12-07-13

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 248 OF 2012

BETWEEN:

COASTAL TWO LTD.

Plaintiff

AND

PLANNING APPEALS TRIBUNAL

Defendant

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO G94 OF 2012

BETWEEN:

COASTAL TWO LTD.

Plaintiff

AND

(1) PLANNING APPEALS TRIBUNAL
(2) CENTRAL PLANNING AUTHORITY
(3) CAYMAN ISLANDS HELICOPTERS LTD.

Defendants

Appearances:	Mr. Matthew Crawford & Ms. Krista Lynn Wight of Maples and Calder on behalf of Coastal Two Ltd. Ms. Suzanne Bothwell of Attorney General's Chambers for the Planning Appeals Tribunal & the Central Planning Authority Mr. Tom Lowe Q.C. instructed by Giglioli & Company & Mr. George Giglioli for Cayman Islands Helicopter Ltd.
Before:	Hon. Justice Richard Williams
Heard:	22nd February 2013
Draft Judgment circulated:	3rd July 2013
Date of Judgment:	12th July 2013

GRAND COURT · CAYMAN ISLANDS

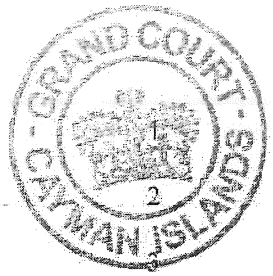
JUDGMENT

Applications

1. This matter involves two separate proceedings brought by Coastal Two Ltd. ("Coastal Two"). Coastal Two is the owner of One Cayman House, the property located at George Town Block 13EH, Parcel 144.

2. In each of its proceedings Coastal Two challenged a refusal by the Planning Appeals Tribunal ("PAT") on 21st February 2012 of an application by Coastal Two to extend the time in which an appeal could be brought from a decision of the Central Planning Authority ("CPA") made on 15th September 2010. The decision was in relation to an application by Cayman Islands Helicopters Ltd. ("CIH"), numbered FA81-0337 (P10-0513), for planning permission to develop and construct a retail building and a helicopter landing pad at George Town Block 13EH, Parcels 9 and 10. CIH's intention was, and is, to run a heliport at that location.

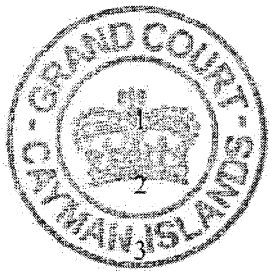
3. The first set of proceedings is Cause No. 94/2012, which is an appeal of the PAT's refusal to extend time in which the appeal could be heard. Coastal Two no longer wishes to pursue the argument that section 48 of the Development and Planning Law (2011 Revision) is appropriate. Coastal Two have applied by way of summons filed on 2nd October 2012 to discontinue the appeal on a no order for



costs basis. The issue for determination by this Court is what order in relation to costs should be made in the proceedings.

4. CIH seeks an order for all of their costs in relation to Cause No. 94/2012 in which they were the named Third Defendant. CIH contend that they have incurred costs before and even after the issuing of the Discontinuance summons, as they could not consent to the terms of the summons due to Coastal Two's position as to costs. CIH indicate that, as Cause No. 94/2012 is still a live proceeding due to the position taken on costs by Coastal Two, it is necessary to determine the argument in relation to the appeal when considering the issue of costs. Coastal Two contend that there should be no order for costs because the issues in dispute in the proceedings are the same and the only question arising is with respect to the appropriate procedure. Coastal Two submit that if costs are to be awarded against them, they should be limited to the PAT's costs. The PAT and the CPA do not seek any costs orders in relation to Cause No. 94/2012.

5. The second set of proceedings is Cause No. 248/12. This involves a claim made by way of Judicial Review of the PAT's decision to refuse to extend time in which the appeal could be heard. This Court is tasked with determining CIH's summons dated 17th July 2012 in which they seek to strike out Coastal Two's Notice of Originating Motion filed on 19th June 2012 pursuant to GCR O.18, r.19. The grounds for CIH's application are that (i) there being no jurisdiction to grant



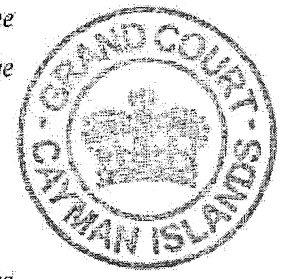
the orders sought the Notice discloses no reasonable cause of action; and (ii) Coastal Two's application in the Notice is an abuse of process.

6. Significantly, Coastal Two and the PAT both agree that the Judicial Review should proceed to a substantive Judicial Review hearing. Therefore, it is only CIH, who were served as a person directly affected pursuant to GCR O.53, r.5, contending that the Judicial Review should be struck out. Ms. Bothwell who appeared for the PAT, the named Defendant, having had the opportunity to review the case law and the full submissions of Coastal Two and CIH, informed the Court that the PAT was taking a neutral position and did not submit, at this stage, that the Notice discloses no reasonable cause of action due to a lack of jurisdiction to make the orders sought in the Notice or that the application in the Notice is an abuse of process.

7. In relation to the second set of proceedings, Coastal Two filed a summons dated 16th October 2012. In the summons Coastal Two seek leave to amend the Notice of Originating Motion. Leave is also sought in the summons to submit into evidence the second affidavit of Rachel Catherine Baxendale sworn on 16th October 2012 and, if the Judicial Review matter goes to trial, a direction that all the materials before the PAT on 24th January 2012 be submitted into evidence. Following the hearing, written clarification was sought by the Court from the parties concerning the status of this summons. This was done as the Court record

from the hearing reflects that Mr. Crawford had specifically referred to the proposed additional grounds for Judicial Review set out in the draft Amended Notice of Originating Motion during his oral submissions. In an email dated 19th June 2013 Maples and Calder confirm that:

> *"The application for leave was not advanced at the hearing and is yet to be heard and determined. The hearing only concerned the threshold issues raised by CIHL's strike out application to the jurisdiction to judicially review at all."*



In an email transmitted on the same date, Mr. Giglioli also confirms that:

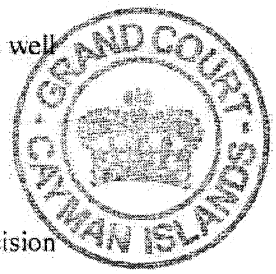
> *"The October summons was not listed or argued. The hearing was limited to strike out and a direction concerning costs on the matter withdrawn by Maples."*

Accordingly, I do not intend to have regard to the contents of the draft Amended Notice of Originating Motion and/or to determine the issues raised in the October summons herein.

Factual Background

8. On 15th September 2010 the CPA heard CIH's application for planning permission to develop and construct a retail building and helicopter landing pad on North Church Street, George Town. Upon reading page 8 and page 11 of the Minutes of the CPA Meeting it is evident that, although Coastal Two's attorney failed to attend the hearing, the letter of objection from the Plaintiff was

considered. The Minutes of the meeting of the CPA contained its decision as well as the reasons for reaching that decision.



9. In a letter dated 20th September 2010 to CIH the CPA confirmed their decision granting, subject to certain conditions, CIH's application for planning permission. On the same date the Executive Secretary of the CPA also notified the then objectors, including Coastal Two[1], of the decision via letter sent by registered mail. The letter also contained express conditions, one of which stated:

> *"You* [CIH] *shall submit a revised site plan showing a 50' by 50' landing pad, but the pad cannot be situated any closer to the sea than what was shown on the plans viewed by the authority at the meeting".*[2]

The letter for Coastal Two was sent to their then attorneys, Bodden & Bodden and not to Coastal Two. Coastal Two contend that the attorneys did not receive the letter until *"on or around 29 September 2010."* In the letter the CPA reminded the objectors of their right to appeal pursuant to section 48(1) of the Development and Planning Law (2008 Revision), setting out details of the procedure including but not limited to the fact that any Notice of Appeal should be submitted within 14 days.

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[1] Ms. Teresa Bodden, director and shareholder of Coastal Two, indicated at paragraph 5 of her affidavit sworn on April 2011 that she first learned about the development in May 2010. Coastal Two's attorney had written to the Department of Planning in a letter dated 3rd July 2010 setting out the Company's objection to the development. The letter was sent as an attachment to email on 2nd July 2010.

