IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G 45 OF 2019

BETWEEN:

THE PROPRIETORS OF STRATA PLAN NO. 405

Plaintiff

AND

THE CABINET OF THE CAYMAN ISLANDS GOVERNMENT

First Defendant

AND

MINISTRY OF HEALTH, ENVIRONMENT, CULTURE & HOUSING OF THE CAYMAN ISLANDS GOVERNMENT

Second Defendant

OPEN COURT via Zoom

Appearances:	Ms Monica Carss-Frisk QC instructed by Ms Kate McClymont of Broadhurst LLC for the Plaintiff Mr. Michael Smith, Crown Counsel of Attorney General's Chambers for the 1st and 2nd Defendants.
Before:	Hon Mrs Justice Margaret Ramsay-Hale
Heard:	14 October 2020
Draft Judgment Circulated:	15 June 2021
Judgment Delivered:	22 June 2021

HEADNOTE

Judicial Review - Decision to grant Coastal Works Permit for dock extending into 128' into waterway - challenge on the grounds of irrationality and illegality - challenge to the decision-making process - decision irrational if lacks comprehensible justification, does not add up - whether Decision unlawful as contrary to policy

Introduction

1. The Plaintiff, the Proprietors of Strata Plan No. 405 (the "Strata") challenges the decision of the First Respondent, the Cabinet of the Cayman Islands Government (the "Cabinet") made on 11 December 2018 to grant a coastal works permit to Mr. Marcus Cumber ("Cumber") for the

construction of a private residential dock and cabana on Crown land adjacent to the upscale Vista del Mar development, situate in Grand Cayman (the "Decision").

2. The Decision is contained in a minute of a meeting of Cabinet on 11 December 2018 and was based upon, and followed the recommendation of, a Cabinet Paper prepared by the Hon. Dwayne Seymour, who was at the relevant time the Minister in charge of the Ministry for Health, Environment, Culture & Housing (the "Ministry") dated 22 November 2018 (the "Cabinet Paper").

3. The Decision will permit the construction of a dock that extends 128' into the Salt Creek waterway for the purpose of mooring a boat owned by Cumber and was granted despite the objections and concerns expressed by the Strata and other interested parties, including the Department of Environment ("DoE") and the Department of Planning ("Planning").

4. The Decision is challenged on the grounds of irrationality and illegality:

(i) As to irrationality, the Strata contends that the Decision is irrational, in that:

(a) the Cabinet Paper upon which it is based discloses no rational basis for its recommendation to grant a coastal works permit or for rejecting the reasons identified by the DoE, by Planning and by private objectors, including the Strata, why a permit should not be granted, and

(b) the Decision departs, without reason, from the Cayman Islands Government's ("CIG") own published policy that *"Docks constructed along a canal may not extend more than 6' into the canal."*

(ii) That the Decision is illegal as it contrary to sections 14 and 26 (1) of the **Public Lands Act** (2017), in that it permits the construction of a private dock and cabana over 'public lands' (in particular the foreshore and territorial waters) obstructing or interfering with the public's right of access to such lands under the Act.

Background

5. The Strata is made up of the proprietors of all the strata lots contained in Strata Plan No. 405, that is to say the proprietors of the strata lots that form part of the development commonly known as Salt Creek. The Salt Creek development borders a waterway which bears the same name. The Salt Creek waterway is a natural, Crown-owned inlet which has been dredged to allow navigation by medium to large sized vessels and connects with a number of privately-owned canals.

6. Between the Salt Creek development and the mouth of the Salt Creek waterway is another development known as Vista del Mar, part of which is also on the Salt Creek waterway. The coastal works permit which was approved by the Decision is for construction of a dock, pier and cabana,

extending into the Salt Creek waterway from Mr Cumber's property in Vista del Mar, to permit the mooring of a boat.

7. In 2014, Cumber jointly with a neighbour made application for a coastal works permit, but that application was rejected. On or around 27 March 2018, CIG received a further application for a coastal works permit made on Cumber's behalf.

8. Public notice of his March 2018 application was given, as required by CIG, and it came to the attention of the Strata which by a letter from its attorneys objected to the application on several grounds. These were that the project would reduce the usable width of the Salt Creek canal by approximately one third; it would create a navigational hazard; it would force small craft users into deeper waters used by large vessels; it would have to be lit at night, causing an additional hazard for vessels and/or disruption to protected species; it would cause light and noise pollution; it would have a negative impact on the views enjoyed by property owners to the southwest of Mr Cumber's property; it would adversely impact the natural environment; it would change the character of the area and set an unwelcome precedent.

9. Finally, the Strata pointed out that Cumber had acquired his property in knowledge of the shallow water adjoining it and that Vista del Mar, within which his property was situate, has a separate dedicated deep-water marina where he can moor his boat.

