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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 368/2000 & 378/200

IN THE MATTER OF THE DEVELOPMENT AND PLANNING LAW (1999
REVISION)

AND IN THE MATTER OF AN APPEAL FROM A DECISION OF THE
PLANNING APPEALS TRIBUNAL

BETWEEN: THE NATIONAL TRUST FOR THE CAYMAN ISLANDS
First Appellant

BURNS CONOLLY
Second Appellant

AND: THE PLANNING APPEALS TRIBUNAL
HUMPHREYS (CAYMAN) LIMITED
First Respondent
Second Respondent

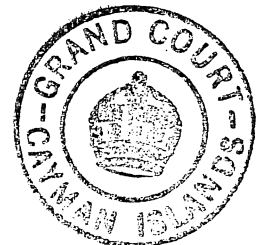
Date of hearing: 25th, 26th, 27th 28th 29th September, and 2nd Oct, 2000

APPEARANCES:

Pierre Lamontagne, Q.C., for the National Trust for the Cayman Islands
Kenneth Farrow for Burns Conolly
Michael Barnes Q.C., and Paul Simon for Humphreys (Cayman) Ltd
Stephen Hall Jones for the Planning Appeals Tribunal

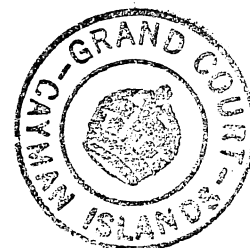
BEFORE MR. JUSTICE SANDERSON

REASONS FOR JUDGMENT



On December 17, 1997, The Central Planning Authority approved the development of the western portion of the Ritz Carlton Hotel and Resort complex, which consisted primarily of a hotel and condominiums on Seven Mile Beach. The application for development of a golf course, club-house, tennis courts and subdivision, which was proposed for the eastern portion of the site, was deferred to allow for the submission of further environmental information. Certain environmental information was subsequently provided and on March 18, 1998, The Central Planning Authority granted permission to develop the eastern portion of the site.

The National Trust for the Cayman Islands and Mr. Burns Conolly appeared at the initial hearing on December 10, 1997, and stated their objections to the proposed development. They did not appeal the Authority's decision of December 17, 1997, but they did appeal the March 18, 1998, decision. That appeal was heard by the Planning Appeals Tribunal from March 28 to 31, 2000, during which time it heard oral evidence from Mr. Popovich, who was from the Planning Department and from Mr. Burns Conolly. In addition the Planning Appeals Tribunal had before it and reviewed the record that was before The Central Planning Authority.



The appeal was dismissed by the Planning Appeals Tribunal on March 31, 2000. The National Trust and Mr. Conolly appealed the decision of the Planning Appeals Tribunal to this Court pursuant to section 51 (4) of the Development and Planning Law (1999) Revision, and Order 55 of the Grand Court Rules.

History

The owners of the property, Humphreys (Cayman) Limited, which is commonly referred to as the "Ritz Carlton", made its application to the Central Planning Authority on November 7, 1997, for permission to develop the entire site. It proposed a new hotel on the beach, condominiums, villas, swimming pools, tennis courts, an overpass across West Bay Road, and a nine hole golf course with canals and a clubhouse. The application was accompanied by plans which showed the proposed development, which covered approximately 143 acres, extending from the North Sound across the Island to Seven Mile Beach. It was projected to cost approximately US\$170,000,000.

Notice of the application was mailed to many neighboring landowners and residents and was advertised in the Caymanian Compass. On November 26, 1997, the Department of Environment wrote a memorandum to the Director of Planning which said in part;

"The Department of Environment is appalled that an application for a project of this magnitude which so clearly anticipates boat access to North Sound is being taken forward for planning permission in "phases" without consideration first being given to the whole application. For all practical purposes, it is impossible to address the environmental impacts of a project such as this, without looking at the entire concept...."

"The Department of Environment strongly recommends that the entire development concept be evaluated and considered before any planning permission is given for individual phrases of the project. Further, the Department of Environment strongly recommends that an Environmental Impact Assessment be conducted on the entire project. The report arising from the EIA should include, but not be limited to, (i) the purpose and need for the project; (ii) project description - master plan overview, site development phasing, land reclamation, waterway construction, infrastructure requirements; (iii) project design alternatives; (iv) baseline data on affected environment, including socio-economic conditions; (v) identification and evaluation of potential physical, ecological and social impacts of the proposed development; (vi) mitigation measures to minimize or compensate for project impacts; (vii) trade-offs between short term impact and long-term condition of resource base; and (viii) irreversible and irretrievable commitments of natural resources."

This fax was then forwarded by the Planning Department to both the Caymanian and the American architects for the Ritz Carlton.

The American architects, for the Ritz Carlton responded to the Director of Planning by a letter dated December 4, 1997, which stated in part;

" In either case, linked or not, we are prepared to deal with all environmental issues in the correct manner.

EDSA is a company dedicated to environmental concerns and have participated in planning and development assignments in very environmental sensitive areas...

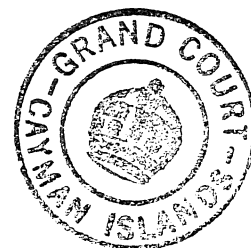
We have been successful in finding detailed and creative solutions to individual environmental issues during the detailed execution of numerous projects. Our intent is to deal with the Ritz project in the same way. Other team members in the planning process have been local architects, consultants, contractors and suppliers bringing their expertise to this project.

I believe typically that these issues are conditions of the approval, if required, and are noted as Terms of Reference.

Details relating to fill, water quality in the canals, depth of canals, etc., are items that we recognize need studying. The acceptance of methods and details will be proposed upon approval of the plan concept. Again, during the detailed development of these site issues we are happy to work with you and develop the best and most successful solution to each."

On December 9, 1997 the local architects for the Ritz Carlton wrote to the Director of Planning and commented on the Department of Environment's memorandum of November 26, 1997, and said in part;

"2. The Department of Environment suggests that an Environmental Impact Assessment ("EIA") might produce design alternatives. Architects, Landscape Architects and Planners in the United States and in Cayman have carefully perused the site and development. The design applied for is the project that best works for the site. It was finalized in consultation with the Planning Department. It is also contemplated by and permitted under the Development Plan, 1977 and Regulations.

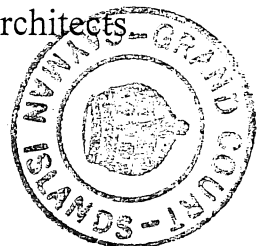


3. In its recommendations, the Department of Environment suggests that an EIA might be conducted to evaluate the purpose of the development. However, the purpose of the development is self evident: it is to replace a 25 year old outdated medium quality hotel and in its place create a five star hotel and resort which will be unparalleled in the Caribbean. The concept of the Ritz-Carlton development is also in keeping with Government's policy to encourage a high quality tourist product."

On December 8, Mr. Burns Conolly, wrote to the Planning Department objecting to the proposed development. His concerns included, in part;

1. removal of the mangrove buffer;
2. the inclusion of suitable and ecological containment of fertilizers so as to not adversely affect the ground water sources and run off into the North Sound; and
3. a requirement that an environmental assessment study be prepared and presented to the public for review.

The first and only public meeting of The Central Planning Authority was held on December 10, 1997. Prior to that meeting an agenda was prepared for circulation among the members. It contained comments from the Water Authority, Chief Fire Officer, Chief Engineer of the Public Works Department, Department of Environment, and the response to those comments, from the developers architects



It also stated that there were two objectors to the proposal and their written objections were repeated in the agenda. Mr. Conolly's objection was not referred to in the agenda, presumably because it was received after the agenda was prepared.

