Claim Form on July 8, 2022 that the claimants sought judicial review against the TCPA, an entirely different entity. Counsel relied upon the case of **John Reginald Mais v Attorney General of Jamaica**<sup>16</sup> to emphasize that, the TCPA did not have an opportunity to make a defence given that the claimants brought the claim against them after the start of the court proceedings.

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<sup>16</sup> [2019] JMSC Civ 40, para 56-72

- [36] In addition, Rule 56.6 in respect of the issue of delay indicates that the claimants were outside the three months prescribed by the rule and its impact on the administration of justice. Consequently, the amended Fixed Date Claim and its supporting documents should be struck out.
- [37] Mr Ricketts for the NRCA and TCPA argued that the amended Fixed Date Claim Form filed and served on July 8, 2022, should not stand. In addressing this issue, he referred to the Fixed Date Claim Form filed on April 14, 2022 which sought orders against the First and Second Defendants and compared it to the amended Fixed Date Claim Form which sought relief against the permission granted to Digicel by the TPCA which created a new ground against another entity.
- [38] The cases of **John Reginald Mais v Administrator General of Jamaica**<sup>17</sup>, and **Golding (Orrett Bruce) & The Attorney General of Jamaica v Portia Simpson Miller (Portia)**<sup>18</sup> were cited to emphasize how the court ought to treat with amendments to statements of case in judicial review matters. Upon the authority of these cases and Rule 56.3 (1), counsel submitted that the claimants are not allowed to amend the Fixed Date Claim Form without leave of the court. This is on the basis that the amendment introduced a new ground and a new party.
- [39] Further, it is not at the trial stage that the court should be determining whether the claimants' have a realistic prospect of succeeding regarding the TCPA's decision to grant planning permission.
- [40] In addition, the time to apply for leave had long elapsed from the date when the grounds first arose. The decision of the TCPA arose on November 16, 2021, so to

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<sup>17</sup> [2019] JMSC Civ 40

<sup>18</sup> SCCA 3/2008.

make an application for leave at this stage, the claimants would have had to apply for an extension of time to seek leave. The claimants failed to do this and for these reasons the amended Fixed Date Claim Form cannot stand.

## **Discussion**

**[41]** The claimants filed a Fixed Date Claim Form dated April 14, 2022. At the first hearing before Palmer, J on May 10, 2022, the learned judge joined Digicel as an interested party and made orders for the conduct of the trial of the claim.

**[42]** On July 8, 2022, an amended Fixed Date Claim Form was filed by the claimants in which the claimants seek:

*“An order of certiorari to quash the 1<sup>st</sup> Defendant’s building permission granted to Digicel Jamaica Limited to erect a Cellular Transmission Tower at 1 Aylsham Heights, Kingston 8, in the parish of Saint Andrew.*

*An order of certiorari to quash the 2<sup>nd</sup> Defendant’s environmental permit granted to Digicel Jamaica Limited to erect a Cellular Transmission Tower at 1 Aylsham Heights, Kingston 8, in the parish of Saint Andrew.*

***An order of certiorari to quash the 3<sup>rd</sup> Defendant’s planning permission granted to Digicel Jamaica Limited to erect a Cellular Transmission tower at 1 Aylsham Heights, Kingston 8, in the parish of Saint Andrew.***

*Costs to the Claimants.”*

**[43]** Rules 56.6(1), Rule 56.13 and 56.14 state:

*“An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.*

*(2) However the court may extend the time if good reason for doing so is shown.*

*(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.”*

...

*56.13 (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim and the provisions of Parts 25 to 27 of these Rules apply.*

*(2) In particular the judge may –*

*(a) ...*

**[44]** *(b) allow the claimant to –*

*(i) amend any claim for an administrative order.*

...

*56.14 Wherever practicable any procedural application during a claim for an administrative order must be made to the judge who dealt with the first hearing unless that judge orders otherwise.*

**[45]** I will rely on the judgment of Sykes, J (as he then was) in the case of **Northern Jamaica Conservative Authority v The Jamaica Environment Trust et al and The Natural resources Conservation Authority v The National Environment**

**and Planning Agency**<sup>19</sup> in which the learned judge makes the following statement which I adopt<sup>20</sup>:

8. ... Rule 56.14 contemplates that procedural matters are dealt with prior to the hearing of the administrative order. It is a rule designed to have consistency and orderly management of the case....