[2] At Paragraph 10 of Coastal Two's Draft Amended Notice of Originating Motion they state that on 19th September 2012 they became aware for the first time of the breach of the condition by reviewing a revised site plan produced by CIH which they contend clearly shows the helipad was to be built in breach of the condition. However, this is not a factor for me to consider in the application before me.

10. Coastal Two states that it filed its Notice of Appeal of the CPA decision dated 16th March 2011[3] on that same date. This was well outside of the 14 day period stipulated in section 48(1) of the Law and just under six months from the date of the notification letter sent by the CPA to Coastal Two's then attorney. In the Notice, Coastal Two requested that the appeal be allowed to be heard out of time for good cause, pursuant to either section 48(1) of the Development and Planning Law and/or for the time for appeal to be extended pursuant to Rule 17 of the Development and Planning (Appeals) Rules (1999 Revision). The Grounds of Appeal appear to have been filed on 4th April 2011.

11. The initial hearing date of Coastal Two's appeal, including their application for leave to appeal was 13th September 2011. Due to non-availability of Mr. Giglioli, it was fixed by agreement of all parties to be heard on 11th October 2011.

12. On 10th November 2011 the Civil Aviation Authority of the Cayman Islands granted CIH permission to operate the heliport. That decision has been challenged by Axis International Ltd by way of Judicial Review. Those proceedings were due to be heard shortly after the hearing of the applications before me.

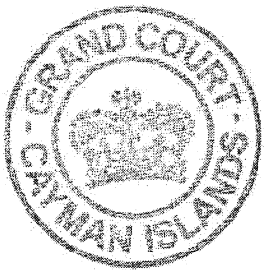
[3] Planning Department date stamp on face of Notice of Appeal is dated 17th March 2011

13. The PAT heard Coastal Two's application for an extension of time on 24th and 25th January 2012. I note that this was over 18 months after the relevant decision of the CPA.

14. By way of an email sent from the Deputy Chief Officer (Development), Ministry of Finance, Tourism & Development dated 21st February 2012, the PAT notified Coastal Two of its decision to refuse leave to appeal out of time and that it:

> *"accordingly confirmed the decision of the CPA."*

The written reasons for the PAT's decision, which were prepared by the Chairman, Ms. Grace Donaldson, are dated 16th March 2012. Coastal Two states that the decision was delivered on 22nd March 2012.



15. The Chairman noted in her reasons that:

> *"The director and owner of Coastal II, Mrs. T. Bodden, had notice of the application for planning permission by CIH. She originally objected that the noise created by the operation of a helicopter landing pad would cause substantial disruption to businesses being operated from her property. Mrs. Bodden's former attorney was informed of the date fixed for the hearing before the Authority on 15th September 2010 and responded that he would be attending on behalf of Mrs. Bodden. Despite this, he failed to attend with the result that Mrs. Bodden did not attend and was not represented at that hearing."*

The Chairman noted that the CPA's decision was served on Coastal Two's attorney and that the attached decision letter explained the section 48(1) time limits for any appeal. The Chairman noted that:

(i) Coastal Two received an ambiguous email from its then attorney;

(ii) that no appeal was lodged; and

(iii) that it was not until CIH started construction that Coastal Two raised serious concerns.

The Chairman further noted that, despite the Director of Planning's recommendation, Coastal Two's then attorney declined to pursue an appeal, but elected to seek a Stop Notice under section 17 of the Law.

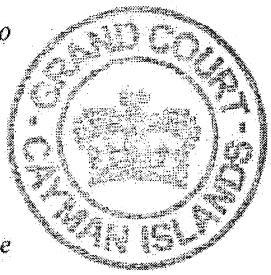
16. On 29th February 2012 Coastal Two filed a Notice of Originating Motion, in Cause No. 94/2012, to appeal the decision of the PAT. On 5th April 2012 Coastal Two filed the Memorandum of Grounds of Appeal. At paragraph 6 in the Memorandum of Grounds of Appeal Coastal Two seek to lay the blame for the delay in their filing the appeal of the CPA decision at the door of their former attorneys whom they claim gave

"negligent representation and advice."

Coastal Two expressed[4] that they had not been

[4] Grounds of Appeal 4th April 2011

> *"properly informed and/or misinterpreted the advice received as to the finality of the* [CPA's] *decision and period within which to appeal as of right."*



Coastal Two stated that in January 2011, it

> *"became apparent to them"* that *"not only did CIH appear to have been granted planning permission, but CIH had also been given permission to build a concrete helipad on a much larger scale than that of which had been advised."*

17. In correspondence between Coastal Two, the PAT and CIH on 14th and 15th May 2012, the latter two rightly indicated that such an appeal was flawed as, under section 48 of the Development and Planning Law (2011 Revision), the Grand Court only had jurisdiction to hear an appeal on the merits and therefore no appeal lay with respect to a decision refusing an application for an extension of time. Following on from this correspondence, to *"preserve its position"*, Coastal Two filed an application to proceed by way of Judicial Review on 17th May 2012.

18. The application for leave to apply for Judicial Review was filed on 17th May 2012, which, as Mr. Lowe QC reminds me, was made

> *"just shy of the three month limit."*

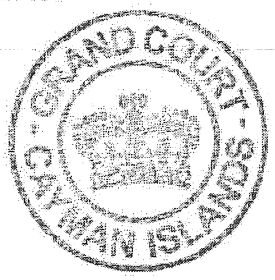
In the application Coastal Two stated that the relief sought was

> *"an order of certiorari to quash the decision of the Planning Appeals Tribunal (by its Chairman), dated 21st February 2012,*

dismissing the Plaintiff's application for an extension of time for appeal pursuant to section 48(1) of the Development and Planning Law (2011 Revision) and Rule 17 of the Development and Planning (Appeals) Rules (1999 revision)."

The grounds upon which relief was sought were not set out in the application for leave save the statement that they were

"contained in a Memorandum of Grounds of Appeal filed on 4th April 2012 in Cause No. 94/2012 as exhibited to the affidavit of Rachel Catherine Baxendale."



19. The application was accompanied by a letter from Maples and Calder dated 17th May 2012 addressed to Miss Philander, Clerk of the Courts. The author of the letter stated that:

"This application has been filed out of an abundance of caution to preserve, on a procedural basis, our client's rights."

The letter also stated that CIH had expressed the view that Cause No. 94/2012 was procedurally flawed and that the decision they sought to challenge was not amenable to Judicial Review. It appears that the PAT and CPA then felt that Judicial Review may be the correct approach. Maples and Calder stated in the letter that:

"In our view, Cause 94 is procedurally sound and our client will resist any strike out application. But to preserve Coastal Two's position in the event that the court were to decide that section 48 of the Planning Law was not the correct procedural route, Coastal

Two is now seeking leave to apply for Judicial Review of the decision prior to the expiry of the three month time period set out in GCR O.53, r.4."

In the letter, the Court was invited to determine the application for leave on the papers without a hearing.

20. Maples and Calder went on to say in the letter:

*"Unsurprisingly, the grounds of Judicial Review are exactly the same as those contained in the Memorandum of Grounds of Appeal filed in Cause 94. This is because section 48 of the Planning Law takes the appeal grounds of unlawfulness and unreasonableness from the general law of Judicial Review. The relevant documents and evidence are also the same, which are "all exhibits and documents which were before or were presented to" the PAT in accordance with Rule 9 (b) of the planning appeals rules, as listed in the indexes for the Bundles before the PAT (the "**Bundles**").*
Our clients have not burdened the Court with the Bundles (including the affidavits therein) as, in our respectful view, the reasons for proceeding in this manner should be clear from this letter and enclosures. However, should any information from the Bundles be required we can submit it forthwith."

21. Upon reviewing the papers I declined to deal with the matter on the papers, indicating that an ex-parte hearing was required. Coastal Two's attorneys were notified of the Court's concern that they were seeking leave to apply for Judicial Review whilst at the same time submitting that there was an alternative remedy

which was simultaneously still being pursued. I questioned the appropriateness of considering Judicial Review being the appropriate remedy, unless there were exceptional circumstances, before the remedy had been exhausted or decision made about whether the alternative remedy existed. I also expressed my concern as to the appropriateness of referring to the exhibited Memorandum of the Grounds of Appeal in Cause 94/2012 rather than setting out the grounds in the normal way in the Application for Leave to Apply for Judicial Review.