10. Before the Cabinet Paper was drafted for the March 2018 application, a revised coastal works application was delivered to the CIG on Cumber's behalf on 10 July 2018. Public notice of the revised application was given and it too came to the Strata's attention, which again objected on largely the same grounds as before.

11. The Strata thereafter sought updates on the progress of Cumber's application and asked to be heard at the Cabinet meeting at which the application was to be considered, but received no substantive response.

12. Following receipt of Cumber's revised application, the Ministry wrote on or around 12 July 2018 to the National Conservation Council through the DoE as well as the Department of Lands and Survey, the Port Authority of the Cayman Islands and Planning, seeking their comments on the application. Their comments were received between 25 July and 23 October 2018. These were incorporated, together with comments and objections from adjacent property owners and the general public, into the Cabinet Paper, which was approved by the Hon. Minister and submitted to Cabinet on 22 November 2018.

13. The Cabinet Paper was considered, and the Decision was made, on 11 December 2018. Cumber was informed of the Decision by a letter dated 27 December 2018 but emailed on 4 January 2019 and, following satisfaction of certain conditions, the coastal works permit (the "Permit") was issued by an instrument dated 17 January 2019.

14. Following pre-action correspondence and a freedom of information request for the Decision and any reasons for it, on 27 March 2019 the Strata filed an application for leave to apply for judicial review. Leave was granted and pursuant to that leave, on 14 May 2019 the Strata filed its Notice of Originating Application, together with its Statement of Facts and Grounds in support of the application for judicial review.

The Statutory Framework

15. The Cabinet's power to grant Permits is set out in section 21 of the **National Conservation Act** 2013, which states in relevant part:

> *"21. (1) Subject to this section, the Cabinet may, upon written application by any person who wishes to carry out any building, dredging or such other type of works in Cayman waters, grant a permit to such person exempting him, subject to any limitations and conditions specified in the permit, from any of the provisions of this Law as may be specified in the permit.*
>
> *(2) The Cabinet shall not grant a permit unless it is satisfied that-*
>
> *...*
>
> *(b) in the case of a permit authorising the works with regard to a protected species or its critical habitat, the works are compatible with any conservation plan for the species or that appropriate and enforceable conditions can be imposed to ensure such compatibility and that the activity will not jeopardise or put at risk any population of the species.*
>
> *(3) The Cabinet may, as a condition of granting a permit and having regard to the potential damage to natural resources from the activity and the costs to remedy that damage, require the applicant to-*
>
> *(a) post a bond in a form acceptable to the Cabinet in such amount as the Cabinet may determine;*
>
> *(b) pay a prescribed mitigation fee which shall be paid into the Fund;*
>
> *(c) pay prescribed royalties which shall be paid into the executive revenue."*

The Decision

16. The Cabinet Paper records that in July 2014, Cumber and another resident within Vista del Mar made application for a cantilevered dock that would require substantial dredging and impact approximately 9,623 square feet of Crown land. The DoE had not supported the application due

to the significant environmental effects that would result from the dredging works which would involve the direct removal of a significant area of seagrass beds.

17. At that time, DoE recommended that Cumber utilise the existing docking facilities provided within the Vista del Mar marina. In its response to the Ministry's queries made after the Ministry had received of the Coastal Works Review, the DoE noted that the docks available at Vista del Mar are known to be used by residents with boats the size of the Applicant's boat and also that Vista del Mar:

> *"was planned and designed in order that those docks would be available for residents eliminating the need to further impact the ecosystem in that area."* [1]

18. The application was renewed on 22 March 2018. In this application, Cumber proposed a 1,787 square foot L-shaped dock which would extend into water deep enough that dredging would not be required.

19. There were a number of objections. The DoE reiterated its earlier concerns *"as the general location (i.e. same size of the same parcel) size and construction methodology of the proposed works remains unchanged."* The plans for the proposed dock were revised by Cumber in an attempt to address the concern of the objectors.

20. Cumber's revised proposal was for the dock to be supported either by 10-inch concrete reinforced PVC piles or 12-inch diameter timber piles, drilled approximately 10 feet into the seabed. It was also proposed that the installation of the pilings would be performed using a barge with a draft of 18 inches which would be stabilised through the deployment of spuds into the seabed and an auger drilling system with a maximum reach of 55 feet would be deployed. It was also proposed that the works closest to shore be undertaken during high tides.

21. In the *"Discussion"* section, the Cabinet Paper records the various objections made. It records in particular the DoE's concerns that while the footprint of the proposed dock did not fall within a Marine Protected Area, the Works would directly and indirectly impact a substantial area of dense, healthy seagrass beds (*Thalassia testudinum*), with some algal cover and that these impacts would be experienced in both the construction and operation stages of the dock.

22. It also recites the DoE's concerns that although Cumber had proposed steps that would minimise the direct loss of benthic habitat by removing the dredging elements of his previous proposal and creating a dock which extends to deeper water, there would still be negative impacts to the marine environment both during construction and post-construction and that the DoE objected in principle to docks being constructed in that location, as previously expressed.

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[1] Page 11 Exhibit TJ1

23. The Cabinet Paper records that in their response to Cumber's previous application, the owners of the marina advised that there were two available berths which could accommodate Cumber's vessel. It notes, however, that in this application, Cumber's agent had advised the DoE that there were no berths available <u>for purchase</u> within the Vista del Mar marina.

24. It also records that, as with the previous application, the DoE considered that the least environmentally damaging option was for Cumber to utilise one of the available berths at the Vista del Mar marina, should one be available.

25. The Cabinet Paper also states that both the Ministry and the DoE received numerous objections to the proposed dock from neighbouring Vista del Mar residents as well the Strata. The objections raised by these private objectors and the DoE's comments in response are set out *seriatim* in the Cabinet paper in the following terms:

    (i) <u>Navigational Implications:</u> The DoE recommends that the Port Authority is consulted to provide comments on navigational safety concerns, as this falls within their remit.

    (ii) <u>Visual Impacts:</u> The revised plans show the dock located further east towards the entrance to the Salt Creek Channel. This location change may help to address the major concerns of adjacent property owners regarding impacts to their views. However, given that visual impact falls within the remit of the Planning Department, their views should be solicited on this issue.

    (iii) <u>Light and noise pollution:</u> These aspects primarily fall outside of the DoE's remit, apart from lighting which affects a Protected Species e.g. sea turtles. As a general comment, illumination of the dock will introduce artificial lighting onto a previously natural vista. If Cabinet is minded to grant approval they may choose to include a condition which restricts lighting on the dock to require wildlife certified lighting, for example, which generally has significantly less of an impact (due to the wavelength that it uses) than standard lighting.

    (iv) <u>Dock to be built adjacent to a proposed Terrestrial Protected Area:</u> Objectors noted that the mangroves to the west of Salt Creek channel are proposed for protection under **National Conservation Act** and that the proposed dock would have negative impacts on this area. The DoE noted that the area was nominated for protected area status but the nomination was unsuccessful and has not been carried forward but, even if it had been awarded Protected Area status, the DoE did not consider that the proposed dock would have a negative impact on the protected area. The mangroves to the west of the Salt Creek are designated as Mangrove Buffer Zone under the Development and Planning Law, which is administered by the Department of Planning.

26. The private objectors' concerns about the potential damage to the sea bed were addressed in the DoE's Coastal Works Review under the heading *"Impact to Benthic Habitats."* There the Technical Review team noted that:

> *"the seabed under the proposed dock footprint has very dense seagrass and some algae. This habitat provides an ecologically important marine habitat supporting a variety of species, particularly those in their juvenile stages. Seagrass also helps to maintain good water quality by binding sediment together – this is particularly important in this area as the seabed is a very soft and silty substrate and it was evident from the site visit that even very low impact disturbance (such as swimming over the shallow areas using fins) created significant plumes of very fine suspended sediment. The Habitat will be directly impacted during construction through the deployment of spuds to anchor the barge and the installations of pilings into the seabed..."*

27. The Cabinet Paper then recites the following excerpt as being the recommendation by the DoE:

> *"The proposed revised dock configuration has less of an environmental impact than that which was proposed in 2014 and was refused permission by Cabinet; this is largely due to the absence of dredging with the current application. However, it is important to note that, if approved, this would be the first shore perpendicular, pile-driven dock along this coastline, creating a precedent which may result in significant negative impacts to the marine environment e.g. reduce water quality, increased sedimentation and turbidity and loss of habitat for marine species. Other docks along this waterway have been cantilevered to accommodate shallow draft or non-motorised vessels, with minimal impacts."*

28. The Cabinet Paper also notes that Planning had reviewed the drawings for the proposed dock and had expressed certain concerns with respect to its length which would extend 128ft into the canal. Those concerns were, *inter alia,* that there was no other dock extending 128ft into the canal, the dock would greatly impact the size of the canal and there was a risk of a proliferation of similar applications, given the amount of undeveloped land in the area. Planning had also flagged the proposed dock as posing a potential hazard to the boating public.

29. The Cabinet Paper also records that the Port Authority had confirmed that the navigational hazard which had been posed by the dock Cumber had originally proposed in 2014 would not be created by the later proposal.

30. Having rehearsed the responses of the divers agencies and the public, most of which were opposed to the construction of the grant of a permit to Cumber, the Cabinet Paper concludes, under the heading *'Recommendation to Cabinet'*: *'Accordingly, Cabinet is hereby recommended to grant approval.'* The recommendation would have conveyed to the Cabinet that the matters that were set out in the Cabinet paper supported the grant of approval.