9. The common sense behind rule 56.14 is obvious. I shall demonstrate this by referring to rule 56.13(1). Rule 56.3(1) specifically states that parts 25 to 27 of the CPR apply to first hearings. Parts 25 to 27 comprise the case management powers of the judge. Those powers are to be used to further the overriding objective. In rule 25.1 the judge is told in quite explicit language that he must “further the overriding objective by actively managing cases.” Parts 25 and 26 authorises the judge to make various orders and give directions to ensure the expeditious and fair hearing of the application for administrative orders.

10. At the first hearing of an application for administrative orders the judge deals with matters such as **the amendment of any claim**. The judge makes orders for affidavits, witness statements, disclosure of document[sic], skeleton arguments (see rule 56.13). The judge may allow any person having a sufficient interest to be heard at the substantive hearing.

11. It is clear, therefore, that rule 56.14 does not permit an application of the type made in this case. This is not a procedural application. It is an application going to the basis of the decision of the court.” (Emphasis added.)

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<sup>19</sup> Unreported Claim No. 2005 HDV 3022; October 10, 2007

<sup>20</sup> Paragraphs 8 to 11

[46] This statement of the law was strengthened in **John Reginald Mais**, a decision of Anderson, J.

[47] The claimants have failed to satisfy the provisions of Rules 56.6 (1) and Rule 56.14 in respect of the proposed amendment to its statement of case for the reasons set out below.

[48] On May 10, 2022, Palmer, J made the following orders:

- 1) *“The first hearing of the Fixed Date Claim is adjourned to June 15, 2022 at 2:00pm for one hour.*
- 2) *The hearing of the Fixed Date Claim is fixed for one (1) day before a Judge alone in Chambers on October 26, 2022 at 10:00a.m.*
- 3) *Digicel (Jamaica) Limited, being a body with sufficient interest in the subject matter of this claim is permitted to be heard and shall file written submissions and make oral arguments at the hearing of this matter.*
- 4) *Claimants’ Attorneys-at-Law to prepare and serve written submissions on all parties, to include Digicel (Jamaica) Limited, by the 5<sup>th</sup> day of September 2022.*
- 5) *The Defendants and Digicel (Jamaica) Limited shall file written submissions in response by the 26<sup>th</sup> day of September 2022.*
- 6) *Claimants are permitted to file any written submissions in reply to authorities by the 7<sup>th</sup> day of October 2022.*
- 7) *Claimants’ Attorneys-at-Law to file a Core Bundle by the 17<sup>th</sup> day of October 2022 and serve the index to the Bundle on all parties.*
- 8) *The Defendants are to make Standard Disclosure by the 27<sup>th</sup> day of May 2022.*

9) *Inspection is to take place on or before the 10<sup>th</sup> day of June 2022.*

10) *No further affidavits to be filed by any party after the 31<sup>st</sup> day of July 2022 unless by leave of the court.*

11) *Costs to be costs in the claim.*

12) *Claimants' Attorneys-at-Law to prepare file and serve the Formal Order herein."*

**[49]** Despite order number one above, which states that the first hearing was adjourned to June 15, 2022, the orders made by the learned judge indicate that he conducted a first hearing pursuant to Rule 56.13.

**[50]** On the next date, of June 15, 2022, Master Reid (Ag.) made an order adjourning the case management conference to July 15, 2022, at 10:00am for one hour as well as orders dealing with prospective applications to be filed by the parties.

**[51]** On July 15, 2022, the same learned Master (Ag.) dealt only with an application for court orders which was then before her. In my view, particularly as it was the same learned Master (Ag) who heard the matter, she treated the dates on which she heard this claim as ones on which a first hearing had already been conducted. Her conduct of the matter strengthens the inference that the first hearing was in fact conducted by Palmer, J. as her orders dealt strictly and solely with an application brought by the claimants for disclosure.