22. The Application for Leave to Apply for Judicial Review came before me ex parte on 12th June 2012, when I received oral submissions from Mr. Crawford. Despite my concern about the unusual situation in which there was a Plaintiff contending that there was an alternative remedy, and my being told that there was a proposed Defendant and an interested person contending that there was not, I granted leave to Coastal Two to apply for Judicial Review. Based on the information placed before me I found that, although the application was made towards the end of the three month period since the relevant decision had been made, the application had still been made promptly. I also found that the Applicant had sufficient interest in the matter to which the application related. I noted that leave should be granted if on the material available the Court thinks, without going into the matter in depth, there was an arguable case for granting relief.

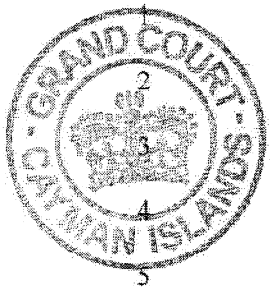
23. The Court when making such an order is of course aware that it only has information provided by one of the parties and that that party has an obligation to give full and frank disclosure to the Court. I directed that the preamble to the order must record the undertaking given by counsel representing Coastal Two, on behalf of his client, that the Judicial Review proceedings would not continue if Cause No. 94/2012 was permitted to continue. Having regard to the issues, some of which have been raised in any real detail for the first time before me at this inter-partes hearing, with the benefit of hindsight, this may have been one of those cases in which the hearing for leave should have been adjourned and notice should have been given to the proposed Defendant and any interested person. This would have enabled CIH or the PAT, if they wished, to attend and assist the Court, at the earliest possible juncture, by filling in any possible gaps in the available information and outlining any grounds they may have in support of a contention that leave should not be given.[5]

24. Having regard to the matters that have emerged during this hearing it appears that this is the type of case in which I should have reminded myself of the helpful guidance given by Lord Donaldson MR in ***Doorga v Secretary of State for the Home Department*** [1990] C.O.D 109, [1990] Imm. A.R. 98. Lord Donaldson MR recommended that judges dealing with applications at first instance should bear in mind that there are always three categories of case. In ***Doorga,*** a case also dealing

[5] See R v Secretary of State for the Home Department, ex P. Begum [1990] Imm. A.R. 1

with the issue of an alternative remedy, the Court of Appeal was asked to intervene where one judge had refused leave, another judge had granted leave and a third judge had set aside the leave. Lord Donaldson MR stated:

> *"The first is the case where there are, prime facia, reasons for granting Judicial Review. In such a case leave shall duly be granted. There are other cases in which the application for Judicial Review is wholly unarguable, in which case, quite clearly, leave should be refused. However, there is an intermediate category - not perhaps very frequent but it does occur - in which the judge may say, "Well, there is no prime facia case on the applicant's evidence but, nevertheless, the applicant's evidence leaves me with an uneasy feeling, and I should like to know rather more about this." Alternatively, he may say, "the applicant's case looks strong but I nevertheless have an uneasy feeling that there may be some very quick and easy explanation for this." In either case it would be quite proper and, indeed, reasonable for him to adjourn the application for leave in order that it may be further heard inter-partes. At such a hearing it is not for the respondent to deploy his full case, but he simply has to put forward, if he can, some totally knock-out point which makes it clear that there is no basis for the application at all.*
>
> *As I say, if judges will bear in mind those three categories - leave, no leave and "I really need to know a bit more about it" - I doubt whether this situation would arise very often. But, nevertheless, there will always be a case where Homer nods, and in such cases the court will have to decide whether it is better to re-trace the judicial steps by setting aside a grant of leave or to let the matter go ahead.."*



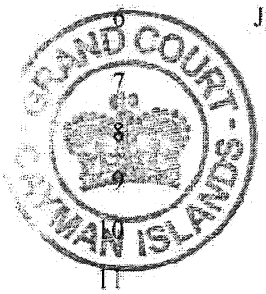
Having heard from Mr. Lowe QC and considered the issues raised, and blessed with hindsight, this is the type of case that at the initial leave hearing could have been viewed as being an "*intermediate case.*" This is because the issues are such that they required the input from the parties to enable an informed decision about the granting of leave to be made.

25. When I mention the benefit in this case of having the proposed defendant or interested party attend the leave hearing, I do so also having regard to the fact that now the Courts in England and Wales, upon whose case precedent much reliance has been placed by both parties, usually benefit from having before them an acknowledgment of service from the defendant setting out the summary grounds for resisting the claim when they consider an application for permission (leave). The acknowledgement may include a ground stating that the claim is unarguable and provide reasons for submitting so. The grounds in the acknowledgment may include a submission, as is made by CIH in the matter before me, that leave should not be granted as there is an alternative remedy. This means that the Court is informed at that important early stage of the grounds and can make a more informed decision as to whether to grant leave.

26. I also note that the approach in England and Wales has, pursuant to, CPR r.54.13, led to a situation in that jurisdiction where a defendant or any other person served with a claim form and who has had an opportunity to put in an acknowledgment

of service form, are now rarely able to apply to set aside an order giving permission to apply for Judicial Review.

27. On 19th June 2012 Coastal Two filed the Notice of Originating Motion seeking an order for certiorari to quash the decision of the PAT. In the Notice the grounds for Judicial Review are stated as being:



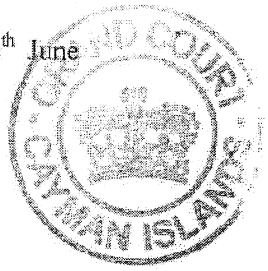
> *"10 The PAT acted perversely and/or erred in law and/or failed to take material matters into consideration and/or considered and was influenced by the irrelevant material dismissing the Plaintiff's application for an extension of time for appeal.*
> *11 In concluding that the merits of the plaintiff's appeal "do not appear to be strong" the PAT acted perversely and/or erred in law."*

28. On 3rd July 2012 the parties filed a consent order in which they agreed to consolidate cause numbers 94/2012 and 248/2012 pursuant to GCR O.4, r.4. It was agreed that the PAT, CPA and CIH should file and serve any applications to strike out and/or dismiss either or both of the proceedings within seven days of the order.

29. Thereafter, on 17th July 2012 CIH, as an interested person in the Judicial Review proceedings, issued the primary summons which is currently before the Court, namely to strike out Coastal Two's Notice of Originating Motion filed on 19th June 2012.

30. On 2nd October 2012 Coastal Two issued the summons to discontinue Cause No. 94/2012 pursuant to GCR O.21, r.3(1). This is a sensible position to have now taken, as it is clear that no appeal lies to the Grand Court from a refusal of the PAT to extend time to appeal, as the Grand Court's jurisdiction is confined to the decisions which the PAT makes under section 48 (2) once an appeal has been brought.

31. On 16th October 2012 Coastal Two filed their summons for directions referred to at paragraph 7 above. Due to the unavailability of Counsel, the 9th November 2012 date which had been set to consider the summons had to be vacated. As confirmed by Maples and Calder and Mr. Giglioli in their emails of 19th June 2013, that summons is yet to be heard.

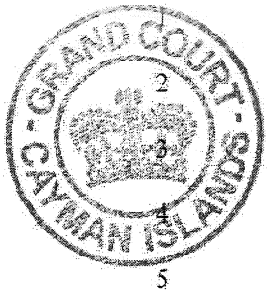


Submissions Made and the Law

32. CIH apply for an order that Coastal Two's Notice of Originating Motion be struck out pursuant to GCR O.18, r.19 (1) (a) and (d) contending that the application for Judicial Review be dismissed on the grounds that the application:

(i) discloses no reasonable cause of action due to a lack of jurisdiction to the court to judicially review the PAT's decision; and

(ii) is an abuse of process.



There is, of course, an inherent power in the Court to strike out proceedings which are an abuse of process. Although it is also submitted by Mr. Lowe QC that leave should not have been given or should not continue, it would be inappropriate for there to be a strike out merely on allegations of wrong or improper exercise of discretion by a judge when granting leave for Judicial Review.