At the meeting on the afternoon of December 10, nine persons appeared on behalf of the Ritz-Carlton, two persons appeared on behalf of the owners of the Villas of the Galleon (an adjoining condominium development on Seven Mile Beach) and Mr. Burns Conolly appeared for himself and The National Trust for the Cayman Islands. The minutes of that meeting indicate that Mr. Chuck Bell, who was one of the individuals who spoke on behalf of the Ritz Carlton, dealt with some of the environmental issues. The minutes state;

"He stated that the overall goal was to work with the environment and not compare the water quality with the canals and lakes. Regarding mangroves, he stated that the intent was to try and reforest with some mangroves in order to provide habitat for fish and mitigate wave action. He also noted that mangrove played a major role in water filtration and that they would try and retain as much as possible. Mr. Bell also noted that local materials and plants would be utilized for the landscaping of the project. He did note that he was aware of the constraints but that they would duplicate the Cayman Islands foliage.

The minutes also showed that Mr. Conolly raised his concerns regarding the environmental issues;

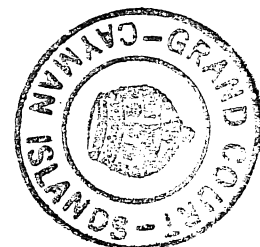
"He referred to the mangrove, excavation, water quality and fill aspects of the proposal. He said an environmental assessment was required because there was a significant impact...

On behalf of the National Trust, Mr. Conolly stated that he represented them as well. His client was concerned about the lack of mangrove buffer. He said that the proposed solution of a combination wall and mangrove was not a good one and was not recommended by the DOE. He warned that any link to the North Sound would be a major issue for his client. He said the basic statements about the environment were not satisfactory to his client. It was their opinion that proper environmental assessment was required ...

Mr. Conolly stated that he wanted to see facts about the impacts of the project. He agreed that the design was good. However, he reiterated that his concerns regarding the environment, scale of the project, lack of mangrove buffer, and retail uses over the road remain outstanding."

The developer then replied to the concerns raised by Mr. Conolly. The Central Planning Authority indicated that its major concerns were environmental in nature and said that the staff would be available to work out all of the issues as expeditiously as possible. It also noted that the final Central Planning Authority meeting was scheduled for December 17, 1997. The public meeting then concluded.

The Central Planning Authority, then proceeded to discuss the situation and it was decided to defer the proposal for the following reasons;



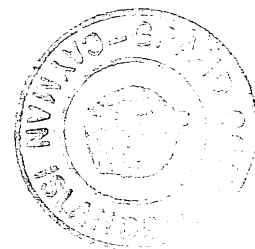
"Decision: It was resolved to defer the proposal for the following reasons;

1. The mangrove buffer is required to be maintained in its entirety;
2. There shall be no retail uses in the over-pass;
3. The applicant is encouraged to investigate a link to the safehaven canals;
4. The applicant shall liaise with staff to address the numerous site plan issues, such as rights of way to the sea, parking layout, access roads, and environmental concerns."

Therefore, you are required to submit revised plans addressing the matters noted above."

On December 11, 1997 The Central Planning Authority received a letter dated December, 10, from The National Trust which had not been distributed at the meeting on December 10, 1997. It raised concerns over the environmental impact of the proposed development and recommended that an environmental assessment report, for the full project, should be required before any component was considered for approval by The Central Planning Authority.

By two letters dated December 15th, 1997 both Mr. Conolly and The National Trust wrote to The Central Planning Authority requesting that they be advised when the Authority would be reconsidering the application. The National Trust again made reference to its concern about the environmental impact.



On December 16, 1997, the Director of Environment sent a memo to The Central Planning Authority again requesting that an Environmental Impact Study be undertaken and referred to Ramsar Convention requirements for such study.

The Central Planning Authority met next on December 17, 1997. The agenda prepared for that meeting was similar in form and content to the agenda that had been prepared for the December 10 meeting. The agenda for the meeting of December 17 did not refer to Mr. Conolly's letter of objection dated December 10, or The National Trust's letter of objection dated December 15 or the Department of Environment's letter dated December 16, regarding the Ramsar Convention.

The meeting of December 17 was not open to the public and neither Mr. Conolly nor The National Trust attended. At that meeting it was decided to grant planning permission for those structures situated west of the proposed by-pass, (hotel/condominium complex, spa, overpass, cabana and two swimming pools), subject to 14 specific conditions that were then listed. The Central Planning Authority resolved that it would defer planning permission for the excavation, golf course and club house and all other development east of the proposed by-pass road and it gave the following reasons;

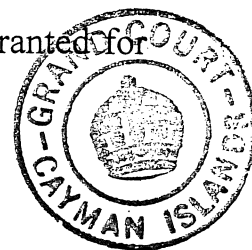


"It was also resolved to defer planning permission for the excavation, golf club house, roadways east of the proposed by-pass road, and the subdivision for the following reasons:

1. The submission of environmental information addressing concerns of the Central Planning Authority.
2. The applicant is to investigate a link to the Safehaven canal and shall liaise with the Planning Department in this regard.
3. Detailed specifications regarding the proposed canals and lakes."

Although Mr. Conolly, The National Trust and the Department of Environment had said that the environmental impact of the entire development should be assessed before approval was granted for any portion of the development, the bulk of their objections actually dealt with the development of the site, east of the proposed by-pass, which was comprised mainly of mangrove and wetlands. To the west of the proposed by-pass there existed a hotel and roadway which was located on a portion of those lands.

On January 7, 1998, Mr. Conolly sent a facsimile to the Director of Planning, requesting notification of the Authority's decision. The Authority replied that it would send a formal notification letter to him once it was prepared. On January 19, 1998, the Ritz Carlton was notified that planning permission was granted for



the western portion of the property subject to the 14 conditions detailed in the letter and that planning authority for the eastern portion was deferred for the reasons I have stated above.

On January 19, 1998, the Director of Environment sent a memorandum to the Director of Planning in which he referred to his earlier memoranda and their conversation of that morning. He then again referred to certain concerns regarding environmental impact and made suggestions on several specific issues of concern including;

1. Investigation of site characteristics, volume of fill required, and source of fill;
2. Whole scale clearing, versus clearing of a footprint for a golf course and removal of vegetation;
3. Water quality;
4. Bulkheading of proposed waterways;
5. Site drainage;
6. Sewage disposal.

This document was not sent to either Mr. Conolly or The National Trust.



On January 23, 1998, the Director of Planning wrote to the local architect for the Ritz Carlton and advised that the Ritz Carlton would have to address certain environmental issues. The issues identified were the same as the environmental issues raised by the Department of Environment on January 19. Again, this document was not forwarded to either Mr. Conolly or The National Trust.

By letters dated January 29 1998, Mr. Connolly and The National Trust were notified of The Central Planning Authority's December 17, 1997, decision.

On February 5, 1998, the local architect of the Ritz Carlton wrote to the Director of Planning outlining a summary of the proposed environmental study that would address the issues raised in the Director of Planning's letter of January 23, 1998.