**[52]** The effect of all this is that the first hearing which is a case management conference was conducted by Palmer, J on June 15, 2022. To take any other view would mean that this claim was not case managed and such a material irregularity could not stand.

**[53]** As a consequence, any application to amend the Fixed Date Claim Form had to have been made on or before June 15, 2022, as thereafter, the window of time for

the making of such an application had closed. The permission of the court is required pursuant to rule 20.4(2) for a statement of case to be amended after a case management conference. There is no evidence before this court that such an application was made.

**[54]** The amended Fixed Date Claim sought to join the third defendant to the claim and prayed a grant of certiorari to quash its grant of planning permission to the interested party.

**[55]** This is a substantial and not inconsequential amendment and a matter which falls under Part 56 of the rules. Compliance with rule 56.4(12) is mandatory. Judicial review claims are distinct from ordinary civil claims. Leave is required for an amendment of this nature and there is none. The defendant's contentions are in line with my view that the claimants' course is impermissible.

**[56]** The delay in the filing of the amended Fixed Date Claim is apparent based on the evidence. The date of the grant of planning and environmental permission is November 16, 2021, and the date the amended fixed date claim was filed is July 8, 2022. I need go no further.

**[57]** There has been no grant of leave in respect of the third defendant, the court at the leave stage was not asked to consider the case in respect of that defendant. this court is not hearing an application for leave. The path ends here.

**[58]** The issue of whether the defendants can raise this application at trial as pursuant to rule 20.2(2)(b) they have to do so fourteen days after an amendment to a statement of case is without merit.

**[59]** It is a finding of this court that in the circumstances of this case, the Fixed Date Claim Form is one which required permission, the case management conference having been held by Palmer, J as has been found. Rule 20.1 is the applicable

rule in the circumstances which allows a party to amend its statement of case at any time before the CMC. After that, any amendment may only properly be made with the permission of the court.<sup>21</sup>

**[60]** The submission of Mr Goffe that the court granted leave to challenge the planning permit in respect of the first defendant, necessitating the amendment as it was the defendant's evidence that the planning permit was granted by the third defendant did not preclude the application from being brought before the learned Master.

**[61]** This issue is determined in favour of the defendants. The amended Fixed Date Claim Form is a nullity. The claim against the third Defendant is dismissed. The fixed date claim remains to be determined.

**Issue 2: Did the KSAMC act illegally by its grant of a building permit in respect of Digicel's application to erect a cellular transmission tower**

**[62]** Mr. Goffe for the claimants contends that the KSAMC granted and issued a building permit to Digicel to erect a cell tower at 1 Aylsham Heights, Kingston 8, just five (5) days after the date on a *Notice of Intention* had been posted in the Aylsham Heights community. Nine working days remained during which the members of the community could have raised an objection to the erection of the cell tower.

**[63]** It was further submitted that in a letter from the KSAMC to Digicel dated December 1, 2021, it was stated that at a meeting of the Building and Town Planning Committee of the KSAMC held on November 17, 2021, it "*approved planning and building permission in respect of your application...*" Mr Goffe submitted that this

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<sup>21</sup> Rasheed Wilks v Donovan Williams [2022] JMCA Civ 15 at para [28]

letter is distinct from the affidavit of Sarah Dawson relied on by the KSAMC which states at paragraph 7 that “*no planning permission was therefore granted by the KSAMC to Digicel Jamaica Limited...*”

- [64] Mrs Bennett-Cooper for the first defendant submits that the KSAMC acted within the parameters of the Building Act, 2018 when it granted a building permit to Digicel. Counsel relies on sections 18(5), (6) and 86 of the Building Act. She argued that the applicable regulations are the Kingston and St. Andrew (Notices and Objections) Regulations and relied on regulations 3 to 7.
- [65] Counsel submitted that section 20 of the Building Act grants emergency powers to the KSAMC enabling it to abridge time if in its discretion there is an emergency requiring the grant of building permission.
- [66] Further, that in planning law matters, the courts have stated that issues of planning policies and judgment are within the exclusive purview of the planning authority. The role of the court on an application for judicial review of a planning decision is to interpret a policy where its meaning is contested: (see **South Bucks District Council v Porter and Chichester District Council v Searle & Ors and Wrexham County Borough Council v Berry [2003] 2 AC 558; Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; R v Hillingdon London Borough Council ex p. Puhlhofer [1986] AC 484**)
- [67] It was submitted that the first defendant acted within its parameters as outlined in the Building Act, when it granted the building permit to Digicel. Although, section 18(5) and (6) of the Building Act, outline the requirement for the developer to give notice of the intention to construct, section 20, allows the KSAMC to divert from those provisions and grant permission to carry out building works before or after a notice is given. Further pursuant to section 2, the KSAMC treated the application