33. In the past applications have also been made by defendants or interested persons following the granting of leave to apply for Judicial Review pursuant to GCR O.32, r.6, which provides a general power to set aside an order for leave if made ex-parte. The position in the Cayman Islands is dissimilar to the current one in England and Wales where, due to the procedure enabling a defendant to file an acknowledgment of service containing grounds for objecting to the grant of leave, set aside applications will now only be entertained extremely rarely. An application to set aside has to be made promptly, and if possible to the same judge who granted leave. It has long been held that set aside applications should only be made in exceptional circumstances and only *"where the respondent can show that the substantive application will clearly fail."*[6]

34. In ***R v Secretary of State for the Home Department ex p. Chinoy*** [1991] COC 381 grounds for setting aside were given as being where the application was fundamentally misconceived, where the applicant had failed to identify a proper point of law for review or where there had been fraud or material none-disclosure

[6] Supreme Court Practice 1993 Vol 1 p841 53/1-14/1 para 3

in obtaining leave. In the same case it was recommended that there should be a time limit of 28 days for the making of an application to set aside a grant of leave.

35. Although a grant of leave may still be challenged by an application to set aside, the Court is also entitled to entertain and consider an application to strike out a Notice of Originating Motion made under the provisions of GCR O.53 seeking Judicial Review orders, pursuant to GCR O.18, r.19 or the inherent jurisdiction of the Court.[7] A defendant or an interested person who is directly affected by the proceedings may apply, as CIH have done, to strike out an originating motion if it is contended that it discloses no reasonable grounds for bringing the claim or is an abuse of process. The Court may consider an application to strike out if it is contended (and CIH do) that the Court has no jurisdiction to determine the issues in dispute or to grant the orders sought. In such circumstances the party need not wait until the hearing of the substantive application to have the question of jurisdiction dealt with. Further grounds for strike out are if the originating motion is otherwise likely to obstruct the just disposal of proceedings or there has been a failure to comply with a rule, practice direction or court order.

36. Although the Court can strike out the originating motion, as with an application to set aside, this is a very limited jurisdiction and will be exercised very sparingly

[7] For example - ***R v Secretary of State for the Home Office Ex P Dew*** [1987] 1 WLR 881 where the court granted the respondent's application for an order that the originating motion be struck out on the grounds that it disclosed no reasonable claim of public law and was an abuse of the process of court.

and only in very clear-cut cases, especially as Judges of the Grand Court grant leave after careful consideration of the papers before them. I say this accepting that the papers at the ex parte hearing are ordinarily only prepared and presented by an applicant and acknowledging that I have also commented that there would have been benefit to be gained from an inter-partes leave hearing in this matter. Generally, unless the case is one where there is no prospect at all of success, prospective applicants should think carefully before making such applications and should be discouraged from routinely following the grant of leave with an application to set aside leave or strike out the originating motion. A court will not ordinarily use this power simply because it considered that the grant of leave should not have been made. As in set aside applications, the only time the Court might do this is if it was satisfied that leave plainly should not have been granted.

37. The Court must remind itself that CIII's application is to strike out pursuant to GCR O.18 , r.19(1)(a) and r.19(1)(d). The purpose of O.18, r.19 is only to provide a remedy in clear and plain cases. The application under r.19(1)(a) must be determined upon the pleadings alone and does not involve consideration of evidence. Whether or not it is a weak case is not relevant unless the Court is satisfied that it has no chance of success. In relation to the application under r.19(1)(d) the Court is entitled to look beyond the pleading and consider evidence. If it requires a detailed scrutiny of documents or assessment of the evidence, the Court will leave those matters to be determined at trial. Although the Court is not

precluded from considering evidence in relation to an application under paragraph 19(1)(d), it is not to be treated as a means of having clearly contentious issues determined summarily. Such determination is for the final hearing and in some cases may not be decided on affidavits alone without discovery or cross-examination.

38. CIH highlights the PAT's jurisdiction to hear appeals in respect of decisions of the CPA relating to applications for planning permission. Section 48(1) of the Development and Planning Law (2011 Revision) provides that an appellant may appeal to the PAT

> *"within fourteen days of notification or publication of that decision, whichever occurs the sooner, or within such longer period as the Appeals Tribunal may in any particular case allow for good cause."*

The appeal is to be determined

> *"based on the record of the hearing to which it relates"*

and it is not intended that new evidence be introduced before the PAT.

39. At paragraph 16 of Mr. Lowe QC's full skeleton argument it is submitted that the jurisdiction to hear appeals expires within six months of the decision of the CPA. In Mr. Lowe's oral submissions the time limit is correctly re-phrased as being within six months of the lodging of the appeal. The six month limit running from

the date of the CPA decision features and is greatly relied on by Mr. Lowe QC in his written submissions. He states at paragraph 28:

> *"The long stop is that the appeal must be determined by the Tribunal within 6 months of the CPA's decision. This limit was introduced by the 2011 revision of the DPL. It was plainly considered important to ensure that no appeal would lie outside this time period."*

He continued at paragraph 29:

> *"When Coastal Two sought an appeal it had already left it too late for the tribunal to have any jurisdiction under section 48(1). The six-month time limit renders it impossible for an aggrieved person to seek anything much more than a short extension of time beyond the 14 days, which that person has for lodging a statutory appeal to the PAT."*

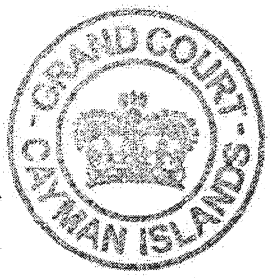
At paragraph 34 of the skeleton Mr. Lowe QC further contends:

> *"The 2011 Revision enacted a strict inflexible time-limit for appeals, section 48(1) provides that the "appeal shall be heard and determined" within 6 months. It should be noted that the provision is mandatory and allows no discretion. The appeal would have to be dismissed outside that period, the Tribunal having no jurisdiction."*

At paragraph 48 of his written submissions Mr. Lowe QC states:

> *"If the PAT extends time in any given case it has no power to do so if this means that the period before any appeal is determined is more than six months after the CPA's decision. It should simply*

dismiss any appeal unless it actually makes a decision before the 6 months has expired."



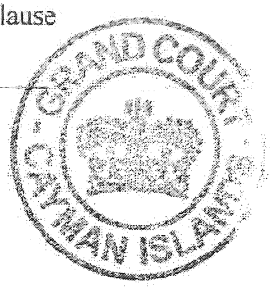
Finally at paragraph 50 he submits that:

"It would also be perverse for the Court to hear an appeal or Judicial Review, the sole purpose of which would be to remit the matter for the PAT to adjudicate when it has no jurisdiction to determine the matter anymore as the case is outside the 6 months limit."

40. It is submitted that even if Judicial Review were possible there is no power to do so as the six months is the '*long stop date.*' CIH contends that an appeal or Judicial Review against the PAT's refusal to extend time does not enable the Grand Court to circumvent that six-month time limit. Mr. Lowe QC in his skeleton argument submits that any decision of the PAT in this case, if the matter were to be remitted, would be well outside that limit. It is submitted that section 48 has been drafted in such a way to deliberately restrict the timeframe for bringing an appeal, and that the time limits are stricter than those for Judicial Review.

41. Mr. Lowe QC relies upon the cases of ***Smith v East Elloe District Council*** [1956] AC 736 and ***R v Secretary of State for the Environment Ex p Ostler*** [1976] 3 WLR 288. In these two cases compulsory purchase orders were challenged

outside the permitted six week period on the basis of bad faith. The time clause was, in each case, held effective to exclude review.