31. Given his decision to recommend the grant of the permit, one can infer that the Minister believed the DoE's views and Planning's concerns should be accorded no weight and that the objections of

the Strata and other private objectors should be ignored, but he does not condescend in the Cabinet paper to give any reasons why those concerns and objections had been outweighed by other considerations or, as Ms Carss-Frisk points out, any reason why Cumber should not be left to moor his boat in one of the berths available in the marina at Vista del Mar, as the DoE suggested.

32. Notwithstanding the absence of any reasons in the Cabinet Paper for making the recommendation to grant the Permit, the Cabinet Minute of 11 December 2018 records that approval was granted '*per the reasons outlined*' in the Cabinet paper and *"after considering the comments and objections received by the Ministry for this application, the recommendation(s) of the Port Authority of the Cayman Islands, the Planning Department, the Lands and Survey Department and the conditions set forth in the [DoE's] Technical Review Committee's report ..."*

33. It is against this factual background that the Strata contends that the Decision granting the permit is irrational as the Cabinet Paper upon which it is based disclosed no rational basis for its recommendation to grant the permit or for rejecting the reasons identified by the DoE, by Planning and by private objectors why a permit should not be granted.

The legal basis of the challenge

34. The classic modern statement of the grounds for judicial review of administrative actions remains the formulation by Diplock LJ in *Council of Civil Serv. Unions* v. *Minister for Civil Servants* [1985] A.C. also known as the GCHQ case because it was concerned with a ban on trade unions at the Government Communications Headquarters. The decision summarised the three grounds for judicial review as being illegality, irrationality and procedural impropriety.

35. As regards a challenge based on irrationality, or *"unreasonableness"* as it was described by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[2], Lord Greene said this:

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'."*

[2] [1948] 1 K.B. 223 at 229,

36. In *GCHQ*, Lord Diplock said this:[3]

> *"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' . . . It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system."*

37. Mr. Smith, who appears on behalf of the Crown, submits that establishing irrationality is a high bar for an applicant to get over, even where the decision-making process is not ideal. In inviting the Court to dismiss the application, he relies on the decision of the Privy Council in *Soomatee Gokool v Permanent Secretary of the Ministry of health and Quality of Life and another*[4] where Lord Carswell, delivering the decision of the Board, said this:[5]

> *"In hindsight it is not difficult to make such criticisms of the course adopted and even without hindsight it is possible to conclude that the process of terminating the appointments could have been handled differently and perhaps better. But that does not necessarily mean that they were irrational. The burden of establishing that a decision was unreasonable in the Wednesbury sense is notoriously heavy and their Lordships do not consider that the appellants have discharged it. In their view the decision was within the range of responses which a reasonable decision-maker might have made in the circumstances."*

38. In the instant case, Mr. Smith submits that the decision to grant the permit was within the range of reasonable responses the Cabinet could have made on the basis of the information before it and it was, therefore, not irrational.

39. Ms Carss-Frisk submits that the Crown's response misses the point, as the gravamen of the Strata's complaint is that neither the recommendation of the Minister nor the Decision logically or rationally followed from the matters that were said to support them, as the word *"accordingly"* was intended to convey. The real question then is not whether the decision was within the range of responses a reasonable decision-maker could make but whether the decision was *'irrational in the strict sense of that term'* meaning that it is *'unreasoned'* or *'lacking in ostensible logic or comprehensible justification' as* described by the authors of De Smith's *Judicial Review* at para 11-032 under the sub-heading *"Rationality: logic and reasoning"*.

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[3] At pp 410-411
[4] [2008] UKPC 54
[5] At para 18

40. Ms Carss-Frisk relies on the formulation of the test for irrationality by Sedley J in *R v Parliamentary Commission for Administration, ex p Balchin* [1998] 1 PLR 1, where he stated that the applicant:

> *"did not have to demonstrate... a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up - in which, in other words, there is an error of reasoning which robs the decision of logic."*

41. Sedley J's dictum was adopted by Ouseley J in R *(Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2003] 1 All ER (Comm) 65 to which Ms. Carss-Frisk also referred.

42. Mr. Smith makes the point that the decisions are at first instance and do not have the weight or binding authority of the decision in *Sommatee,* which is true enough, but they are persuasive. I note too that Sedley J's dictum was also cited with approval by Burnett LJ, as he then was, in *Regina (Demetrio) v Independent Police Complaints Commission* [2015] PTSR 1268, cited by the authors of de Smith's Judicial Review in a footnote. There the learned Chief Justice said this:

> *"64. The language of "irrationality" carries with it pejorative overtones which may obscure the nature of the review called for. A decision will be vulnerable to being quashed where the reasoning is so flawed that it "robs the decision of logic", as Sedley J put it in R v Parliamentary Comr for Administration, Ex p Balchin [1998] 1 PLR 1. That formulation has been repeated since, for example in R (Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd [2003] 1 All ER (Comm) 65.*
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> *"65. Accordingly, we consider that the proper approach when analysing a report of this kind for public law error is to consider the connection between the evidence available to the writer of the report and the conclusions drawn from that evidence. Where there is no logical connection on an objective analysis, the conclusions may be found to be irrational. Whether the lack of ostensible logic is sufficient to render the decision irrational will depend on the significance of the evidence to which no, or no sufficient regard, was given."*

43. Mrs. Carss-Frisk submits that the Crown's response to the Strata's application, that it was open, in principle, for Cabinet to grant approval or that the grant of approval fell, in principle, within a "reasonable" range of responses, is no answer at all as the reasoning in this case, as she put it, just doesn't stack up. She submits that the *Wednesbury* doctrine has never been solely concerned with the outcome, as the Crown submissions suggest, but has always been a principle that has when appropriate, focussed on the process, as in the thinking process, the reasoning underlying

the decision. This, she says, is illustrated by Lord Green's judgment in the *Wednesbury* case in which His Lordship alluded to the thinking process of the decision-maker, as for example whether the decision-maker took into account all relevant considerations or considered irrelevant ones.[6]

Discussion and Analysis

(a) No rational basis for the Decision

44. Ms Carss-Frisk submits that the Decision was expressly based upon the *'reasons outlined'* in the Cabinet Paper and that the irrationality of the Decision lies in the fact that the Cabinet Paper's recommendation to grant approval for the permit, and Cabinet's acceptance of that recommendation, have no rational connection whatsoever with matters set out in the Cabinet Paper which were said to justify it.

45. Having rehearsed the objections of the DOE, Planning and residents in the vicinity of the proposed dock and the fact the Cabinet Paper simply concludes, under the heading *'Recommendation to Cabinet'*: *'Accordingly, Cabinet is hereby recommended to grant approval'* for the issuance of the Permit.

46. Ms Carss-Frisk submits that the use of the word *"accordingly"* necessarily implies a conclusion that the recommendation follows from the matters which preceded it; but the recommendation did not in fact follow. On the contrary, the Cabinet Paper contained no positive reasons for the recommendation, no reasons why the concerns expressed by the DoE, Planning and residents in the vicinity were outweighed by other reasons, and no reason why Mr. Cumber should not be left to moor his boat in one of the berths which was available in the marina at Vista del Mar as the DoE suggested. In the premises, she submits that the Cabinet Paper discloses no reasonable basis for its recommendation and the Decision, which accepted the recommendation *'as per the reasons outlined'* in the Cabinet Paper, is accordingly irrational and liable to quashed on that ground.

47. Mr. Smith submits that the comments from the relevant departments and all the objections received were placed before Cabinet on 22nd November 2018, in good time for the Cabinet meeting on 11th December 2018, having been previously considered in detail by Caucus. All relevant considerations were, therefore, before the decision-maker. The weighting to be given to a relevant consideration is in the discretion of the decision making body and it was entirely open to Cabinet to decide to give lesser weight to the considerations in the Cabinet Paper which militated against granting the coastal works permit than those which favoured granting it.

48. That may be so but, as Ms. Carss-Frisk notes, there is no evidence that Cabinet weighed or sought to reconcile the divers views or competing considerations reported in the Cabinet Paper, as Mr. Smith submits. Rather, it appears, as Ms Carss-Frisk submits, that Cabinet proceeded on the basis

[6] At p 239

that approval followed logically from the matters that the Cabinet Paper rehearsed in the *"Discussion"*.

49. I note further, there were no considerations that favoured the granting of the permit unless, as Mr. Smith suggests, the Port Authority's opinion that the dock did not pose a navigational hazard could be construed as a consideration which favoured the grant of the permit.

50. Crown Counsel submits, and I accept, that the granting of a coastal works permit will more often than not involve some loss of amenity to the neighbouring residents but the objections of those residents went beyond loss of amenity as their concerns included the potential hazard posed by the proposed dock to larger vessels using the central, dredged channel of the Salt Creek waterway as well as to small boats, kayakers and paddle boarders in shallower water. Although the Port Authority stated that there was no navigational hazard to vessels using the central, dredged channel, there is nothing to suggest that the Port Authority considered the potential hazards to small boats, kayakers or paddle boarders using the edges of the waterway. This potential hazard was explained by Mr. Don Seymour whose evidence was that small craft operating in the shallow water, which are regularly operated by children of the Strata proprietors including his own, would be forced, if the proposed dock were built ,to navigate into the deeper water towards the centre of Salt Creek where larger vessels navigate which he says is unsafe, particularly so close to the entrance to the waterway,[7]

51. Planning, for its part, considered that the proposed dock did pose a potential hazard to the boating public generally.

52. Mr. Smith also submits that it cannot be said from its Report that the DoE opposed the application. If it had, it would have been open to it to say so, as it did in respect of the 2014 application. In this instance, he argues, the DoE clearly anticipated that Cabinet might choose to grant permission and had suggested terms on which such permission might be granted. Mr. Smith also observes that, in its 2014 report, the DoE had stated that a 'T'- shaped dock, such as that subject to the Decision, would be *"potentially acceptable."* From this Crown Counsel concludes that DoE *"thus confirmed that there was no environmental reason for Cabinet to oppose the application."*

53. The submission is extraordinary in the light of DoE's specific objections as well as its in principle objection to a dock being constructed in that area. That the agency provided Cabinet with the fees in the event they were minded to approve the application for the permit is a recognition only that the decision lies with Cabinet, not an endorsement of the proposal.

54. Mr. Smith submits that it was entirely open to Cabinet to decide to give lesser weight to the considerations in the Cabinet Paper which militated against granting the coastal works permit than those which favoured granting it. That may be so but there is no evidence that Cabinet

[7] Affidavit sworn 29 March 2019 at para 19

weighed or sought to reconcile the divers views reported in the Cabinet paper or the competing considerations as Mr. Smith submits. It simply proceeded on the erroneous basis that approval followed from the matters that the Cabinet Paper recited, that is to say, it granted approval *"per the reasons outlined".*

55. I accept, as Mr. Smith submits, that Cabinet was under no obligation to take the least environmentally damaging option but I also accept that it was irrational, as Ms Carss-Frisk submits, for Cabinet to pick the more environmentally damaging option in the face of opposition from its own DoE, without any positive reason for so doing, and all the more irrational to conclude, that the choice of that more environmentally damaging option somehow followed - *"accordingly"*- from the matters that were set out in the Cabinet paper.

56. Mr. Smith accepts that the Cabinet Paper and Decision offered no positive reason for granting the Permit but he offers the opinion that *'this is likely to be the case with any application for permission to institute private constructions, save in exceptional cases where such works produce a benefit to the wider public or environment'.* I would have thought the obverse were true, and that Cabinet would offer a positive reason where the proposal under consideration was potentially detrimental to the environment and there was objection from the section of the public most closely affected by it.

57. The fact is that no agency was in favour of the proposed dock being built there. The Port Authority merely confirmed the dock was not a navigational hazard and Lands and Survey had no comment. DoE and Planning were opposed. I adopt Ms Carss-Frisk's submission that the *'Discussion'* in the Cabinet Paper which consisted, to a very large extent, of a recital of objections to the application, is rationally incapable, in the absence of positive reasons to grant the application, of supporting the Minister's recommendation and Cabinet's decision to grant the permit. A logical connection between the facts available to the writer of the report and the conclusion drawn from those facts must be demonstrated or the conclusion may be found irrational as Burnett LJ observed in *In re Demetrio.*[8] Here the decision to recommend the grant of the coastal works permit simply did not follow from the fact of the objections to the dock's construction made by CIG's own agency charged with the protection of the environment in the absence of any positive support for the proposal, or from the fact that there was a berth in the Vista del Mar marina where Cumber could dock his boat.

58. Mr. Smith submitted that the phrasing and the use of the word *'accordingly'* is standard wording on which too much emphasis should not be placed by the Court, but it conveys to the reader that the conclusion which follows coheres with the discussion that went before. An apt example is the Cabinet Paper prepared in 2014 with respect to Cumber's earlier application which recorded the fact that the DoE did not approve of the dock then proposed by Cumber and then said: *"Accordingly, Cabinet is hereby requested to refuse the issuance of a...License as per the reasons*

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[8] Supra para

outlined and subject to the recommendations of the DoE", which was to refuse or defer the proposal.

59. I do not say that the decision wasn't within the range of decisions the Cabinet could make, as Mr. Smith has submitted, but that is not the question for resolution. The question is whether the matters set out in the *'Discussion'* in the Cabinet Paper provide a reasonable or rational basis for the recommendation that Cabinet grant the permit, and Cabinet's decision to grant it.

60. Did it follow from the in principle objection of the DoE to a dock being built in that area, even though it would not obstruct the navigational channel, and DoE's specific objection that the construction of the proposed dock would directly and indirectly impact a substantial area of dense, healthy beds of *Thalassia testudinum*, a protected species, both during and after construction, the objections of Planning and the private objectors set out in the Cabinet Paper that the permit ought to be granted? Because those were the apparent reasons for the recommendation on which Cabinet based its decision to grant the permit.

61. In my judgment, the recommendation that the permit be granted, despite the objections raised against it, robbed the Cabinet Paper, and the decision of Cabinet made on the basis of it, of all logic. Or, as the Strata put it, the Cabinet Paper set out no rational basis for the Minister's recommendation, or Cabinet's decision, to grant the permit.

62. I would allow the application and quash the Decision on this ground.

(b) Irrational departure from policy

63. I turn to consider the second argument advanced under this head of irrationality that Ms Carss-Frisk submits, that the Decision involved an unreasoned departure from CIG's own policy, set out in a 2013 policy document entitled ***Design and Construction Guidelines for Docks***, that *'Docks constructed along a canal may not extend more than 6 feet into the canal'*.

64. Counsel makes the point that the proposed dock would extend 128 feet into the Salt Creek canal, more than 2000% in excess of the six-foot maximum, with no reason given in either the Cabinet paper or the Decision for departing from the policy.

65. Mr. Smith says in response that the area where the dock is proposed to be constructed is not a canal but a natural inlet and there has been no departure from the policy in fact. He accepts, as Ms Carss -Frisk points out, that CIG itself in a number of documents refers to Salt Creek as a canal but submits that the word was not being used forensically, but casually.

66. In response, Ms Carss-Frisk argues that it is apparent from the policy, which distinguishes between docks constructed *'along the coast'* and *'along a canal'* and refers to Governor's Harbour and Safe Haven as examples of *'canals,'* that CIG's use of the word *'canal'* is intended to include natural

creeks or inlets that, like Salt Creek, are partly *"canalised"* to use her word. She submits further that CIG's intended meaning of *'canal'* is put beyond any doubt by the references by both DoE and the Planning to the Salt Creek *'canal'* in the context of Cumber's applications.

67. As attractive as that submission is, I am unable to accept the proposition that the use of the word by departments of government in the divers documents are determinative of the meaning of a word in a government policy document, where that use conflicts with the ordinary meaning of the word which, in ordinary usage, describes a manmade waterway. I would also note that in common usage the word 'creek' refers to an inlet in a shoreline[9]. It seems to me that the reference to the *'Salt Creek canal'* in the documents is a shorthand descriptor of the area, which starts at the natural inlet known as Salt Creek and ends in the manmade canals which extend the waterway into the surrounding residential development. That the waterway is so extended does not, in my judgment, turn the natural inlet into a canal.

68. The developments of Governor's Harbour and Safe Haven to which the policy document refers illustrate the point. Although Ms Carss-Frisk objected to the Crown's reliance on a Google map instead of evidence in support of their proposition that the proposed dock did not fall within a canal and was not subject to the guidelines, the map allows one to see that how the canals extend the waterway coming in through Governor's Creek into the Governor's Harbour and Safe Haven developments and which areas are "canalised" in the sense of being made by man and not by nature. I do not think it would be possible to suggest that, because of the existence of these canals, that the inlet from the sea was itself now a canal.

69. Although not relied on by either party, the reference to canals in the Development and Planning Regulations puts it beyond doubt that CIG uses the word to mean manmade waterways. Regulation 33 provides that:

> *"Canals shall not be straight and, at the point of entrance from the sea, so designed as to provide adequate protection from storm surges and, wherever possible, to meander through the area with an inlet to provide circulation of water."*

70. The use of the phrase *"so designed"* echoes the language of the Canadian court in the matter of *The Hermes*[10] on which Mr. Smith relied in which the Court held a waterway was only a canal, if *"...the ingenuity of man is paramount in the making of the watercourse,..."*[11] I adopt the reasoning of the Court in *The Hermes* that naturally formed bodies of water do not qualify as canals, even if they have been extensively modified by man.

71. Whatever the language employed in other documentation or by the divers departments, the Cabinet Paper, as Mr. Smith points out, refers to the proposed dock as being *"offshore"* and to

[9] Also a small inlet or bay

[10] *Nord-Deutsche VG & Ors v R* [1969] (2) LLR 347 from 350 to 352

[11] *Ibid.* bottom of 351

Salt Creek as a *"waterway"* and not a canal. This, I think, demonstrates that the Ministry was alive to the distinction between a natural waterway and a manmade canal when recommending the grant of approval the construction a dock well in excess of 6' in length.

72. It follows that Cabinet's decision to grant approval for a dock which extended beyond the 6' maximum was not a breach of policy. The application under this head of irrationality is dismissed.

Ground 2: Illegality

73. Under this head of review, the Strata relies on section 2, 14 and 26(1) of the **Public Lands Act** 2017 (the "PLL") as conferring certain rights on the public from which CIG cannot derogate.

74. Section 2 defines *'Public land'* as including *inter alia* Crown land and the seabed and territorial waters of the Islands.

75. Section 26(1) provides that:

> *"No person shall, without lawful authority, obstruct or interfere with the right of a member of the public under this Law to have access to public land, to use public land or to exercise a public right of way over private land".*

76. The Strata also relies on section 14 of the PLL which it argues is the source of the right of access and use to which section 26(1) refers. Section 14 provides as follows:

> *"Public areas of public land are open for use by all members of the public without discrimination ......"*

77. Ms Carss-Frisk submits that by virtue of section 2, the foreshore is Crown land and the dock, pier and cabana, which the Decision would permit Cumber to build, would obstruct or interfere with the statutory right given to the public to access that part of the foreshore, Salt Creek and the seabed over which the dock is to be built, a right of access which some of the objectors have so far enjoyed.[12] The Strata's evidence is that small craft which persons have regularly operated in shallow water will now have to navigate in the main channel.