as an emergency application given the COVID-19 pandemic. Section 2 of the Building Act, 2018 defines an emergency.

- [68]** It is submitted that the evidence before this Court, is that the increased demand for internet connectivity and the need to protect the health, safety, and welfare of Jamaicans in the midst of a worldwide pandemic, were direct influences upon the treatment of the application as an emergency application. This position is also stated in the affidavit of Xavier Chevannes. Accordingly, the KSAMC, having concluded that there was an emergency, acted within its powers to grant building approvals despite, the abridged notice period and did not act illegally in doing so.
- [69]** Despite the claimant's contention to the contrary, the planning permission was considered by the TCPA and not the KSAMC. This is evident, from the affidavits of Sarah Dawson and George Knight respectively.
- [70]** Mr Manning, KC, for the interested party, Digicel, submitted that the evidence of Sarah Dawson was that no planning permission was granted by the KSAC to the interested party as has been alleged by the claimants.
- [71]** In addition, Digicel went through the mandatory screening process which involved deliberations concerning reasonable technical, environmental, and social considerations, as well as the need for improved telecommunications services in light of the challenges posed by COVID-19. Kings Counsel cited the letter from Mr Robert Hill which was filed in support of the fixed date claim.<sup>22</sup> That letter stated that the KSAMC had received Digicel's application on November 9, 2021, as well as the recommendations of external agencies to include the Ministry of Health, NEPA/TCPA and the Civil Aviation Authority. The application had been submitted

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<sup>22</sup> Dated December 28, 2021

with a favourable community survey. The application was approved on November 17, 2021, and Digicel was notified on December 1, 2021.

[72] Kings Counsel submitted that the KSAMC had done its due diligence to ensure that the tower would pose no risk to health and of the claimants or other community members and relevant third parties. In light of these considerations the failure to post the notices at the post office and police station should not be considered procedurally unfair. It is submitted that these procedural irregularities and the abridged notice period did not render the process unfair in all the circumstances nor would it nullify the decisions of the defendants.

[73] It was further submitted that the claimants by way of the affidavit filed in support of the Fixed Date Claim Form confirmed that the KSAMC did not require the evidence of service of a *Notice of Intention to carry out building works* prior to considering the application.

### **Judicial Review**

[74] What must be shown by the claimants in order to succeed in this claim is a relevant error of law, i.e., an error in the actual making of the decision/s which affected the decision/s itself/themselves.<sup>23</sup>

[75] *“The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of the public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality.”*

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<sup>23</sup> R v Lord President of the Privy Council, ex pl Page, Lord Browne-Wilkinson at page 701

[76] The heads of judicial review from the well-known case of **Council of Civil Service Unions v Minister for the Civil Service**<sup>24</sup> are set out below:

*“The process of judicial review is the basis on which courts exercise supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or making administrative decisions affecting the public. It is trite that judicial review is concerned only with the decision making process of a tribunal and not with the decision itself. Lord Hailsham of St. Marylebone L.C. expressed in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 at page 1161a that the purpose is to ensure that the individual receives fair treatment and not to ensure that the authority which is authorised by law to decide for itself reaches a conclusion which is correct in the eyes of the court. Lord Diplock in Council of Civil Service Unions v Minister for the Civil Services [1985] AC 374 at page 410 F-H, discussed the principle of judicial review in relation to decision making powers and spoke to three heads -- illegality, irrationality and procedural impropriety:*

*By illegality as a ground for judicial review, I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

*By irrationality I mean what can now be succinctly referred to as ‘Wednesbury unreasonableness’ (Associated Provincial Picture Houses Ltd*