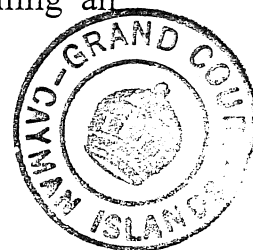
On February 9, 1998, the local architects again wrote to the Director of Planning and enclosed a report which outlined the design principles and criteria that would be employed to deal with the environmental issues. The report provided, that the results of the detailed analysis would be presented in a summary overview document by April 1998 for review and approval. A recommended outline for the overview was attached as a schedule and contained six proposed headings with twenty-six sub-categories.

On February 9 and 10, 1998, the outline proposed by the Ritz Carlton, for the environmental study, was sent by the Director of Planning to the Director of the Department of Environment, as well as the Chief Fire Officer, Chief Engineer, Director of Water Authority, Chief Building Control Officer, Director of the Department of Environmental Health and the Director of Mosquito Research and Control, with a request for their comments and recommendations. This report and attachment, was not forwarded to The National Trust or Mr. Conolly.

On February 12, 1998, the American architect for the Ritz Carlton wrote to the Director of Planning and said;

"It has come to our attention that your office requires more specific design information on the proposed waterway system design, drainage system design and project surface water quality prior to making a favourable recommendation on the pending planning application for Ritz Carlton. At the request of the project developers and c/o Mr. Danny Owens we have prepared and respectfully submit design detail for those three project elements."

Attached to that letter were three pages dealing with the waterway system design, site drainage and maintenance of water quality. Also, on February 12, 1998, the local architects for the Ritz Carlton forwarded to the Director of Planning an update to its February 9, 1998, report.



On February 19, 1998 the Director of the Department of Environment wrote a memorandum to the Director of Planning and commented on the environmental proposals and issues raised by the Ritz Carlton's architects and consultants. At the end of the report it states;

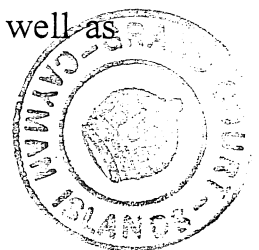
"The Department of Environment still maintains that a full and complete EIA should have been carried out for this project. However, we are satisfied that the proposed contents of the Environmental Overview Document outlined by ATM, Inc. will address the main design and environmental mitigation issues associated with the golf course."

On the first page of this memorandum there is a handwritten note which says;

"Jim asked me to prepare report for CPA with these comments. I asked if we had to invite objectors in for phase two meeting. He said natural justice had already been considered. 20/2/98 NP."

I assume that the initials NP are for Nicholas Popovich the Planning officer and that Jim refers to Jim Corcoran, the Director of Planning.

The next meeting of The Central Planning Authority was set for March 11, 1998 at 1:00 p.m. An agenda was prepared for that meeting, which refers to the environmental proposals by the Ritz Carlton architects' and consultants as well as



the Department of Environment's comments on the proposals. There was no reference in the agenda to the previous objections of The National Trust or Mr. Connolly, or to the December 16, 1997, memorandum from the Department of Environment, recommending an environmental impact study be done, before any work commence in the wetlands. The significance of the agenda, is that it was the material that was before The Central Planning Authority.

When the matter came before The Central Planning Authority on March 11, 1998, it resolved to defer the application to await receipt of a revised master plan illustrating the mangrove reserve in relation to the overall proposal. The Authority further resolved that it was satisfied with the environmental reports and if approval was granted, the LLP would be waived in lieu of the applicant's contribution to developing the bypass road and maintenance of the mangrove buffer. By letter dated March 16, 1998, The Central Planning Authority advised the developer of its decision of March 11, 1998.

On March 18, 1998, the matter came back before The Central Planning Authority. The prepared agenda was the same as for the March 11, meeting, with the same omissions I have already referred to. The agenda for the March 18th meeting, also



indicated that the developer had provided an up to date site plan. The minutes of the March 18, meeting state;

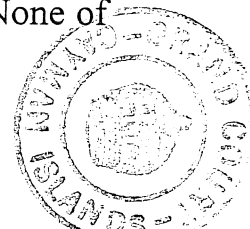
"Decision: It was resolved to grant planning permission for the Golf Club House, Four (4) Tennis Courts, Nine (9) Hole Golf Course, 11 lot Subdivision, Excavation for Canals, and By-pass Road subject to the following:

In addition to the Building Permit requirements, conditions (1-6) listed below shall be met before a Building Permit can be issued an any site works can commence.

The submission of a Final Comprehensive Environmental Assessment report, as outlined in the February 1998 document titled "Environmental Criteria and Design Guidelines" prepared by ATM Incorporated. The contents of same shall be to the satisfaction of the Department of Environment and the Planning Department...." (emphasis added.)

The minutes go on to recite a total of 21 conditions that the Ritz Carlton must comply with. The March 18, decision of the CPA was communicated in writing to the Ritz Carlton on March 27, 1998, and to The National Trust and Mr. Conolly on March 30, 1998.

After the hearing on December 10, 1997, and the receipt by The Central Planning Authority of the December correspondence from the appellants there was no communication from The Central Planning Authority to the appellants regarding the environmental issues before it, except to inform them of its final decision. None of



the documentary or oral evidence it received regarding the environmental issues was forwarded or made available to them and they were not given the opportunity to make any comments or submissions with respect to it.

Both Mr. Conolly and the National Trust appealed the decision of The Central Planning Authority to the Planning Appeals Tribunal, which dismissed the appeal. Both now appeal to this Court.

Section 51(1) (2) (4) & (5) of the Development and Planning Law (1999 Revision) which is the same as its predecessor section 43(1) (2) (4) & (5), of the 1995 Revision, provide as follows;

"51(1) Any person aggrieved by a decision of the Authority may, within ten days after receipt of notification of such decision (or within such longer period as the Tribunal may in any particular case allow for good cause), appeal by way of rehearing to the Tribunal against such decision on the ground that -

- (a) it is erroneous in law;
- (b) it is unreasonable;
- (c) it is contrary to the principles of natural justice; or
- (d) it is at variance with a development plan having effect in relation thereto,

but not otherwise.

- (2) On any such appeal the Tribunal may make such



order (including any order for costs) as it thinks just.

- (4) Any person aggrieved by a decision of the Tribunal under subsection (2) may, within fourteen days, appeal there against to the Grand Court.
- (5) After hearing the parties to an appeal under subsection (4), the Grand Court may confirm, reverse or modify any decision of the Tribunal and the decision of the Grand Court shall be final and binding upon the parties affected thereby."

Further, the Grand Court Rules, Order 55, Rule 7(1) and 7(5) provide:

- "(1) In addition to the power conferred by rule 6(2), the Court when hearing an appeal to which this Order applies shall have the powers conferred by the following provisions of this rule."
- "(5) The Court may give any judgment of decision or make any order which ought to have been given or made by the Governor-in-Council, the Registrar of Lands, tribunal or other person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him."

As I held in Cortina International Ltd. v. The Planning Appeals Tribunal Cause 101/99, this Court must;

"confine its review to whether or not the Tribunal erred in upholding the Authority's decision. It must therefore confine its review to considerations and evidence that fall within the four grounds of appeal set out in section 51(1)."



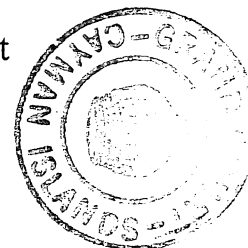
The appellants' two notices of appeal and subsequent amended grounds of appeal contain almost fifty different grounds of appeal. Many of them were very similar and some were identical. Needless to say, both appellants argued that they had grounds of appeal under all four categories enumerated by section 51(1), with several different factual arguments for each of the four separate grounds.