78. Learned Queens' Counsel contends that it was not open to Cabinet to grant a permit to Cumber to construct a dock on public land and, if it were constructed. Cumber would commit an offence under section 26 of the **PLL** as he had no lawful authority.

79. Ms Carss-Frisk contends that where the right of the public to access and use public land has been established by statute, it cannot be overridden by executive decision. Rather, Cabinet requires specific statutory authority to breach or interfere with that right. She submits that it is not open to Cabinet to say that they granted permission under section 21 of the **National Conservation**

[12] Affidavit of Don Seymour at para

Law because that is a different statutory regime and there is nothing in the PLL that gives Cabinet the power to exempt Cumber from the scope of section s 14 and 26.

80. Ms Carss-Frisk suggests that the potential for that is found in section 36 of the PLL which provides that:

> *"The Cabinet may, after consultation with the Commission, make regulations respecting the use of, and activities on public land...*
>
> *(l) for the issuance of permits to use or engage in any activity, including any commercial activity, including commercial activities, on public land and setting the terms and conditions of such permits."*

81. Ms Carss-Frisk submits that section 36 is a clear indicator that when section 26 speaks to lawful authority what it has in mind, consistent with the principle of legality, is a statutory basis for Cabinet to grant an exemption from what would otherwise be an interference with public access.

82. In developing her argument, Ms Carss-Frisk relied on the decision in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563. There the Court was concerned with the question of whether a tax statute had abrogated the common law right to rely on legal professional privilege. Hobhouse LJ at para 45 said this:

> *"45. It is accepted that the statute does not contain any express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in B v DPP [2000] 2 AC at 481. A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."*

83. Ms Carss-Frisk submits that there is nothing in the PLL that gives rise to any implication that Cabinet has the power simply to exempt people from the scope of the law. She also observes that while section 21 of the **National Conservation Law** expressly provides for Cabinet to grant permission to persons wishing to carry out any building, dredging or such other type of works in Cayman waters, there is no equivalent provision in the **PLL.**

84. She invites the Court to find hold that the principle of legality applies *a fortiori* to statutory rights and requires that there be express statutory authority for any derogation from the rights of the individual such as those created by section 14 and protected by section 26(1) and that, in the absence of any statutory authority to grant permission for coastal works, the Decision was unlawful in that it purported to permit an obstruction or interference with the rights of the public to access and use public land, without any lawful authority.

85. Mr. Smith in reply submits that, on its proper construction, section 14 of the **PLL** does not grant any member of the public a statutory right of access to any and all public land. It simply stipulates that if Cabinet or other authority permits public access to any area of public land, then this should not be done in a discriminatory manner.

86. Mr. Smith says further that the construction of section 14 for which the Strata contends would abrogate the common law rights of a landowner - the Crown in this case - to deal with its land. He submits, and I accept, that the Strata's position ignores the presumption in statutory construction, which was at the heart of the decision in the *Grenfell* case on which Ms Carss-Frisk relies, that the legislature does not intend to change the common law unless this intention is express or must necessarily be implied, neither of which is present in the **PLL.**[13]

87. Crown Counsel submits finally that, on the plain and ordinary meaning of section 14, it is open to Cabinet to refuse to designate areas of public lands as public areas and also open to Cabinet give people permission to build on public lands, as these are the ordinary incidents of ownership of land. The permit, once granted, would give Cumber lawful authority to interfere with the public's right of access to those areas of public land affected.

88. The question for resolution is whether Cabinet is empowered to grant a coastal works permit thus giving Cumber lawful authority to interfere with the public's right of access over the relevant area of Salt Creek and, in my judgment, the answer is plainly yes. Mr. Smith correctly submits that no statutory authority is required for the Crown to deal with Crown lands. The Crown/Cabinet is entitled to sell Crown land [14] and grant leases, licenses and other rights over public lands. Its authority to deal with Crown land is subject only to such restrictions as law or policy may impose on such dealings, as say for example, the restrictions on dealing in land designated a protected area under Part 3 of the **National Conservation Law.** The application on this ground of review is dismissed.

CONCLUSION

89. The Decision is quashed and remitted to Cabinet for further consideration. Costs follow the event and I would order that CIG pay the Strata's costs of this application. If the Crown wishes to make submissions why a different costs order should be made, submissions should be filed with the

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[13] See para 44 of *Morgan Grenfell supra*

[14] More correctly, recommend to the Governor that Crown land be vested in third parties.

Clerk of Courts within 14 days of the handing down of this decision. If no submissions are filed, then CIG shall pay the costs of the Strata, such costs to be taxed on the standard basis if not agreed.

90. It only remains for me to thank Counsel and their clients for their patience in awaiting this decision which has been much delayed.

DATED 22nd JUNE 2021

RAMSAY-HALE J.
JUDGE OF THE GRAND COURT