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<sup>24</sup> [1985] AC 374

*v Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it...*

*I have described the third head as —procedural impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.*

*The balancing and weighing of relevant considerations is primarily a matter for the public authority, not the courts (per Lord Green MR in Wednesbury, at page 231; and per Lord Hailsham in Chief Constable of the North Wales Police at page 1160 H). However, if there has been an improper exercise of power, it will be viewed as unreasonable, irrational or an abuse.”*

**[77]** In **Chief Constable of The North Wales Police v Evans**<sup>25</sup> at page 1160 paragraphs F-G, Lord Hailsham of St. Marylebone L.C opined as follows:

*“But it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court*

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<sup>25</sup> [1982] 1 WLR 1155

*is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law.”*

[78] In addition to these grounds, our Court of Appeal has now added the grounds of unconstitutionality and proportionality as heads of judicial review. (See **Latoya Harriott v University of Technology**)<sup>26</sup> These additional grounds were not argued in this claim.

[79] The role of this court is to exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or who were making administrative decisions affecting the public. This decision is primarily concerned with the decision-making process and not with the decision itself. To this end judicial restraint is required in order that the court not substitute its own views in this matter under the guise of exercising a supervisory jurisdiction. Judicial restraint is buttressed by the understanding that the primary decision maker is better placed than the court to evaluate these matters falling within its area of expertise.

### **Discussion**

[80] The Chronology of events is as follows:

- 1) November 10, 2021: Notice from Digicel posted on the gate.
- 2) November 16, 2021: Meeting of the NRCA/TCPA. Notice of the decision of the NRCA/TCPA issued by Morjorn Wollock, Secretary of TCPA and on behalf of the NRCA, to Robert Hill, CEO of KSAMC, advising that the application had been reviewed and approval for planning permission granted subject to conditions by the TCPA and

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<sup>26</sup> [2022] JMCA Civ 2 at para [47]

pending the favourable comments of the National Works Agency, and that environmental permission had been granted subject to the comments of certain government agencies.

- 3) November 17, 2021: Meeting of the Building & Town Planning Committee of Council, KSAMC, approving the completed application and a building permit granted at its meeting.
- 4) December 1, 2021: Notice of the decision of the grant of approval of building, environmental and planning permission granted to Digicel by letter from KSAMC.
- 5) December 28, 2021: Letter from Mr Robert Hill, CEO of the KSAMC to the citizens of Aylsham Heights and Durie Drive advising that Digicel's completed application was presented to the Building & Town Planning Committee of Council and had been approved at its meeting on November 17, 2021.

**[81]** Mrs Bennett-Cooper relies on **section 20 of the Building Act, 2018** which would lend itself to discretionary action on the part of the KSAMC provided it acted reasonably. Section 20 provides:

- (1) *Subject to subsection 2 and notwithstanding anything to the contrary in this Act, emergency building work may be carried out before immediately or before a notice of intention to carry out building work can be given.”*
- (2) ...
- (3) *In the exercise by the Local Authority of any power conferred upon it by Part VI, the Local Authority shall take into account the*

*circumstances which necessitated the carrying out of the emergency building work.”*

**[82]** “Emergency” is defined in **section 2 of the Building Act, 2018:**

*“means a present and imminent event in respect of which a Local Authority reasonably believes prompt co-ordination of action or special regulation or persons or property is required to protect the health, safety or welfare of persons or to prevent loss or damage to property.”*

**[83]** The evidence of the present and imminent event was COVID-19, and this has not been disputed. The reasonableness of the belief said to have been held by the Local Authority requires scrutiny. The evidence of Xavier Chevannes on this issue is set out below:

*“...since the onset of the COVID-19 pandemic and the government policy, which encouraged work from home and online schooling, the KSAMC treated the application for the construction of cell towers as emergency applications. The KSAMC, reasonably considered the applications for the construction of cell towers in the Aylsham Heights area and other areas to be necessary for the protection of the health safety and welfare of persons as it facilitated the work from home policy which aimed to slow the spread of the COVID-19 by providing better telecommunication services. In the circumstances, the KSAMC did not require the evidence of service of a notice of intention to carry out Building Works in respect of the construction of the cell tower at 1 Aylsham Heights, Kingston 8 in the parish of Saint Andrew.”<sup>27</sup>*