The grounds of appeal that were advanced during the 6 day hearing can be summarised as follows;

1. The Central Planning Authority did not have jurisdiction to issue two decisions or split a single application into two decisions; one decision on December 17, 1997, for the western portion and a second decision of March 18, 1998, for the eastern portion.
2. The Central Planning Authority could not delegate to the Department of Environment or the Planning Department the decision of being satisfied with the environmental assessment report, that was to be prepared.



3. The Central Planning Authority could not grant permission, subject to the condition that an environmental assessment report be issued sometime in the future.
4. The decision of The Central Planning Authority was governed by the 1997 Development Plan, under which the zoning provisions would have prohibited this development. The Central Planning Authority erred in concluding that it was governed by the 1977 Development Plan under which the zoning would have allowed such development.
5. The decision was contrary to the principles of natural justice because;
 - (a) the appellants were not given an opportunity to fairly present their case and
 - (b) the members of The Central Planning Authority who made the decision on March 18, 1998, were different from the members of the Authority who heard and considered the appellants' objections on December 10, 1997.
6. The application for permission was deficient because it failed to comply with the provisions of the Planning and Development



Regulations (1995 Revision) and therefore, was not a proper application and could not have been properly approved.

Ground # 1 - Split Decision:

The appellants argue that the relevant legislation does not permit The Central Planning Authority to make two rulings on one application. They rely on the Development and Planning Law (1999 Revision) and argue that because;

1. section 18(1) says the Authority may grant permission, in the singular and not permissions in the plural and;
2. section 18(5) refers to the decision in the singular and;
3. section 15(1) refers to a decision in the singular;

that the Authority does not have the power to issue two decisions or a split decision, because it only has the power to do that which is authorized by statute.

There is nothing in this legislation which specifically authorizes or prohibits the making of two decisions. However, I think the Authority does have jurisdiction to issue a split a decision for two reasons. Firstly, section 18 clearly contemplates that permission can be granted subject to conditions imposed by the Authority



Therefore, the development could be allowed to proceed until the point in time when the condition must be performed. The Authority could decide at that point in time, if the condition had been satisfied and allow the developer to proceed or not to proceed. Clearly, the legislature had in mind the very real possibility of an approval being granted or continued in stages, as conditions were satisfied.

If the Authority had issued its decision on December 17, 1997, in the form of a condition such as "approval is granted subject to the Authority being satisfied with an environmental assessment report in respect of the property to east of the bypass", then it could not be criticized for splitting its decision. In substance that is what the Authority is procedurally attempting to do and is entitled to do.

Secondly, the Law recognises that where a statute authorizes the carrying out of some functions, there is an implied or additional power to do that which is incidental or ancillary to the carrying out of that function. See Attorney General v. Great Eastern Railway Company (1880) 5 App. Cases 473 at 478 & 481 and Attorney General v Smethwick Corporation [1932] 1 Ch. 562 at p. 577.

In the case at bar The Central Planning Authority was authorized to grant permission either unconditionally or subject to such conditions as it thought fit. The



Central Planning Authority also had the authority to do that which was incidental or necessary to carry out that function. In this case, that included the right to split the decision into two parts because that was incidental to the carrying out of its function. I conclude that The Central Planning Authority was entitled to issue its decision in two parts.

Ground 2 - Delegation

The appellants argue that condition one of the March 18th, 1998 approval amounted to a delegation of the decision making process from The Central Planning Authority to the Department of Environment and Planning Department. That approval stated in part;

"It was resolved to grant planning permission... subject to the following:...

1. The submission of a final comprehensive environmental assessment report, as outlined in the February 19th, 1998 document entitled "environmental criteria and design guidelines" prepared by HEM Incorporated. The contents of same shall be to the satisfaction of the Department of Environment and the Planning Department..."

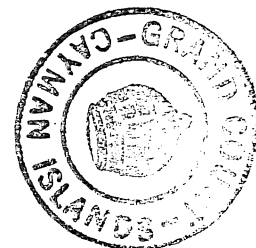
The appellants submit that an administrative body cannot abdicate its statutory duty to make the decision to approve or reject an application. They rely on Ebanks v. Central Planning Authority [1980-1983] CILR 207 at 211, where Hercules J. held;

"Any decision made by this body must be its own independent decision uninfluenced by an outside influence whatsoever. There can be no abdication of its authority. If outside influences are brought to bear upon any of its deliberations, then any decision arrived at in such circumstances would certainly not be in keeping with what must have been the spirit and intendment of the legislature, and would be a travesty of justice. This august body, like any similar body performing a judicial or quasi-judicial function, must carry out its functions by conferring only amongst its members and making decisions without external influence or pressure. The decision must be the Authority's decision. Anything done to the contrary is to my mind illegal and cannot be sustained.

I have searched the Development and Planning Law, albeit without any success whatever, to find whether there is any section in it giving authority to the Central Planning Authority to abdicate its statutory rights to any other authority or any other body."

The appellants argue that the power to make the decision is with The Central Planning Authority and in this case, it has been delegated to or abrogated by the Department of Environment and the Department of Planning.

Counsel for the Ritz Carlton and counsel for the Attorney General do not disagree with the general proposition that a decision making authority cannot delegate its function but in this case they argue that it has not done so. They refer to the principle expressed at page 347 of Wade and Forsyth on Administrative Law (7th Ed.) as follows;

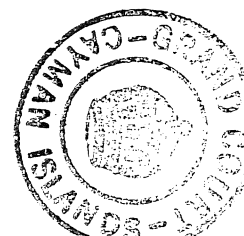


"An element which is essential to the lawful exercise of power is that it should be exercised by the Authority upon whom it is conferred and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, subcommittees or delegates, however expressly authorize by the authority endowed with the power."

The respondents' argument is that it was The Central Planning Authority that made the decision to allow the development to proceed. That it considered the environmental concerns as well as the benefits of the development and decided that the development should proceed, with the environmental details to be dealt with by the Department of Environment and Department of Planning. The respondents say that The Central Planning Authority granted permission to develop the land, subject to certain conditions, which it was entitled to do.

The seminal question is, what exactly did The Central Planning Authority decide and what did it direct the Department of Environment and Planning Department to decide - if anything. Mr. Barnes submitted;

"that if the Central Planning Authority had purported to grant a planning permission but with a condition that the permission should only be effective if approved as a whole by some outside body, such as Executive Council, then the substance and effect of the condition



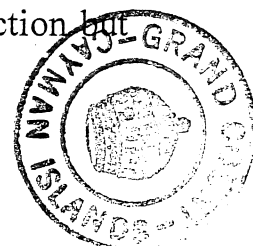
would be to remove the true decision on whether to grant the permission from the Central Planning Authority and delegate it to the outside body in question; that would be unlawful delegation."

As an example of such unlawful delegation, he referred me to Ellis v. Dubowski [1921] 3 K.B. 621. In that case, the licensing for the showing of films was vested in each area's County Council. One County issued a license for the showing of films, subject to a condition that no film should be shown, which had not been certified by the British Board of Censors. Lawrence C.J. said in his reasons at p. 625;

"The first five branches of this condition are quite proper; then follows the sixth, as to the film being certified by the British Board of Films Censors, which is, in my opinion, bad. I am prepared to assume that the powers of the Board are exercised wisely and discreetly. But the Committee has no power to create an absolute body from which no right of appeal exists. If, as was suggested by Sankey J. in the course of the argument the condition had reserved to the Committee the right to review the decision of the Board, it would seem to be a reasonable condition. Upon that Mr. Givens's answer did not convince me; for it is reasonable that no film should be shown which is not being passed by some body. But that body should not be made the final dictator and the condition putting the matter into the hands of a third person or body not possessed of statutory or constitutional authority is ultra vires the Committee."