42. However, section 48(1) actually provides that:

> *"... Such appeal shall be heard by the Tribunal within six months of such appeal being lodged."*

The section does not provide that the appeal must be heard within six months from the date of the CPA decision. For completeness sake, the section provides that the hearing of the appeal shall be heard within six months, it does not say that it must be determined in that time. Arguably, in these circumstances, an appeal may not be viewed as being properly lodged until leave had been given to file it out of time, and the time limits would then run from that date. I say this as the right to appeal expires at the end of the 14 days unless an extension of time in which to lodge the appeal is granted. Until that extension of time is given, Coastal Two has no right to appeal. One may query whether this was the interpretation taken by the PAT, as it did not seek to determine the application for the appeal to be heard out of time until well past six months after the delivery of the Notice of Appeal to them on 17th March 2011. This counters the submission made by Mr. Lowe QC that:

> *"Any decision of the PAT, if the matter were to be remitted in this case, would be well outside that limit"* and that *"accordingly Judicial Review is hopeless."*

43. I note that on the information before me it does not appear that the delay, in the PAT hearing of the submitted leave to appeal out of time application, was caused by Coastal Two. Although not required to be determined for the purposes of this application, the approach to the six-month limit for the hearing of the appeal is one that may raise interesting issues in future cases, especially if the fault for any delay in hearing the matter post lodging of the appeal is caused by inefficiencies or logistical problems for the PAT and not by the conduct of either party. In some other jurisdictions, the approach set out in statute is that the planning tribunal has a duty to ensure that appeals are disposed of expeditiously and the objective of the tribunal is to ensure that every appeal is determined within a set time period beginning on the date of the receipt by the tribunal of the appeal.

44. CIH rightly contends that section 48(4) gives the Grand Court jurisdiction to review, on appeal, the decisions of the PAT in a planning appeal. The jurisdiction is not extended in relation to a refusal by the PAT of an application to extend time, for it applies only to an appeal of a decision given by the PAT after the PAT has heard the appeal before it. It is contended by CIH that this has been deliberately excluded, as the Legislature wishes there to be certainty arising from strict time limits on the rights of appeal.

45. Mr. Lowe QC submits that this is a "*comprehensive alternative*", as the grounds of appeal set out at section 48 (4) in the 2011 Revision are substantially the same

as those existing in Judicial Review.[8] The PAT is, following the 2011 Revision, able to remit the matter back to the CPA with directions. It is submitted by CIH that the legislation pre-empts any right to invoke GCR O.53, r.2 and it is intended to offer a proposed appellant a "*complete alternative*" whilst making it clear to him that he has strict time limits in which to act.

46. What I have to consider is whether the Legislature's intention was that the statutory review would take the place of Judicial Review. This issue is one best determined at the leave stage but can be revisited at this stage where for the first time I have had the opportunity to hear submissions on behalf of CIH.

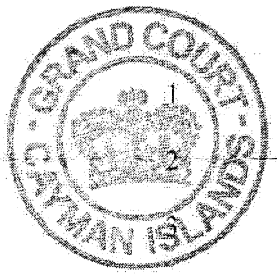
47. Mr. Lowe QC refers to section 15(5) Development and Planning Law (2011 Revision) which states:

> "*Subject to section 48, the decision of the Authority* [CPA] *of any application made to them under this section shall be final.*"

I note that this section does not use the words that are often used in effective ouster clauses which the courts have found preclude challenges by way of Judicial Review and that the only avenue of challenge is the statutory procedure. The type of clause in those matters[9] specifically provides that the validity of such decisions

[8] The 2008 Revision provided for a wider scope for appeals to the PAT as the appeal was "*by way of rehearing.*" This meant that the PAT acted more akin to a second decision maker rather than an appellate tribunal.

[9] For example in ***Smith v East Elloe District Council*** [1956] AC 736 and ***R v Secretary of State for the Environment Ex p Ostler*** [1976] 3 WLR 288.



may not be questioned in any legal proceedings whatsoever except by use of the statutory procedure. The clause in section 15 is not what may be termed a 'no certiorari clause' providing that the remedy of certiorari is not to be available in respect of a particular decision.

48. It is submitted by Mr. Crawford that there is a general presumption against any restriction of the supervisory powers of the Grand Court. He refers to the comments of the authors of ***De Smith's Judicial Review***[10] when they state:

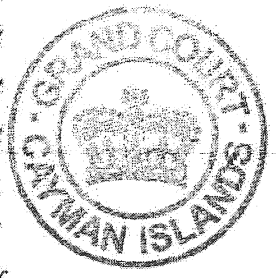
> *"The view is widely held that "the proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified applicants, fitted for the task." It is a common law presumption of legislative intent that access to the courts in respect of justiciable issues is not to be denied save by very clear words in a statute."*

49. Mr Crawford submits that section 48 does not oust the Court's jurisdiction to judicially review the PAT's decision refusing leave to appeal out of time. Mr Crawford referred to the case of ***R v Medical Appeal Tribunal ex p. Gilmore [1957] 1 QB 574*** where the court was considering whether the wording in the National Insurance (Industrial Injuries) Act, 1946 was enough to oust the Court's jurisdiction to quash the decision of a medical appeal tribunal where the statute provided the decision of a medical appeal tribunal was "*final.*" The word final is

[10] 6th Ed., 2007, 4-016.

the same wording found in section 15(5) of the Development and Planning Law related to a decision of the PAT. Lord Denning said at page 583 that:

> *"I find it very well settled that the remedy of certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal" It does not mean "without recourse to certiorari." It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final," certiorari can still issue but excess of jurisdiction or the error of law on the face of the record."*



It is contended that Coastal Two wishes to subject that decision to proper judicial scrutiny as it is alleged that the PAT made a fundamental error in law and/or acted perversely.

50. I am not satisfied that section 15, which provides that the decision is *"final"*, in itself excludes Judicial Review of the decision to refuse to extend time to appeal. The fact that the decision is *"final"* means that it cannot be appealed, in this case except subject to section 48. With this type of wording I remind myself that the remedy of certiorari should not be taken away by a statute except by the most clear and explicit words.

51. In relation to the application for leave to appeal I am not satisfied that the combined effect of section 15 and section 48 amounts to a time-limited ouster

clause as seen in the ***East Elloe*** case and the ***Ostler*** case. I accept that statute may provide an alternative statutory procedure for challenging the validity of a decision and provide that the decision cannot be questioned in any other proceedings. I also accept that legislation can provide that a person aggrieved may apply to appeal decisions within a set period of time after the decision. I accept that such provisions may prohibit direct challenge by way of Judicial Review. That is the approach taken in ***East Elloe*** and in ***Ostler***. In both of those cases the clause specifically provided that the validity of such decisions may not be questioned in any legal proceedings whatsoever. Also, in those cases the time frame was rigid saying that challenges could only be made using the statutory machinery during the set out and non-extendable period. The combination of the two clauses meant that Judicial Review was not available at all either during the period or even after that period. In the matter before me the period is not as rigid as those cases as the PAT has a discretion to extend time for leave to appeal. It is the making of the decision refusing to extend time, for which there is no provision to appeal, which Coastal Two seek to have reviewed.

52. Mr. Lowe QC submits having regard to the type of wording used, in particular the grounds of appeal, and the time limits in section 48, that a Court should not find there to be a right of Judicial Review of the PAT's refusal to extend time. It is suggested that if there is any scope for Judicial Review of such a decision it could not be for matters other than procedural unfairness. It is contended that it would

be wrong for the Court to "*invent an even broader remedy*" under GCR O.53. It is submitted that the Legislature deliberately refrained from setting out a right to challenge a decision as to whether to allow an appeal to be brought out of time under section 48(1).

53. CIH contends that the strict time limits specifically imposed for appeals to the PAT in the Development and Planning Law (2011 Revision) were deliberate and intended to reflect the Legislature's desire to promote development by the removing of potential sources of delay from the moment that a planning decision is made. It is contended that these time limits followed a complete overhaul of planning legislation at the time. It is submitted that the more restrictive approach to challenging decisions adopted in the 2011 Revision when compared to the 2008 Revision, especially when looking at section 15(5) and section 48 and the introduction in the 2011 Revision of Judicial Review principles on the review, was a conscious decision by the Legislature to oust the jurisdiction of the Courts in separate Judicial Review proceedings. However, it is conceded by Mr. Lowe QC at paragraph 45 of his written skeleton argument that the Law does not expressly take away the right to Judicial Review.