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<sup>27</sup> Para 12

- [84]** There was an affidavit in reply on this issue from the claimants by Kesha Grant. The submission was made by Mr Goffe that the claim of an emergency by the KSAMC was not set out in the minutes provided to the court. It is noted that the minutes supplied to the court were from the meeting of the KSAMC held on November 17, 2021.
- [85]** It would seem to be reasonable to infer to from the evidence of Mr Chevannes that the KSAMC concluded that there was a statutory emergency and as a consequence granted the building permit well before the expiration of the notice period. However, upon review of the minutes of the meeting of the KSAMC held on November 17, 2021, there is no mention of an emergency, government policy or the pandemic, neither issues related to nor the treatment of Digicel's application as one falling in the category of a statutory emergency.
- [86]** There is a duty of candour on public authorities to provide all the information relevant to its decision making process. This duty is a high one as the provision of information is to assist the court.
- [87]** The court now has to consider whether in proceeding as it did, the KSAMC acted ultra vires and irrationally. Mr Manning, KC submitted, and the court adopts these principles of law.
- [88]** Procedural ultra vires occurs when a public authority fails to follow the procedure laid down by law. These procedures may involve consultation with others, the imposition of time limits or the proper form in which an order may be executed.
- [89]** The court has to examine the statute, its words and objects, the purpose of the requirement and its relationship with the scheme of the Act, the degree and seriousness of any non-compliance, and its actual or possible effect on the parties. The court must attempt to assess the importance attached to the requirement by Parliament. If, in the opinion of the court, a procedural code laid down by a statute

is intended to be exhaustive and strictly enforced, its provisions will be regarded as invalidating an action taken in breach, but even a mandatory procedural requirement may be held to be susceptible of waiver by a person having an interest in securing strict compliance.

[90] Mr Manning, KC cited the case of **Charles v Judicial and Legal Service Commission and another**<sup>28</sup>, the court opined in respect of the failure to comply with a time provision it was better to avoid the use of the words mandatory and directory and instead ask two questions:

*“The first was whether the legislature intended the person making the determination to comply with the time provision, and secondly, if so whether the legislature intended that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void.”*

[91] The relevant statute containing the time provision in the instant claim is the Building Act and the relevant regulations set out above. The parties are agreed that the KSAMC did not require the evidence of service of a *Notice of Intention to carry out building works* prior to considering the application. This ties into the submission of Mr Manning, KC that the intention of the legislature has to be considered.

[92] In my view, **section 20 to the Building Act, 2018** ensured that the KSAMC would be able to abridge time if an emergency arose within the meaning of the statute. The use of the words *“notwithstanding anything to the contrary in this Act”* in section 20(1) is the indication of this.

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<sup>28</sup> [2002] UKPC 34

- [93] The drafters of the statute under review included in section 20, language which prevails over another provision of the same Act, or another Act, by the use of the words: “*notwithstanding anything to the contrary.*” To my mind, these words really mean, despite anything contained in this Act or another Act. The effect of the inclusion of such language is that section 20 prevails over the rest of the Building Act in the event that its conditions are fulfilled.
- [94] Emergency building work may be carried out immediately or before a notice of intention can be given. This means that the provisions of section 18 and the applicable regulations would yield to section 20(1) in light of an emergency as defined in the statute.
- [95] It cannot be in doubt that COVID-19 presented an emergency for the nation. The Disaster Risk Management Act was amended many times as a result of the threat posed by the pandemic. The need for increased telecommunications services then and now similarly cannot be in doubt or dispute.
- [96] The difficulty is that the actions of the KSAMC in granting the building permit are not supported by the evidence. The affidavit evidence filed on its behalf is inconsistent with the minutes of the meeting at which approval was granted. There being no emergency approval on the record. The provisions of the Building Act were not followed in granting approval for the building permit. In my judgment, the KSAMC failed to act within its statutory remit as section 20 was not demonstrated on the evidence to have been a material consideration in the minutes of its meeting to grant the application. It cannot therefore be said that it observed the rules of natural justice or followed the statutory procedure laid down in the Building Act.
- [97] The court finds that the decision to issue the building permit was invalid on the ground of procedural ultra vires.

**Issue 3: Whether the second defendant is permitted by statute to grant conditional approval**

- [98] The claimants argue that the NRCA granted conditional approval of Digicel's application just four (4) days after the date of the *Notice of Intention* with a period of ten (10) days remaining during which the members of the community could have similarly raised an objection to the erection of the cell tower.
- [99] The claimants question whether the court can properly review the permits that have, purportedly, been provisionally approved by the second and third defendants but not issued to the applicant. They submit that provisionally approved permits cannot be reviewed at this time and cite the case of **R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council**.<sup>29</sup>
- [100] Mr Goffe submitted that section 16 of the Town and Country Planning Act does not contemplate provisional planning permits and that a planning decision had been made in this case. He referred to section 9 (2) of the Natural Resources Conservation Authority Act and submitted that according to its governing statute, the NRCA only had two options available to them, which were the grant of a permit subject to such terms and conditions as it thinks fit or the refusal of a grant. Therefore, the provisional approval of environmental permits is not an option available to the NRCA.
- [101] Mr Ricketts, for the second defendant argued that the environmental permit must be granted and issued in order to be in effect. Under section 9(2) of the NRCA Act, no person can undertake in a prescribed area any construction, development, enterprise inter alia except, under and in accordance with a permit issued by the

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<sup>29</sup> [2002] UKHL 23

Authority. The decision to conditionally grant the environmental permit without issuing it to Digicel, indicates that the decision taken is not a final one and would therefore not make the decision of the second defendant final and capable of being reviewed at this time.

**[102]** It was submitted that the decisions of the second and third defendants to conditionally approve the permit and planning permission of Digicel cannot and should not be taken as proof that the permits were issued without taking material considerations into account.

**[103]** If the court were to rule that the decisions of the second and third defendants were final ones, capable of being reviewed, then in the alternative, it is submitted that it is trite law that on any application for judicial review, the court's concern is not with the substance of the decision but with the propriety of the methods by which the decisions were arrived at.

**[104]** Mr Ricketts submitted that the role of the court was stated by Wint-Blair, J in **Firearm Licensing Authority v The Minister of Labour and Social Security & the Industrial Disputes Tribunal**<sup>30</sup> :*“The court adopts the following statement as correctly reflecting the law:*

*‘The power of judicial review may be defined as the jurisdiction of the superior courts to review laws, decisions, acts and omissions of the public authorities in order to ensure that they act within their given powers. Broadly speaking, it is the power of the courts to keep public authorities within proper bounds and legality.’*<sup>31</sup>

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<sup>30</sup> [2022] JMSC Civ 132

<sup>31</sup> Commonwealth Caribbean Public Law, Fiadjoe, Albert, 3<sup>rd</sup> ed. at p. 15.

## Discussion

[105] The evidence of Mr Knight was that on the 15<sup>th</sup> of November 2021, the KSAMC applied for planning permission in Aylsham Heights requesting comments and recommendations within 21 days. The TCPA considered and approved Digicel's application for planning permission on November 16, 2021. As a result, the TCPA by a letter dated November 16, 2021 wrote to KSAMC indicating that the permission for planning was approved subject to the conditions and favourable comments of the National Works Agency. The NRCA similarly wrote on the same date approving the grant of environmental permission subject to the favourable comments of certain government agencies.

[106] His evidence was that the planning permission that KSAMC referred to the TCPA was legally and properly considered under section 12 (1) of the Town and Country Planning Act. In addition, the TCPA was guided by the Town and Country Planning (Kingston and St. Andrew and the Pedro Cays) Provisional Development Order, 2017. Therefore, as at May 27, 2022, the environmental and planning permission permits had not been issued to Digicel as the matter was pending discussion and review with respect to the results of the verification of the survey done in the Aylsham Heights community.