The respondents submit that the decision in Ellis is not applicable here because

The Central Planning Authority did not delegate its decision making function but



rather by the imposition of a condition, vested a degree of subsequent control, to the Department of Environment and the Planning Department.

Counsel for the Ritz Carlton refers to the decision in Hookings v Director of Civil Aviation [1957] N.Z.L.R., 929, in which the Governor-General was authorized by legislation to make such regulations as appeared to him necessary or expedient for regulating civil aviation. He made a regulation which provided that an aircraft should not be used for towing another aircraft without the approval of the Director of Civil Aviation. It was argued that this amounted to an unlawful delegation by the Governor-General of his power to make regulations. After an extensive review of English and other Commonwealth authorities, Turner J. said at p. 938;

"Neither is the regulation invalid by reason of sub-delegation; regulation 43 does not purport completely to sub-delegate a legislative power given to the Governor-General as in Geraghty v Porter (supra), nor even any substantial part thereof, but is analogous to the dispensing power granted by the regulations in Mackay v Adams (supra). The Director is empowered by Reg. 43 to grant or withhold permission in certain places in order the more efficiently to carry into effect the true purpose of the regulations-namely, "the safety of the aircraft and of persons therein."

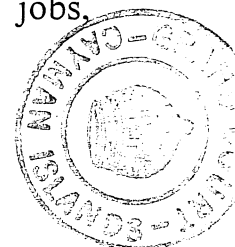
The Ritz Carlton argues, that, as this was a complex development, it was up to The Central Planning Authority to decide, as a matter of overall principle, whether



permission should be granted or refused. If it decided in principle to grant permission, it is then open to it, to allow the details, such as highway access, surface run off water, architectural appearance and approval of the Final Comprehensive Environment Assessment report, to be managed by others.

If one examines the chronology in the present case, it is clear that Mr. Conolly, The National Trust for the Cayman Islands and the Department of Environment were all concerned about the environmental impact of the proposed development. They raised specific concerns and also requested an Environmental Assessment Report. Some of the concerns raised were responded to by the Ritz Carlton and its consultants. However, the final Comprehensive Environmental Assessment Report was to be prepared in the future. An index of the topics to be included in the final report was published. But since the final report was not prepared, it could not be said that there had been a final assessment of what the environmental impact would be, or what steps could be taken to reduce or minimize that impact.

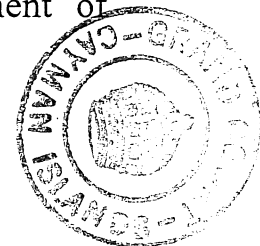
The function of The Central Planning Authority is to consider, within the scope of the development plan, all of the long and short term effects that a proposed development could have on the residents of these Islands. It must consider such things as noise, congestion, appearance, disruption, inconvenience, added jobs,



economic growth, tourism and all other factors which it believes will effect all those who live, work and visit here. It must then exercise its best judgment to determine if there are environmental impacts, and if so, how significant are they and can they be minimized or reduced in some way. It must also consider what environmental impact is justified given the advantages or benefits of the proposed development. Simply put, it is to decide what is in the public's best interest, given the particular circumstances of each case.

Did The Central Planning Authority do that here or did it delegate that decision making authority? In my judgment, it did delegate the decision making authority that it was required to exercise and accordingly its decision must be set aside.

The Central Planning Authority ruled that it would grant development permission to the Ritz Carlton subject to the submission of a final Comprehensive Environmental Assessment Report, the contents of same to be "to the satisfaction of the Department of Environment and the Planning Department". (emphasis added) De facto, it was the Department of Environment who had to be satisfied that the environmental impact was not too severe or could be sufficiently ameliorated and not the Central Planning Authority. If the department was not satisfied it could refuse and the development could stop. In this case, the Department of



Environment was being asked to perform the function of determining, if any potential negative impact on the environment was justified, considering the potential benefits of the development. That is not its function.

If The Central Planning Authority had ruled that it would grant permission, subject to it being satisfied with the Final Environmental Report, that would not have been a delegation of its authority. It would have retained its duty to consider the relevant factors and base its reasoned decision upon them.

Even if The Central Planning Authority had ordered that the planning permission would be granted, subject to the Environmental Assessment Report being to the satisfaction of the Department of Environment, but with the final approval or decision, regarding the report to be by The Central Planning Authority, that would still have left the final decision for permission with The Central Planning Authority (see Mills v London County Council [1924] 1 K B 213).

It cannot be correct to say that The Central Planning Authority made its decision after considering the environmental issues because those issues had not been finally identified. What the Central Planning Authority did, was to decide that the



development could proceed only if someone else was satisfied with the environmental impact.

The determination of whether there has been a delegation of the decision making process, or rather a direction for administrative supervision of a decision, is difficult. It involves shades of gray and will depend on the circumstances of each case. Here I am satisfied that the environmental impact and resolution of these matters was a fundamentally important issue. It was open to The Central Planning Authority to examine the environmental issues and make a determination that the development could proceed, only if certain stated environmental issues or concerns were addressed. That is, it could say for example, "We are concerned about pollutants being deposited into the North Sound and we require the developer to propose a solution to that problem." It could have received such a proposal, and decided that it would only grant permission on the condition that the Department of Environment was satisfied that the developer had actually complied with the approved proposal or its directions. In that case, The Central Planning Authority would have made the essential decision and not left it to someone else. What it has given to someone else, is the responsibility for ensuring administratively, that the decision of The Central Planning Authority is being complied with.



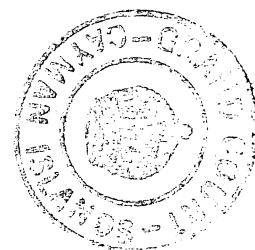
Ground 3 - The Environmental Assessment Report must be issued before The Central Planning Authority can grant permission.

Mr. Lamontagne, counsel for The National Trust, submitted, that although there was no legislative requirement to obtain an environmental report at any time, if one was going to be prepared then it must be before any decision was made. He referred to the Ramsar Convention which stated in section 5, that there should be integration of environmental considerations including environmental assessment reports before approval. The Ramsar Convention is not binding in these Islands but Mr. Lamontagne argued that free standing conventions were persuasive considerations for this Court and he referred to the decision of Smellie, C.J. in Grant et al v The Principal of John A. Cumber Primary School [1999] CILR. 307 He argued that it was unreasonable in the Wednesbury sense to grant approval before the final report was prepared.

Mr. Farrow, counsel for Mr. Conolly, submitted that the issue of requiring an Environmental Assessment Report before the decision, really went to the issue of being given a fair hearing.

As I have previously observed, the legislation in force did not require an Environmental Assessment Report, before approval could be given to develop wetlands, nor had the Ramsar Convention been adopted here. Other countries, England and Canada for example, require that such reports be prepared before wetlands can be developed. I think such requirements are best determined by the respective Legislatures in each country. In the Cayman Islands the Legislature has not required such studies, before development approval and I am not persuaded that because they are legislatively required in other countries, means that the absence of such requirements here, would make granting a permission here unreasonable. Nor, am I persuaded, on a common sense basis, that it would always be necessary to have an environmental report before development permission is granted. I can envisage a proposed development, which could have a foreseeable environmental impact, but The Central Planning Authority nevertheless deciding to approve the development, subject to the issuing of an environmental report, the purpose of which would be to identify how to minimize or confine such impact.