54. I accept that reflected in these provisions is an attempt by the Legislature to refine and tighten up the procedures to be adopted by persons seeking to impugn by way of appeal decisions made by the planning authorities. This includes not only the

time frame, but also narrowing the scope of appeals to review rather than a complete rehearing. One reason behind this is to promote the idea that a person who has obtained a planning permission should at a relatively short interval after the date of such a decision, in the absence of an appeal, presumably be left in a position to act with safety on the basis of that decision. However the legislation is not as clear and specific as some found in other jurisdictions where a similar goal is better expressed and achieved. Although the Development and Planning Law (2011 Revision) goes some way to promoting this approach it did not specifically exclude challenge by way of Judicial Review. If the intention of the Legislature was to be as time limit driven to the rigid extent suggested by Mr. Lowe QC, then one might have expected there to be no discretion given to the PAT, to extend time for an appeal to be lodged.

55. I am satisfied that the Court's jurisdiction is not removed by any ouster provision in the Development and Planning Law (2011 Revision).

56. One of the grounds of CIH's application[11] is that the Court has no jurisdiction to hear the Judicial Review and therefore the notice discloses no reasonable cause of action. Although it may be argued that may be the case if I had found there to be an effective ouster clause, it cannot apply to submissions concerning alternative remedy. The question is not one of jurisdiction in the strict sense of the word. The

[11] GCR O. 18 , r. 19 (1) (a)

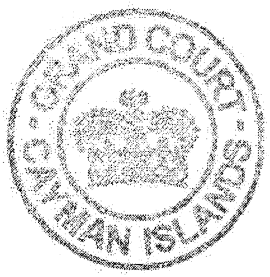
authorities make it clear that the Court does have jurisdiction, in the sense of legal power, to grant Judicial Review even where alternative remedies are available. The mere existence of an alternative remedy, of itself, does not oust the jurisdiction of the Court. Having regard to this, to my view concerning the application and effect of the time limits set out in section 48 and to my findings that section 48 and section 15 do not oust the Court's jurisdiction to judicially review, I find the GCR O.18 , r.19(1) (a) is not established. Accordingly, I do not exercise my discretion to strike out on that ground.

57. However, the existence of an alternative remedy may be a powerful factor when it comes the question of whether discretion to review should be exercised. Therefore the principle rightly brought to the fore by Mr. Lowe QC is that the power to grant Judicial Review would ordinarily not be exercised where there are alternative remedies open unless there are exceptional circumstances. I accept that this was regretfully not fully explored at the ex parte leave hearing. As I have already indicated herein, part of the reason for that was this Court's failure to recognise that this was one of those cases where there should have been an adjournment and the proposed defendant and any interested person invited to attend an inter-partes hearing for leave. The fact the issue was not fully addressed at the leave stage does not preclude this Court reviewing the contents of the Originating Motion, having had the benefit of having the issue fully addressed at this hearing, and adopting the approach of Lord Donaldson MR in ***Doorga***, if the

Court decides that it is better to *"re-trace the judicial steps"* by setting aside a grant of leave, or in this case striking out the notice, or to let the matter go ahead. Alternative remedy has in the past been a conventional ground for setting aside leave.[12] There is some merit in dealing with it at this stage although it may be dealt with as a preliminary issue at a substantive Judicial Review hearing.

58. It is contended by CIH that Coastal Two have the right to statutory Judicial Review of the CPA under section 48. It is contended that it is their fault if they chose not to use the procedure in time. CIH contends that this was a deliberate decision made by Coastal Two at the time.

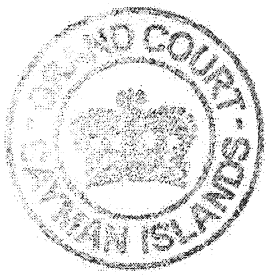
59. It is submitted by Mr. Lowe QC that one should view the aggrieved person as having the opportunity, pursuant to section 48, to challenge a planning decision on grounds akin to a Judicial Review. It is contended that it would be wrong if that person, who failed to act within the strict time limits imposed by the Law, should be afforded a second opportunity to challenge the decision by means of separate Judicial Review. It is argued that it would be wrong, because he would effectively be in a better position for failing to comply with the statutory time limit under section 48.



[12] R v Secretary of State for the Home Department, ex p Watts [1997] COD 152

60. It is contended by CIH that the Legislature in the Development and Planning Law (2011 Revision) has excluded reviewing refusals to extend time from the Grand Court's supervisory powers provided for under section 48(4). It is submitted that the Grand Court should not use Judicial Review proceedings to *"re-introduce"* this jurisdiction in an *"unqualified form"*. At page 828 paragraph 16-018 in ***De Smith's Judical Review***[13] the authors state under the section "*Avenues of appeal or review created by statute*" that:

> *"The most straightforward substitute remedy is where legislation provides an appeal. Judicial review is essentially a mechanism to be used where there is no statutory right of appeal. In almost all cases the Administrative Court will regard a statutory appeal, whether to a court or tribunal, as a proper substitute for judicial review, though exceptional circumstances may dictate otherwise."*



61. There is authority for the proposition that a court may refuse relief on the basis that the applicant has not used an alternative remedy, such as statutory appeal, which would be more convenient for the disposal of the issue in question. A Court may refuse to grant permission to apply for Judicial Review or refuse a remedy at the substantive hearing if an adequate alternative remedy exists, or if such a remedy existed but the claimant had failed to use it. In other words there is a general principle that an individual should normally use alternative remedies where they are available rather than Judicial Review.

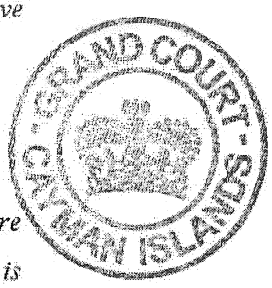
[13] 6th Edition 2007.

62. It may arguably be an abuse of process of the Court for an applicant who is allowed an appeal out of time to then seek to proceed by way of an application for Judicial Review. Therefore, in some instances an individual who fails to appeal within the appropriate time limit (which may be shorter than the three month time limit for Judicial Review) may be unable to seek Judicial Review and unable to challenge the decision. This is particularly so where the appeal procedure has strict time limits with no discretion to extend the time limit for bringing the appeal. However, in the matter before me, review sought is not of the primary CPA decision but of the PAT's decision not to exercise its discretion to extend time in favour of Coastal Two, the proposed Appellant.

63. Mr. Lowe QC relies upon the Privy Council decision in ***Sharma v Brown-Antoine and others*** [2007] 1 WLR 780 to demonstrate that at the strike out stage the Court looks at the question of the delay and alternative remedies. In ***Sharma*** the Privy Council accepted that a decision to institute a criminal prosecution is, in principle, amenable to Judicial Review but Judicial Review of such decisions is generally inappropriate and challenges to such decisions should be considered in the context of the underlying criminal proceedings and not in Judicial Review proceedings. At page 787D Lord Bingham of Cornhill stated that:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not*

subject to a discretionary bar such as delay or an alternative remedy".



Lord Bingham continued at 787E that:

> *"... arguability cannot be judged without reference to the nature and gravity of the issue to be argued"* and that *"It is a test which is flexible in its application."*

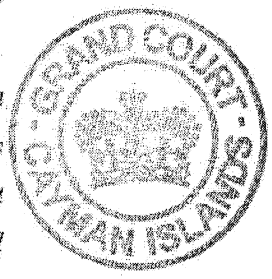
It is contended by Mr. Lowe QC there is a duty on the applicant to inform the court at a leave hearing about delay provisions and other remedies.