[107] Section 16 of the Town and Country Planning Act is under Part IV which is headed "*Compensation for refusal or conditional grant of planning permission.*"

*Section 16. In this Part "planning decision" means a decision made on an application for permission to develop land under Part III."*

[108] Conditional grants of planning permission are contemplated within the statute and its clear words. Mr Ricketts submits that sections 11 and 12 of the TCPA empower the TCPA to make provisional decisions, it may grant permission either unconditionally or subject to such conditions as it may deem fit. This is also clear

from the plain language of the sections. The permits from both the TCPA and the NRCA have to be issued not merely granted.

[109] The NRCA Act in section 9(2) provides:

*“Subject to the provisions of this section and section 31, no person shall undertake in a prescribed area any enterprise, construction or development of a prescribed description or category except under and in accordance with a permit **issued** by the Authority.”* (Emphasis added)

[110] Section 31 of the NRCA Act also provides: “

*“The grant of a permit or a licence under this Act does not dispense with the necessity of obtaining planning permission when such permission is required under the Town and Country Planning Act, and in such circumstances, an application under that Act for planning permission in respect of any development which, pursuant to an order section 9(1), is of a prescribed description or category shall be made thereunder simultaneously with the making of an application for a permit or licence under this Act.”*

[111] Both sections have to be read together, the permits granted are issued in order to constitute planning permission and environmental permission.

[112] In the minutes of the meeting of the NRCA held on November 16, 2021, the application for environmental permits and planning permission *“were approved with the recommended conditions.”* In my view, approval of does not mean issuance of. This conclusion is supported by the evidence that the Secretary of the TCPA in a letter to the KSAMC regarding the above meeting, said that the approval for planning permission was granted subject to conditions by the TCPA and pending the favourable comments of the National Works Agency. Further that the preparation of the planning permission was currently being finalized and that

the instrument would be sent to the KSAMC once it was concluded. This was the same for the environmental permit. This is evidence that the grants had not been officially issued to Digicel.

[113] The NRCA and KSAMC were both aware of the need to refer the application to the TCPA and this is evident from the correspondence in evidence. The KSAMC was given directions pursuant to section 12 of the TCPA, which were that planning permission had been granted with conditions and that the instrument was being finalized. In my view, this means the grant of planning permission could not have been made by the KSAMC despite what was communicated by that body in its letter to Digicel.

[114] The letter to Digicel from the KSAMC when read with the letter from the KSAMC to the citizens of Aylsham Heights and Durie Drive indicate that the application was approved having gone through all of the stages. However, that was not so on the face of the record.

[115] In a very helpful case submitted by Mr Goffe in **R (Burkett) v Hammersmith LBC**<sup>32</sup> Lord Steyn stated:

*“There were two conditions precedent to a binding planning permission coming into existence. It is common ground that the resolution itself created no legal rights. Only upon fulfilment of the two conditions precedent and the grant of planning permission did rights and obligations as between the local authority, the developer and affected individuals come into existence. Until all these things happened the resolution was revocable not by the designated official but by the local authority itself.”*

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<sup>32</sup> [2002] 3 All E.R. 97 at page 108 para [32]

[116] In the instant case, there is no instrument before the court demonstrating the finalized grant of planning permission nor is there evidence that the environmental permit has been finalized and granted.

[117] This court will adopt the statement of the law from **Hammersmith** and find that the meeting of the NRCA and TCPA held on November 16, 2021 did not create binding planning permission. It cannot be said therefore that the second defendant and third defendant have made final decisions which are capable of judicial review and the court so finds.

[118] The actions of the second defendant cannot be said to be invalid on the ground of ultra vires, irrational or procedurally improper in all the circumstances. The court will therefore refuse to grant orders sought against the second defendant in the fixed date claim form filed on April 14, 2022.

[119] **Orders:**

1. An order of certiorari to quash the building permit granted by the first defendant to the interested party is granted by the court.
2. Order No. 2 is refused.
3. No order as to costs.
4. Notwithstanding order number 3, the parties are at liberty to make written submissions as to the proper costs order which should be made in this claim. Each may file and serve on the other, within seven days of the delivery of this judgment, written submissions setting out the form of order sought and brief reasons therefor. Each party may lodge and serve a response to the submissions of the other within three days thereafter. The issue of costs will be determined on paper, failing which order number 3 stands.

**Wint-Blair, J**