Accordingly, the appeal based on this ground is refused.



Ground 4- The Decision of The Central Planning Authority was governed by the 1977 Development Plan, which prohibited this development.

The central issue here, is what Development Plan applies to this application. If it is the 1977 Plan, then the development is permitted. If it is the 1997 Development plan, then the development cannot proceed because it is not permitted by the zoning.

The Development Plan in effect on November 11, 1997, was the 1997 Plan. On December 5, 1997, the Legislature approved the 1997 Development Plan.

The application in question was filed with The Central Planning Authority on November 11, 1997. Section 10 (1) of the Development and Planning Law (1995 Revision) states;

"10. (1) Subject to this law, permission should be required under this Part for any development of land that is carried after the 17th day of January, 1972. Except where otherwise provided for by this Law, permission shall not be given which would result in a development at variance with a development plan..."

On December 15, 1997 The Development and Planning (Amendment) (Development Advisory Board) Law, 1997 was passed. It provided in section 4:



"4. Section 10 of the principle law is amended by inserting after sub-section (1) the following sub-section-

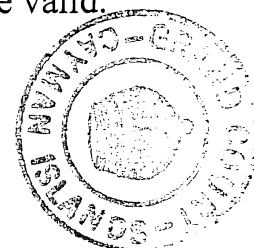
(1A) Any application for planning permission that has been received by the Authority, the Board or the Advisory Board before the 5th December, 1997, shall be dealt in all respects as if the amendment to the Development Plan approved by the Legislative Assembly on the 5th day of November, 1997, had not been so approved."

The above amendment was assented to on February 18, 1998 and was gazetted on August 3, 1998.

Pursuant to section 15 of the Interpretation Law (1995 Revision), a Law comes into operation the day it is published. Therefore, this section which provided that the 1977 plan would apply to applications made before December 5, 1997, although it was passed in the legislature on December 15, 1997, it did not come into effect until August 3, 1998.

Mr. Lamontagne argues, therefore, that it was not in effect when either of the decisions, of December 17, 1997 or March 18, 1998, were made and both decisions are therefore void.

Mr. Barnes, counsel for the Ritz Carlton, argues that the legislation is clearly intended, on its face, to have retroactive effect and therefore, the decisions are valid.



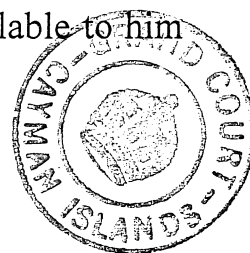
Mr. Barnes also argued that pursuant to section 39 (1) of The Cayman Islands Constitution Order 1972, the amending section became law when the Governor assented to it on February 18, 1998.

I agree with Mr. Barnes' submission that the legislation on its plain interpretation, intends to be retroactive. By necessity it must be intended, to be retroactive because it was not passed until December 15, 1997 and the legislation is referring to the manner in which applications that occurred before December 5, 1997, are to be dealt with. It is clear that the legislature intended that the subject application and any other applications that occurred before December 5, 1997, would be dealt with under the 1977 Development plan. Accordingly, the appellants appeal on this ground is dismissed.

Ground 5 - Fair Hearing

The appellants raised a number of factual arguments to support their contention that they have been denied a fair hearing in accordance with the principles of natural justice. The chronology reveals the following:

1. Mr. Conolly says there is at least one plan that was not made available to him before the decision on December 17, 1997.



2. Neither Appellant was provided with copies of ;
 1. The Department of Environment letter of objection dated December 15, 1997;
 2. The Department of Environment letter of December 16, 1997, enclosing the Ramsar Convention;
 3. The January 20, 1998, letter from Director of Environment regarding environmental concerns;
 4. The January 23, 1998, memo from the Director of Planning to the architect for the Ritz Carlton advising that the Ritz Carlton would have to address certain identified environmental issues;
 5. The February 5, 1998, letter from the Developer's local architects outlining a proposed environmental study;
 6. The February 9, 1998, proposal from the Developer's local architect, to The Director of Planning, outlining the design proposals and criteria. It had attached the outline for the proposed environmental study;
 7. The February 9, and 10, 1998, correspondence from The Director of Planning to various Government departments seeking comments on the proposals contained that were outlined in paragraph 6 above;

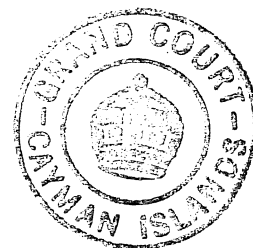


8. The February 12, 1998, update from the local architects of the Ritz Carlton to the Director of Planning;
 9. The February 19, 1998, memo from the Director of the Department of Environment to the Director of the Planning Department, which commented on the environmental proposals.
-
3. That neither appellant was notified of or given the opportunity to appear at the December 17, 1997, March 11, 1998 or March 18, 1998, hearings:
 4. That the agendas for the December 17, March 11, and March 18, meetings did not contain any reference to the appellants' objections that were based on environmental concerns, or their request for a full Environmental Assessment Report before any decision was made:
 5. The Environmental Assessment Report was to be issued after the permission was granted and therefore Mr. Conolly and The National Trust did not have a chance to comment on it.

In summary, the appellant says that after Mr. Conolly's appearance and submission before The Central Planning Authority on December 10, 1997, both he and the National Trust were kept in the dark. They were not told what was being proposed, discussed, or considered. Information was being provided to and comments were being sought from others but not them. The very issues, on which they had expressed concern, were being decided without giving them any chance of knowing what was being proposed, discussed or a chance to comment on those issues.

The Ritz Carlton and Mr. Hall-Jones on behalf of the Planning Appeals Tribunal submit that both appellants were given an opportunity to be heard. The notice of the proposed development was published and well known in these Islands. Mr. Conolly on his own behalf and on behalf of The National Trust appeared before The Central Planning Authority at its only public hearing on December 10th, 1997 and addressed it on their concerns regarding the environment.

Mr. Barnes points out that Mr. Conolly was successful, in that The Central Planning Authority accepted some of the concerns he raised. Namely, it ordered that the mangrove buffer be preserved, it investigated some specific environmental concerns and it ordered that a full environmental assessment report be prepared.



The respondents argued that while the appellants are entitled to be heard they are not required to be involved in every aspect of the decision making process, nor to receive all documentation and technical reports that are given to The Central Planning Authority. They say, the authority gave the appellants a fair hearing, considered their objections and based its decision in part, on those objections.

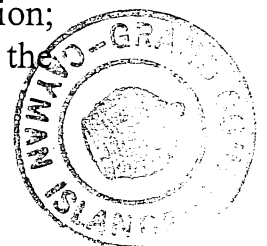
In Cortina International Ltd v The Central Planning Authority (supra) I followed the judgment of Tucker LJ in Russell v Duke of Norfolk [1949] 1 All ER 109, where at page 118 he said;

"There are in my view, no words which are of universal application in every kind of domestic tribunal....whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

I also adopt the following passage from Judicial Review of Administrative Action; de Smith, Woolf & Jowell, 5th edition at p. 441.