64. It is submitted by Mr. Lowe QC that it will only be in exceptional circumstances when a person can be allowed to embark on the Judicial Review process when a statutory appeal procedure is available and has not been used. He referred to the case of ***Harley Development Inc and Another v Commissioner of Inland Revenue [1996]*** 1 WLR 727 where at page 736 C stated:

> *"Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed. The two decisions in these appeals involve no unfairness and hence no abuse of power."*

65. In reaching this decision Lord Jauncey of Tulichettle referred to Lord Scarman's following statement at page 852 in ***R v Inland Revenue Commissioners, ex-parte Preston*** [1985] AC 835:

> *"My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statute, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."*

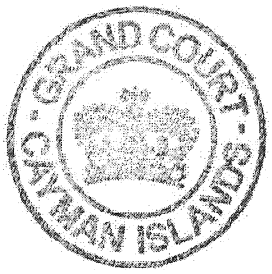


66. In ***R (Sivasubramaniam) v Wandsworth County Court*** [2003] 1 WLR 475 Lord Phillips of Worth Matravers MR reviewed a number of cases including ***Harley*** and ***Preston*** and then stated at paragraph 47:

> *"What these authorities show is that judicial review is customarily refused as exercise of judicial discretion when an alternative remedy is available. Where Parliament has provided a statutory appeal procedure will rarely be appropriate to grant permission for judicial review. The exceptional case may arise because the statutory procedure is less satisfactory and the procedure of judicial review. Usually, however, the alternative procedure is more convenient and judicial review is refused."*

67. In ***Sivasubramaniam*** the Court of Appeal found that decisions of district judges in respect of which appeals will lie is open to review by a judge when he considers whether to grant leave. The Court found at page 492, paragraph 54 that:

> *"This scheme we consider provides the litigant with fair, adequate and proportionate protection against the risk that the judge of the lower court may have acted without jurisdiction or fallen into an error."*



Lord Phillips stated that:

> *"the possibility that a circuit judge may exceed his jurisdiction, in the narrow pre-Anisminic sense, where that jurisdiction is the statutory power to determine an application for leave to appeal from the decision of the district judge, is patently unlikely."*

Lord Phillips went on to say that:

> *"In such circumstances an application for judicial review is likely to be founded on the assertion by the litigant that the circuit judge was wrong to conclude that the attack on the decision of the district judge was without merit."*

Lord Phillips further stated that:

> *"We do not consider that judges of the Administrative Court should be required to devote time to considering applications for permission to claim judicial review on grounds such as these. They should dismiss them summarily in the exercise of their discretion. The grounds for so doing is that Parliament has put in place an adequate system for reviewing the merits of decisions made by*

district judges and it is not appropriate that there should be further review of these by the High Court."

68. Mr. Lowe QC submits that, having regard to the reasoning of the Court in ***Sivasubramaniam*** and the approach of the Court of Appeal to the reasoning in ***R (On the Application of Sinclair Investments (Kensington) Ltd) v The Lands Tribunal*** [2006] H.L.R 11, the Legislation provides an adequate system for reviewing the merits of the decision of the CPA and fair, adequate and proportionate protection against the risk that the CPA acted without jurisdiction or fell into error. That being the case he submits that Judicial Review of refusal to extend time should only be granted in exceptional circumstances. Mr. Lowe QC contends that there is nothing on the grounds relied upon by Coastal Two in the Judicial Review that makes this case exceptional. He highlights that there is no allegation of bias or error of jurisdiction or error of law and that the grounds are formulated on the basis that the PAT acted unreasonably.

69. If leave to extend time had been given pursuant to section 48(1) and the statutory appeal process ended up with the Courts making a determination under section 48, it is plainly obvious that Judicial Review should not live thereafter. The reason being that the grounds were or could have been raised in the comprehensive statutory review. The issue in this case is whether the application for leave to extend time, for which there is no appeal to the Grand Court pursuant to section 48(4), is reviewable because it could not be appealed or is not

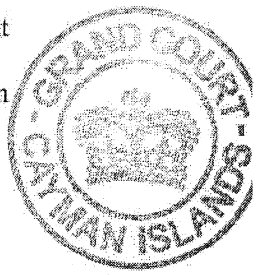
reviewable because, as submitted by Mr. Lowe QC, the intention of the Legislature was to make it non-reviewable and un-appealable.

70. Coastal Two now accept that the Development and Planning Law (2011 Revision) does not give a statutory right of appeal against a refusal to give leave to extend time for filing an appeal; a view held throughout by the PAT, CPA and CIH. Mr. Crawford does not share the view that the Legislature thereby intended there to be a bar to such a decision being judicially reviewed. In fact, Mr. Crawford appears to argue that the absence of provision in the statutory appeal process providing for review of a decision to refuse to extend time means that it can and should be reviewed by the only route contended to remain, namely Judicial Review.

71. Mr. Crawford gave examples of the Court addressing the issue of Judicial Review to correct an error made by an inferior court in such circumstances. In ***R (on the application of Cart) v Upper Tribunal*** [2012] 1 AC 663 the Supreme Court considered the High Court's powers to judicially review decisions of the Upper Tribunal. Baroness Hale stated at 1673g that in the past

> *"... the principle was firmly established that the unappealable decisions of inferior tribunals, including the refusal of leave to appeal, were amenable to Judicial Review on all the usual grounds."*

Baroness Hale was referring to the position in England and Wales before the establishment of the Upper Tribunal by the Tribunals Courts and Enforcement Act 2007, when the arrangements were similar to those still found in the Cayman Islands.



72. Both parties made a number of submissions concerning the wider implication of the test case of ***Cart.*** Although I do not find ***Cart*** to be a case which is directly applicable in the Cayman Islands, due to the nature of submissions made, it is necessary for me to comment upon it. C***art*** concerned the circumstances in which the unappealable decisions of the Upper Tribunal (principally the refusal by the Upper Tribunal to grant permission to appeal against a decision of the First-tier Tribunal) were amenable to Judicial Review in the High Court.

73. The Divisional Court and the Court of Appeal had accepted the Government's submission that, whilst inferior tribunals were historically amenable to Judicial Review, following the establishment of the Upper Tribunal by the Tribunals Courts and Enforcement Act 2007, Judicial Review was only available in the wholly exceptional circumstances involving an outright excess of jurisdiction or a procedural irregularity which denied the right to a fair hearing. It is important to recognise that the 2007 Act made radical changes to tribunal justice by consolidating a wide range of tribunals into a single integrated structure. At the

top of this structure is the Upper Tribunal which is a judicial body designated as a superior court of record and on the whole headed by High Court judges.

74. Mr. Cart appealed to the Supreme Court arguing that, in the absence of an express ouster clause in the 2007 Act, Judicial Review should remain available on ordinary grounds, or alternatively that the same approach should be taken as in the case of second appeals, namely that permission to bring the claim should be granted if it raises an important point of principle or practice or there is some other compelling reason for the High Court to hear the claim. ***Cart*** raised significant questions as to the relationship between the courts and tribunals, the principles underpinning the High Court's Judicial Review jurisdiction and whether the scope of Judicial Review could be restricted absent an express statutory provision to that effect.

75. The Supreme Court rejected the Divisional Court and the Court of Appeal's approach and held that Judicial Review of the Upper Tribunal should be available whenever the intended challenge raises an important point of principle or practice or where there is some other compelling reason for the High Court to hear the claim. Thereby, the Supreme Court assimilated the test for bringing Judicial Review proceedings against the Upper Tribunal with the circumstances in which the Court of Appeal will hear an appeal against a decision which was itself a decision on appeal. In other words, the same test as for second appeals should be

applied by the High Court in considering applications for permission to bring a Judicial Review claim against an unappealable decision of the Upper Tribunal.

76. ***Cart*** is a decision that has grown out of the significant changes and arrangements created by the 2007 Act. In the Cayman Islands there is no similar infrastructure, and I am not satisfied, on the submissions before me that the changes in approach that ***Cart*** made in England and Wales are applicable in this jurisdiction.