"DUTY OF ADEQUATE DISCLOSURE

If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answer. In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances there will be a duty on the



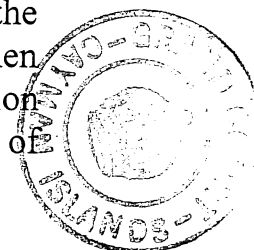
decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; but it cannot be said that there is a hard and fast rule on this matter, and sometimes natural justice will be held to be satisfied if the material is divulged at the hearing, which may have to be adjourned if he cannot fairly be expected to make his reply without time for consideration. In deciding whether fairness does or does not require an adjournment in order to allow further time to consider such material and to prepare representations, a court or other decision-maker should take into account the importance of the proceedings and the likely adverse consequences on the party seeking the adjournment; the risk that the applicant would be prejudiced; the risk of prejudice to any opponent if the adjournment were granted; the convenience of the Court and the interests of justice in ensuring the efficient dispatch of business; and the extent to which the applicant has been responsible for the circumstances leading to the request for an adjournment."

Mr. Barnes quoted the following passage from Russell v Duke of Norfolk (supra), at p. 118;

"The requirement of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth."

He also referred to Lloyd v McMahon [1987] A.C. 625 at p. 702 where Lord Bridge said ;

"My Lords, these so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will effect the rights of individuals depends on the character of

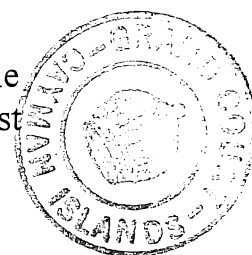


the decision-making body, the kinds of decisions it has to make and the statutory or other framework on which it operates."

Finally, Mr. Barnes referred to the decision of Lord Mustill in Doody v Secretary of State for the Home Department [1993] 3 All ER 92 at p. 106 where he said;

" What does fairness require in the presence case? My Lords, I think it is unnecessary to refer by name or to quote from any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following.

- (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
- (2) The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type.
- (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
- (4) An essential feature of the context is the statute, which creates the discretion, as regards both its language and the shape of the legal administrative system within which the decision is taken.
- (5) Fairness will often require that a person who may be adversely effected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken, with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.
- (6) Since the person effected usually cannot make worthwhile representations without knowing what factors may weigh against



his interest fairness will very often require that he is informed of the gist of the case which he has to answer."

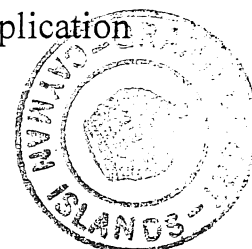
In his skeleton argument Mr. Lamontagne put it this way;

"The rules of nature justice require at least this much: any one having an interest in a decision must have the opportunity of being heard: Smith v Commissioner of Police [1980-83] CILR 126 at p. 179; Jacques Scott v The Immigration Board, cause no. 91 of 1997, Harre J, 1st September, 1998, (unreported) at p. 13, Pierson v Secretary of State for the Home Department, [1997] 3 All ER 577; Cross, Statutory Interpretation, 3rd (1995), p. 165-167; Bennion, Statutory Interpretation, 2nd Edition (1992), p. 737-744.

Mr. Lamontagne also argued that because the membership of The Central Planning Authority, on March 11, and 18, was not identical to the membership of The Central Planning Authority on December 10, when Mr. Conolly made his submissions, therefore Mr. Conolly and The National Trust were not given a hearing by the body which actually made the decision on March 18, 1998.

What was required in this case, to constitute a fair hearing in accordance with the principles of natural justice?

I agree with the submission of Mr. Barnes on behalf of the Ritz Carlton, that while it is not appropriate to lay down a complete code as to what constitutes natural justice before The Central Planning Authority, but for this particular application



there were three requirements that had to be satisfied for natural justice to be achieved:

- (1) the parties affected must have the opportunity to understand what is the nature and content of the application for planning permission. In other words they must know the case they have to meet.
- (2) the objector must be given a reasonable opportunity to put before The Central Planning Authority his objections;
- (3) the objection must be considered by The Central Planning Authority, but it will determine what weight is to be attached to any particular objection.

I conclude that in this case, the appellants have not been given a fair hearing in accordance with the principles of natural justice because there has been a failure to meet the requirements outlined in paragraphs 1 and 2 above.

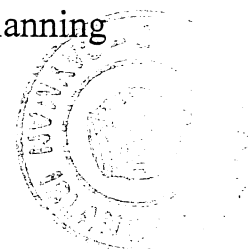
While the appellants did have notice of what was proposed in December 1997 and on December 10, 1997, appeared and opposed the granting of permission, they did



not have notice of the issues, submissions, or proposed environmental measures that were being put forward and discussed after December 17, 1997.

The concerns of the Department of Environment, the proposals of the Ritz Carlton, the revised plan, the proposed contents of the environmental assessment report, and the comments of the Department of Environment were all matters that went to the heart of the appellants objections and concerns. How can it be said that the appellants were given the opportunity to put their position before The Central Planning Authority when they were never told of the proposed environmental measures?

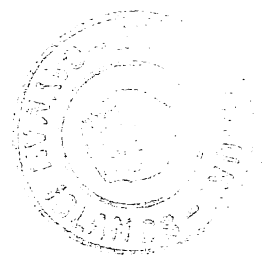
The appellants were simply told that the Ritz Carlton was seeking to develop a golf course in the wetlands and they were given and exercised their rights to object. If The Central Planning Authority had granted permission to develop the golf course in its December 17, 1997, meeting the appellants would probably have had little ground to complain about the lack of a fair hearing. However, The Central Planning Authority deferred that decision and thereafter, it received revised submissions from the developer, submissions on environmental impact and proposed studies and comments from the Department of Environment. The issues that were key to the appellants were obviously important to The Central Planning



Authority and it was being widely discussed and revised without any notice to, or input from the two main objectors. Having decided to accept a revised plan and a proposal to deal with these key environmental issues, a fair hearing in accordance with the principles of natural justice required, in this case, that the objectors be made aware of what has being filed and be given a reasonable opportunity to comment, either orally or in writing, as The Central Planning Authority considered appropriate.

Mr. Hall-Jones for the Attorney-General submitted, that to do so, would wreak administrative havoc in these Islands, that it would not be possible to notify everyone at every stage and that if the appeal was allowed on these grounds The Central Planning Authority would no longer be able to function. Whilst colourful, his submissions, were not in my judgment, correct.

What had to be done here, was that the two appellants be told of what had been filed, given the opportunity to look at it and respond to it. It would have been up to The Central Planning Authority to consider their views and make its decision as it saw fit.

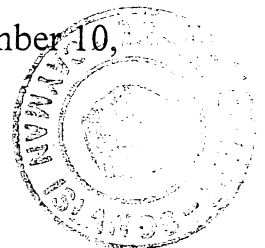


I was also not persuaded that in other cases, involving hundreds of objectors, that it would be impractical to keep them informed and give them an opportunity to be heard. Should it be necessary in order to achieve a fair hearing then administratively it is not difficult to advise objectors either by mail or publication, that there is new material to examine and that they will have a further hearing or opportunity to respond in writing. This will not unduly restrict or impair the planning process.

Finally, I am persuaded, that the failure to meet the requirements of giving a fair hearing in accordance with the principles of natural justice has in this case resulted in a real risk of prejudice . We do not know this as a certainty but nevertheless, there is a real risk that it has (see George v Secretary of State for the Environment [1979] 77 LGR 689.)

Accordingly, the appeal on this ground is allowed and the decision of The Central Planning Authority of March 18, 1998 is set aside.

Before leaving this area I should, however, comment on the appellants' submission that the decision must be set aside because the members who made the decision on March 18, 1998, were not the same as those who heard the matter on December 10,



or made the decision on December 17, 1997. In Jeffs and Others v New Zealand Dairy Production and Marketing Board and Others [1966] 3 All ER 863, the Privy Council held that in some circumstances it would suffice for a board to have before it and to consider an accurate summary of the evidence and submissions before a prior and differently constituted board, if the summary adequately disclosed the evidence and submissions to the Board. Similarly, the Bermuda Court of Appeal in Bermuda Telephone Co. Ltd v Minister of Telecommunications [1991] 43 WIR 90 at p. 96 where Sir D. Roberts P. said;

" I do not see that every member of Telecom had to attend each meeting, so long as he was fully informed of what went on at those meetings which he did not attend, by means of comprehensive minutes of the meetings and copies of all written submissions which were considered thereat."

In view of the ruling I have already made, it is not necessary for me to make a finding, whether The Central Planning Authority constituted on March 18, considered all of the relevant matters brought up at the previous meetings. I will only say that in future The Central Planning Authority must be able to demonstrate from the record below, exactly what was actually before The Central Planning Authority that makes the final decision.



Ground 6 - The application is deficient because it fails to comply with the Planning and Development Regulations (1995) Revision and is therefore void.

Mr. Farrow, on behalf of Mr. Conolly pointed out that there were several sections of the above Regulations that were not complied with by the Ritz Carlton when they filed their application. They include:

1. Submitting plans that were drawn to 1/20 scale instead of 1/4 or 1/8 scale as required by Regulation 6(1);
2. The Ritz Carlton failed to provide setbacks on the plan as required by Regulation 6(3)(c);
3. The Ritz Carlton failed to provide dimensions of the large single family lots contrary to Regulation 6(3)(d);
4. The Ritz Carlton failed to show the water supply and sanitary drainage systems as required by Regulations 6(3)(f);
5. The Ritz failed to show the water supply and sanitary drainage systems on the floor plans as required by Regulation 6(5).



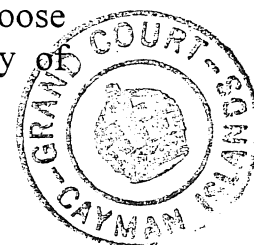
Mr. Farrow argued that these requirements were mandatory pursuant to Regulation 3 and 6 of the Development and Planning Regulations. I think he is correct in the sense that The Central Planning Authority can reject any application that did not comply with the regulations. However, even if they are mandatory in that sense, it does not follow that any permission that is granted in a situation where the regulations have not been complied with, would necessarily render that decision void. The court has discretion in certain circumstances not to strike down a decision that is made where a mandatory requirement has not been complied with.

In Judicial Review of Administrative Action, de Smith Woolf & Jowell 5th Edition at p. 265 the authors state:

"DISREGARD OF STATUTORY REQUIREMENTS

When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts have therefore formulated their own criteria for determining whether the prescriptions are to be regarded as mandatory, in which case disobedience will normally render invalid what had been done, or as directory, in which case disobedience may be treated as an irregularity not affecting the validity of what has been done.

These terms, like others we have been considering in this chapter, often cause more problems than they solve, The law relating to the effect of failure to comply with statutory requirements thus resembles an inextricable tangle of loose ends and judges have often stressed the impracticability of

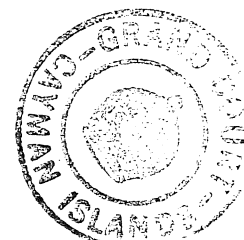


specifying exact rules for the assignment of a provision to the appropriate category. Nevertheless, it is possible to state the main principles that the courts have generally followed and to illustrate their application in a few settings. In brief, the principles are as follows:

- (1) A decision or action is in general to be treated as valid until struck down by a court of competent jurisdiction. This issue has been discussed above and need not be repeated now.
- (2) Statutory words requiring things to be done as a condition of making a decision, especially when the form of words requires that something "shall" be done, raise an inference that the requirement is "mandatory" or "imperative" and therefore that failure to do the required act renders the decision unlawful.
- (3) The above inference does not arise when the statutory context indicates that the failure to do the required act is of insufficient importance, in the circumstances of the particular decision, to render the decision unlawful.
- (4) The courts, in appropriate cases and on accepted grounds may, in their discretion refuse to strike down a decision or action or to award any other remedy...

The matter is thus better conceived in terms of inferences drawn from the language used and the context of the legislation, and by acknowledging the fact that courts may in their discretion decide not to strike down or otherwise provide a remedy in relation to a failure to observe a required statutory provision.

In order to decide whether a presumption that a provision is mandatory is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of the provision to the general object intended to be secured by the Act. It is necessary to assess the importance of the provision, particular regard being given to its significance as a protection of individual rights, the relative value that is



normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced. But the requirement will be treated as "fundamental" and "of central importance" if members of the public might suffer from its breach. Another factor influencing the categorisation is whether there may be another opportunity to rectify the situation, of putting right the failure to observe the requirement."

In R v Dacorum Gaming Licensing Committee ex parte EMI Cinemas and Leisure Ltd [1971] 3 All ER 666, Lord Widgery C.J. in speaking for court at p. 668, concluded that a trifling error in the Notice which could have not misled anyone could not form the basis for the licensing committee to refuse to hear the application. A similar result was reached in R v Inner London Betting Licensing Committee [1971] 1 WLR 421.

In the present case Mr. Farrow conceded in argument, that this Court can consider the nature of the information contained in the drawings, the nature of the non compliance , the actual or potential prejudice to the appellants and the respondents and that ultimately the Court had the discretion to uphold the authorities decision notwithstanding non compliance with some of the regulations. I think that Mr. Farrow was correct in his concession.

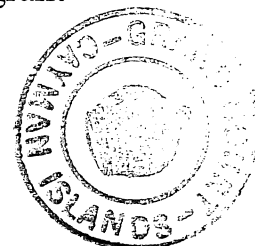


I have considered the deficiencies in the application and I do not think that anyone was prejudiced by them. They were not matters that were raised at any time prior to the final decision on March 18, 1998. They did not appear to relate to the primary concerns of the appellants, which were environmental in nature. They do not appear to be significant. Accordingly, I do not think the decision of The Central Planning Authority should be set aside on this basis.

RULING

1. The Appeal from the decision of The Planning Appeals Tribunal dated March 31, 2000, is allowed on the basis;
 - (a) That The Central Planning Authority delegated its decision making powers and;
 - (b) That The Central Planning Authority failed to give the appellant's a fair hearing in accordance with the principles of natural justice.

2. The decision of The Central Planning Authority of March 18, 1998, to grant development permission is set aside.



3. The Central Planning Authority is to make available to the Appellants, all environmental reports and any other documentation pertaining to environmental issues within 10 days of this order.

4. The Central Planning Authority shall allow the appellants 21 days from the date it makes information available to them, to make submissions either orally or in writing as The Central Planning Authority considers appropriate. Thereafter The Central Planning Authority shall decide whether or not the permission shall be granted.

5. The 1977 Development Plan shall apply to this application.

6. If the parties are unable to agree on costs they may apply to the Court.

Dated this 13th day of December, 2000.

D.G. Sanderson

D.G Sanderson
Judge of the Grand Court