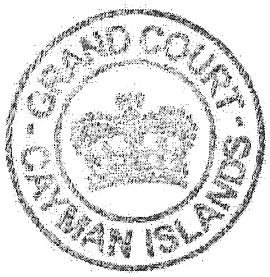
77. Mr. Crawford also relied upon the case of ***Morina v Secretary of State*** [2008] 1 All ER 718 in which it was established that there is no statutory appeal available to appeal a discretionary decision made by Social Security Appeal Tribunal to refuse to grant leave to appeal, leading Maurice Kay LJ to find at 728E that:

> *"a refusal by a commissioner to grant leave to appeal from an appeal tribunal is challengeable only by way of an application for judicial review."*

78. Mr. Crawford referred to ***White v Chief Adjudication Officer*** [1986] 2 All ER 905 where it was held that there was no right of appeal against a Social Security Commissioner's refusal to grant an extension of time to appeal, Glidewell LJ noted at 910f that in those circumstances:

> *"it seems to me that if there were to be any way in which a refusal by a commissioner to extend time for applying for leave to appeal could be challenged, that would be by way of an application for judicial review."*

79. In ***White*** the court considered Regulation 3(3) of the Social Security Adjudication Regulations. That regulation dealt with a power to extend time in which to apply for leave to appeal if an appeal was not brought within the requisite three months. The regulation stated:



> *"Except in the case of an application to the chairman of an appeal tribunal or a medical appeal tribunal for leave to appeal to a Commissioner the time limited by this regulation and schedule 2 for the making of an application, appeal or reference to the Secretary of State or to an adjudicating authority may be extended for special reasons....."*

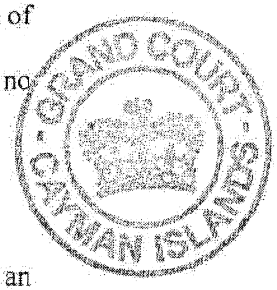
In ***White*** the Court of Appeal held that:

> *"A refusal by a Social Security Commissioner to grant an extension of time within which to appeal against his decision was not a 'decision' for the purposes of s 14(2) of the 1980 Act (Social Security Act 1980) because it was not an order which determined the outcome of the appeal, and since there was no right of appeal against a Commissioner's decision except as provided by the terms of the 1980 Act and 1984 Regulations (Social Security Adjudication Regulations) an applicant had no right of appeal against a Commissioner's refusal to grant an extension of time under Reg. 3 (3)."*[14]

[14] Head note at 905e

This is a position very similar to that in which Coastal Two find themselves when trying to obtain leave to appeal pursuant to section 48(1) of the Development and Planning Law (2011 Revision).

80. As already mentioned herein, Coastal Two has no right to appeal outside the terms of the Development and Planning Law (2011 Revision). The Law gave Coastal Two a right to appeal to the PAT, and on the PAT's refusal to this Court; but that right expired at the end of 14 days unless the PAT gives an extension of time to lodge the appeal. Unless there is an extension of time, Coastal Two has no right of appeal.

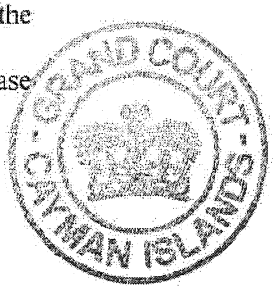


Conclusion

81. I am satisfied that the decision of the PAT refusing to grant Coastal Two an extension of time in which to bring the appeal can be challenged by an application for Judicial Review.

82. Coastal Two contends that the PAT acted perversely and/or erred in law and/or failed to take material matters into consideration and considered and/or was influenced by irrelevant material when it dismissed the application for the extension of time to lodge the appeal. An application for Judicial Review can succeed on these grounds.

83. Coastal Two set out their grounds in the Notice of Originating Motion filed on 19th June 2012. The grounds set out therein are arguable. Despite Mr. Lowe QC's clear and impressive submissions, in which every possible point was covered, and my recognition of there being some force in his submissions concerning delay, this is not a case in which I can find that it is clear and obvious that the grounds for Judicial Review are hopeless. The pleadings cannot be said to amount to an abuse of process of the Court. I remind myself that strike out applications in these circumstances must be used very sparingly and only in clear-cut cases. Despite certain reservations concerning Coastal Two's challenge of the decision of the PAT, I cannot at this stage say that there is no prospect at all of success. This case is not one in which I should utilise my very limited jurisdiction to strike out.



Costs in Cause Number 94/2012

84. Coastal Two have issued a summons seeking to discontinue these proceedings. CIH, the Third Defendant, contends that they should be struck out pursuant to their summons. The reason why CIH had been unable to consent to a discontinuance is because Coastal Two declined to pay their costs. It is submitted that this has meant that CIH has had to maintain their application to strike out.

85. The PAT and CPA, the First and Second Defendants, are content for the proceedings to be discontinued on a no order for costs basis. That being their position, I make no order for costs in relation to cause number 94/2012 between the Plaintiff and the First and Second Defendants.

86. Coastal Two's submissions in relation to costs were very brief, they submitted that the issues in dispute are "*exactly the same*" and the only question arising is with respect to the appropriate procedure.

87. When considering whether to strike out or to give leave to discontinue, I am conscious of the costs position of CIH. I am entitled to go on and consider the position as to costs, as the parties had made submissions upon the same.

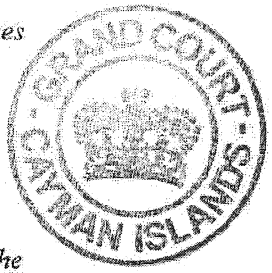
88. Matters to take into account when considering costs orders in withdrawn/discontinued proceedings appear in a series of cases helpfully summarised in the Court of Appeal decision in ***Erica Brooks v HSBC Bank Ltd*** [2011] EWCA Civ 354. Moore-Bick LJ at paragraphs 6 to 7 stated that he was of the view that the judge had fairly summarised the effect of the authorities which had been drawn to his attention and that the following principles were not in dispute:

> *"(1) When a* [plaintiff] *discontinues the proceedings, there is a presumption* [...] *that the Defendant should recover his costs; the burden is on the* [plaintiff] *to show a good reason for departing from that position;*
> *(2) The fact that the* [plaintiff] *would or might well have succeeded at trial is not in itself a sufficient reason for doing so;*
> *(3) However, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption:*

(4) The mere fact that the [plaintiff] *decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;*

(5) If the [plaintiff] *is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;*

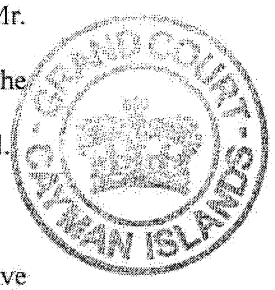
(6) However, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason from departing from the rule."



89. Moore – Bick LJ summarised in the position at paragraph 10:

"...A [plaintiff] *who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J in Maini v Maini: a* [plaintiff] *who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage of the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment. That principle also underlies the decision of this court in Messih v Macmillan Williams. There may be cases in which it can be said that the defendant has brought the litigation on himself, but even that is unlikely to justify a departure from the rule if the* [plaintiff] *discontinues in circumstances which amount to a failure of the claim."*

90. It is clear having regard to the decisions of the House of Lords in ***Lane v Esdaile*** [1891] A.C. 210 and in ***In re Housing of the Working Classes Act 1890, Ex Parte Stevenson*** [1892] 1 Q.B. 609 that there was no jurisdiction to appeal the decision to refuse to extend time for lodging the appeal. This was a position that was made very clear to Coastal Two at an early stage of the proceedings by the Defendants, but they persisted for some time with the proceedings. I recall Mr. Crawford submitting at the leave stage of the Judicial Review proceedings that the cause was "*procedurally sound*" and that any strike out action would be resisted.



91. In light of the position taken by Coastal Two, it is inevitable that CIH will have incurred costs. The Court has at this hearing had to consider, albeit to a limited degree, the merits of the Cause. The Court has had to do this because of the position taken by Coastal Two in relation to CIH's costs. Also the Court, when considering the principles set out in the ***Erica Brookes*** case, should consider whether it is plain that the proceedings brought by Coastal Two would have failed when deciding whether to apply the presumption in relation to costs.

92. It is clear that there is a presumption that Coastal Two should pay the costs of Cause 94/2012 if I give leave to discontinue the proceeding in Cause 94/2012. Coastal Two have shown no good reason for departing from the presumption. It is plain that the application would be unsuccessful. Coastal Two in the brief

submissions have not provided any cogent reason for departing from the presumption.

93. I grant Coastal Two leave to discontinue the proceedings but not on a no order for costs basis. Accordingly, I order that Coastal Two do pay the costs of CIH in relation to Cause number 94/2012. Having regard to the submissions made before me in relation to costs, the basis of the costs will be limited to costs on the standard basis.

Costs In Relation to Cause Number 248/2012

94. In the absence of any submissions made by Counsel, I will adjourn consideration of costs to a later hearing if agreement cannot be reached.

Dated this 12th day of July 2013.

.....

The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT