**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2010-04524**

**Between**

**BROADGATE PLACE PROPERTY COMPANY LIMITED**

**Claimant**

**And**

**MINISTER OF PLANNING ECONOMIC AND**
**SOCIAL RESTRUCTURING AND GENDER AFFAIRS**

**Defendant**

***Before the Honourable Madam Justice Rajnauth-Lee***

**Appearances:**

Mr. Douglas Mendes S.C. leading Mr. Michael Quamina and instructed by Mr. Ronald Simon for the Claimant.

Mr. Russell Martineau S.C. leading Mr. Kelvin Ramkissoon and instructed by Ms. Florence Ramdin and Ms. Grace Jankey for the Defendant.

Dated the 4th October, 2012.

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## JUDGMENT

## INTRODUCTION

1. This is a claim for judicial review. The Claimant is a limited liability company whose registered office is situate at Nos. 18-20 Pembroke Street, Port of Spain, formed for the purpose of developing lands formerly owned by Transcorp Development Company Limited ("Transcorp"), the company formerly responsible for the Broadgate Place Project.

2. The Defendant is the Minister with responsibility for the granting of permission to develop land and is the line Minister for the Town and Country Planning Division ("the Division") which is located at the Eric Williams Finance Building, Independence Square, Port of Spain.

3. By an Application Without Notice dated and filed on the 2nd November, 2010 the Claimant applied for an order for permission to make a claim for judicial review pursuant to Part 56.3 of the Civil Proceedings Rules, 1998 as amended ("the CPR") of the decision of the Defendant contained in a letter dated the 19th July, 2010 and received by the Claimant on the 3rd August, 2010 refusing permission to develop land located at 6, 8, and 10 Broadway, 56, 58 and 60 South Quay and 7 and 5 Henry Street, Port of Spain by carrying out building operations, that is, the erection of a building for office and retail purposes ("the Minister's decision").

4. The Application was supported by two affidavits filed on the 2nd November, 2010 of Ms. Jacqueline Melissa Bowen, the Executive Director and Corporate Secretary of the Claimant ("Ms. Bowen") and Mr. Ronald Simon, instructing Attorney for the Claimant ("Mr. Simon").

5. By an Order of the Court dated the 10th November, 2010 the Claimant was granted permission to make the claim for judicial review. The Claimant filed its claim on the 24th November, 2010.

6. The Claimant seeks *inter alia* an order of certiorari to remove into this Honourable Court and to quash the Minister's decision, and a declaration that the Minister's decision is unlawful, null and void and of no effect. At the conclusion of oral addresses, however, Mr. Mendes S.C. on behalf of the Claimant made it clear that the Claimant was no longer seeking an order of certiorari to quash the Minister's decision.

**EVIDENCE**

7. Several affidavits were filed in this matter. The following affidavits are highlighted:

   i. The first affidavit of Ms. Bowen filed on the 2nd November, 2010;

   ii. The second affidavit of Ms. Bowen filed on the 24th November, 2010;

   iii. The affidavit in reply of Ms. Bowen filed on the 18th February, 2011;

   iv. The first affidavit of Ms. Sheryl-Ann Haynes, the former Director of the Division ("Ms. Haynes") filed on the 28th January, 2011;

   v. The second affidavit of Ms. Haynes filed on the 8th April, 2011.

**STATUTORY FRAMEWORK**

8. The **Town and Country Planning Act Chap. 35:01** ("the Act") makes provision for *inter alia* the development of land and the grant of permission to develop land. The Minister's permission is required for any development of land pursuant to section 11(1) which provides as follows:

   *"Subject to this section and section 12, where application is made to the Minister for permission to develop land, the Minister may grant permission either unconditionally or subject to such conditions as he thinks fit, or may refuse permission."*

9. An application for permission to develop land ("Application for Planning Permission") may be made by the owner of the land or by an agent. The Application for Planning Permission must be accompanied by plans and drawings which describe the development which is the subject of the application.

10. Depending on the type or scale of development to be undertaken, an applicant may choose first to make an application for outline permission ("Outline Application"). Although this may be used for single family residential applications, it is usually used for non-residential projects. The reason for this is that the Outline Application will give the applicant the criteria to be followed when designing the building. Obtaining these criteria through the outline process can also reduce costs in the long term and avoid the redrawing of plans. An Outline Permission letter gives the applicant one year to submit the reserve matters listed in the document for approval.

11. When an Outline Application has been approved, the applicant may then submit his Application for Planning Permission in conformity with the conditions and reserved matters listed in the Outline Permission letter.

12. The application process requires that an application be filed and a reference number be assigned to it. The decision on the application is generally made in accordance with the approved land use policy for the area.

13. The Division uses two (2) levels of approval for development projects. The Outline Application grants approval for the use of the site based on conditions and reserved matters stated in the approval letter. The reserved matters refer to approvals and standards to be met in the design. One of the usual conditions of the Outline Permission is that it will lapse after one (1) year from the date of dispatch. There is a provision for the renewal of the Outline Permission up to three (3) times. The second type of approval is an Application for Final Permission based on detailed plans submitted for the project.

## BACKGROUND

14. The background facts which are important to understanding this matter are somewhat extensive.

### *The Claimant's Project*

15. Over several years several parcels of prime land in downtown Port of Spain totaling over 60,000 square feet were acquired originally by Transcorp Credit Union Co-operative Society Limited ("TCU") and Transcorp [incorporated in September, 2003 with 100% of the shareholding owned by TCU] for the purpose of constructing a multi-storey high office building with retail stores and car parking facilities to be called the Broadgate Place Project ("the Broadgate Project"). Based on discussions with the Government of Trinidad and Tobago ("the Government") it was understood that the Government would occupy all the office space.

16. By letter dated the 30th September 2005, the Ministry of Public Administration informed TCU of Cabinet approval to lease 235,012 square feet of office space in the building complex to be known as the Broadgate Project on terms and conditions to be negotiated in accordance with Government procedures and approved by the Cabinet.

17. Negotiations in relation to the finalization of the terms and conditions of an Agreement to Lease and a Form of Lease continued for many years between Transcorp and the Government. By letter dated the 4th April, 2007 the Government through the Ministry of Public Administration and Information indicated Government's agreement to lease 391,687 square foot of a 26 storey office tower in the Broadgate Project.

18. By an Agreement to Lease dated the 17th June, 2009 between the Claimant and the Government [the Claimant then being the owner in fee simple absolute of the lands in the Broadgate Project], the Government agreed to lease the said 391,687 square feet of office space in a proposed twenty-seven (27) storey office tower ("the Agreement to Lease"). The

Claimant and the Government also executed a Consent and Agreement dated the 4th September, 2009.

19. On the 12th October, 2009 there was a meeting held with representatives of the Claimant, Turner Alpha Limited, its Project Managers ("Turner Alpha") and the Division with Ms. Haynes, the Director in attendance. At the meeting discussions were held as to the requirements for the obtaining of final approval of the Broadgate project. The Division was concerned that the Broadgate Project must not be taller than the highest building in the Port of Spain International Waterfront Project Centre ("the Waterfront Project").

20. The Claimant has contended that the determining factor was that the Broadgate Project must not be higher than the Waterfront Project in terms of metres.[1] The Defendant has contended on the other hand that the determining factor was that the Broadgate Project must not be higher than the Waterfront Project in terms of number of floors.[2]

21. By letter dated the 24th November, 2009, Turner Alpha made an application for final approval. This letter purportedly addressed the matters raised in the meeting of the 12th October, 2009, including the fact that the Broadgate Project was going to be shorter [10.4 metres] than the Waterfront Project.

***Town and Country Planning Applications made in respect of the Broadgate Project***

22. Several applications for outline approval were made in respect of the Broadgate Project. The first Outline Application was dated the 22nd May, 2000 and submitted on the 26th May, 2000 by Planviron Limited for the development of land situated at No. 5 Henry Street, Port of Spain and stated to comprise 614.8 square metres in area for the erection of a building to be used for commercial purposes. The application was referenced T1M:1055/2000. Outline Permission was granted for that application in June, 2000. That site now forms part of the

[1] See paragraphs 13 and 14 of the affidavit in reply of Ms. Bowen filed on the 18th February, 2011.

[2] See paragraph 7 of the second affidavit of Ms. Haynes filed on the 8th April, 2011.

Broadgate Project site. One of the conditions of the Outline Permission was that the maximum height of any proposed building shall not exceed six (6) storeys or 21.5m from ground level.

23. The second Outline Application was submitted on 29th October, 2003 by the Caribbean Design Group Ltd. of 5 Sydney Street, Port of Spain, Project Architect and Agent for Owner/Developer. The Liaison Officer was named as Mr. Johann Lambkin. This Outline Application was referenced T1M:2365/2003. The Outline Application was made for a development called Broadgate Place, at No. 1 Broadway, Port of Spain and proposed to comprise 105,000 square feet. The Outline Application was made for the erection of a complex of buildings for office, retail and entertainment purposes. Outline Permission was granted by letter dated the 18th October, 2005. One of the conditions of the Outline Permission was that the maximum height of any proposed building must be 25 floors not exceeding 87m in height from ground level to ridge of roof.

24. The third Outline Application was submitted on the 6th May, 2004 for a 105,000 square feet site by the said Caribbean Design Group Ltd. that made the second Outline Application. This Outline Application was referenced T1M:0913/2004. The Liaison Officer was once again named as Mr. Johann Lambkin who later withdrew the application. The application was for a proposed 25 storey office tower.

25. A fourth Outline Application was submitted on the 26th September, 2008 by Transcorp in care of Stephen Ed. Anderson and Associates of No. 5 Rice Mill Road, Garden Village, Arouca for development of a site comprising 61,000 square feet (5,667 square metres) located between Broadway and Henry Street, Port of Spain. The application was for the proposed development of a 27 storey office building to include retail shops, entertainment and car parking. This Outline Application was referenced T1M:1845/2008. By letter dated the 3rd December, 2008 the application was refused because the development did not conform to the site development standards which were required to be maintained under planning policy, as framed in accordance with the development plan for Trinidad and

Tobago, that is to say, a maximum building height of 24 floors not exceeding 84.0m from ground level to ridge of roof.

26. An application for Final Planning Permission dated the 24th November, 2009 as opposed to merely Outline Permission was submitted on the 26th November, 2009.[3] This Final Application was referenced T1M: 2015/2009. The Claimant was the applicant. The total site area was 5,693 square metres comprising Nos. 6, 8 and 10 Broadway, Nos. 56, 58 and 60 South Quay and Nos. 3 and 5 Henry Street. These were the same lots as those in the fourth Outline Application which was refused.

27. Meanwhile, on the 1st February, 2010, the Claimant submitted a fifth Outline Application in respect of the same site as that in the Application for Final Planning Permission. By letter dated the 24th February, 2010 the Claimant was granted Outline Permission ("the fifth Outline Permission") subject to the subsequent approval by the Minister with certain matters reserved and subject to various conditions including that the maximum height of any proposed building must be 24 floors not exceeding 83m in height from the ground level to ridge of roof. The fifth Outline Permission was to lapse in one year's time. This Outline Application came about because the Claimant had been told by the Water and Sewage Authority ("WASA") that it would need a current outline permission to address certain water and sewerage issues.

***Refusal of Planning Permission***

28. After the Division received the Application for Final Planning Permission, it dispatched a letter dated the 10th May, 2010 to the Claimant requesting further information. The letter indicated *inter alia:*

> *"....Certain additional information is required without which the processing of your application cannot be completed....*

[3] See paragraph 21 of this judgment.

*…The instruction of the Honourable Minister responsible for town and country planning has been received. The maximum height for the building will be 24 floors. Kindly adjust your plans accordingly. Once this is done the permission can be promptly issued."*

29. By letter dated the 14th May, 2010, the Claimant brought to the Honourable Minister's attention the Agreement to Lease between the Claimant and the Government which provided for the construction for a twenty-seven (27) storey building. The Claimant concluded its letter by indicating that it made itself readily available to meet with the Minister at her earliest convenience to treat with this most imperative and critical issue which had the potential of impeding the development of the project.

30. The Defendant refused the Claimant's Application for Final Planning Permission by Notice of Refusal of Permission to develop land dated the 19th July, 2010 ("Notice of Refusal"). The reason given for the refusal was as follows:

*"The proposed development does not conform to the following site development standards, which are required to be maintained under the present planning policy, as framed in accordance with the development plan for Trinidad and Tobago:-*

*A maximum building height of 24 floors and not exceeding 87.0m from ground floor level to top of elevator shaft."*

**THE CLAIMANT'S WRITTEN SUBMISSIONS**

31. Both parties filed Skeleton Arguments on the 21st November, 2011. In its arguments, the Claimant contended *inter alia* that the Minister's decision to refuse permission to develop was irrational and illegal having regard to the following:

    i. The letters dated the 10th May, 2010 and the 14th May, 2010 together with the active discussion taking place between the parties with respect to the height of the

buildings which centered on whether the building would be higher than the Waterfront Project building as opposed to a restriction on the number of floors, it was evident that the parties were actively discussing the same issue which formed the basis for the refusal;

ii. The same project had received the fifth Outline Permission which had not yet expired;

iii. The fifth Outline Permission had given the Claimant one year to comply with the conditions which formed the basis of the refusal, thereby permitting further time to resolve the height issue pursuant to discussions already held;

iv. The Government had agreed to lease a building twenty-seven (27) storeys high;

v. Final Permission was refused without pursuing any further discussion and prior to the expiration of the fifth Outline Permission;

vi. In making her decision, the Minister failed to take into account relevant considerations, that is to say, that the fifth Outline Permission gave the Claimant one year to comply with the conditions as to the height of the building and that the Government had agreed to lease a building twenty-seven (27) storeys high.

32. The Claimant further contended that it had a legitimate expectation that the Minister would not refuse planning permission until one year had elapsed from the date of the fifth Outline Permission or until there were further discussions between the parties. The legitimate expectation was premised on the following:

i. The terms of the fifth Outline Permission;

ii. The request by the Claimant for a discussion on the question of the height of the building having regard to the Agreement to Lease which provided for a twenty-seven (27) storey building; and

iii. The failure of the Minister to respond to the request for further discussions.

33. In addition, the Claimant contended that the Minister abused her power in refusing planning permission before the year had expired without warning that she intended to do so and without giving the Claimant any opportunity to meet the condition.

34. The Claimant also contended that the Minister acted unfairly in failing to notify the Claimant of her intention to renege on the promise of a one year period to comply with the condition and to give the Claimant an opportunity to be heard before making her decision.

35. The Claimant concluded that the Minister's decision in every respect was flawed and that the facts demonstrated that the said decision, the consequences of which were effectively fatal to the Broadgate Project, was arrived at in circumstances which rendered the said decision irrational and illegal and not in accordance with the legitimate expectation of the Claimant.

**FURTHER WRITTEN SUBMISSIONS OF THE CLAIMANT**

36. Both parties filed Further Written Submissions on the 12th March, 2012 after Ms. Bowen and Ms. Haynes, were cross-examined on the 29th November, 2011.

37. The Claimant submitted that the following was elicited during cross-examination of Ms. Haynes:

i. The Director made the decision to refuse final planning permission without reference to the then current Minister, but on the Minister's behalf, based on 'policy' which had been previously stipulated by the incumbent Minister;

ii. The Director refused final permission without giving any consideration to the Agreement to Lease between the Claimant and the Government;

iii. The Director refused final permission because of the perception based upon the number of floors proposed for the building that the Claimant's building would be taller than the tallest building at the Waterfront Project, even though in fact the Claimant's building would not be taller.

38. The Claimant submitted that in so deciding, the Director took into account an irrelevant consideration, failed to take into account a relevant consideration, and made a decision which no reasonable Director, properly instructed in the law, would make. In short, it was contended on behalf of the Claimant that the Director acted irrationally and came to a wholly perverse decision. I will consider the submissions filed on behalf of the Defendant in the course of this judgment.

**THE CARLTONA PRINCIPLE**

39. It should be noted at the outset that it was lawful for the Director to have made the decision on behalf of the Minister. It is a well established principle of law that acts of officials of government departments are synonymous with the acts of the Minister. In the landmark decision of **Carltona Limited v Commissioner of Works and Others** [1943] 2 All E.R. 560 Lord Greene M.R. acknowledging the realities of governmental activity in the 20th century opined as follows at p. 563:

> *"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them….It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter….*

*[Therefore] the duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible."* (emphasis mine).

40. This principle was also recognized and applied in the case of **R v Secretary of State for the Home Department ex p Oladehinde and Alexander** [1991] 1 A.C. 254 at page 300 letters A-B where Lord Griffiths stated that:

*"It is obvious that the Secretary of State cannot personally take every decision…. The decision must be taken by a person of suitable seniority in the Home Office for whom the Home Secretary accepts responsibility. This devolution of responsibility was recognized as a practical necessity in the administration of government by the Court of Appeal in Carltona Ltd v Comrs of Works [1943] 2 All ER 50 and has come to be known as the Carltona principle."*

**IRRATIONALITY, ILLEGALITY AND RELEVANT CONSIDERATIONS**

41. When issues of policy are raised, the Court has little power to enquire into the reasonableness of the policy. The Court cannot substitute itself for the regulatory body which is the decision-maker. As was stated by Lord Greene M.R. in **Carltona** (supra) at p. 564*:*

*"It has been decided as clearly as anything can be decided that, where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith. If it were not so it would mean that the courts would be made responsible for carrying on the executive government of this country on these important matters. Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion if bona fide exercised no*

*court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith.* ***Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense, or any other aspect of the transaction****."*(emphasis mine)

42. The classic test for irrationality and illegality continues to be found in **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 where Lord Diplock said at page 410:

> *"By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it …*
>
> *By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'.... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it…."*

43. In addition, in **Nottinghamshire County Council v Secretary of State for Environment** [1986] 1 A.C. 240, their Lordships of the House of Lords held that in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the Secretary of State it was inappropriate for the courts to intervene on the ground of "unreasonableness" in a matter of public financial administration that had been one for the political judgment of the Secretary of State and the House of Commons. Lord Scarman made the point[4] that there would have to be shown either a pattern of perversity or an absurdity of such proportions that there could not have been a *bona fide* exercise of political judgment on the part of the Secretary of State. In Lord Scarman's judgment, the courts below had acted with constitutional propriety in rejecting the so-called "*Wednesbury* unreasonableness" argument

[4] See page 248 letters A-F

in this case. In Lord Scarman's view, the trial judge, Kennedy J., rightly reminded himself of an observation made by Lord Diplock that the very concept of administrative discretion involved the right to choose between more than one possible course of action upon which there was room for reasonable people to hold differing opinions as to which was to be preferred.[5]

44. The limited nature of the judicial review of planning decisions has also been emphasized in **Tesco Stores Ltd v Secretary of State for the Environment and others** [1995] 2 All ER 636, where Lord Hoffman stated at p. 657:

> *"If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."*

45. Mr. Martineau S.C. also relied on the case of **Lord Luke of Pavenham v Minister of Housing and Local Government and Another** [1968] 1 Q.B. 172, where Lord Denning observed that what was before the court was planning policy and the court had no authority to interfere with the way the Minister carried it out. In my view, Mr. Martineau has correctly pointed out that Lord Denning's statement was subject to the principle of irrationality.

46. Further, in the case of **City of Edinburgh Council v Secretary of State for Scotland and Another** [1998] 1 All E.R. 174 it was held that it was for the decision-maker to decide, having regard to all the material considerations, what weight was to be given to the development plan and his assessment of those considerations could only be challenged on the ground that it was irrational or perverse.

47. It was argued on behalf of the Claimant that there must be a rational basis for developing the planning policy for the City of Port of Spain and that the Claimant was not told of the existence of any policy on height. Senior Counsel further submitted that the policy was

[5] Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] A.C. 1014, 1064.

based on the *perception* of what was the highest building in the City of Port of Spain and that such a policy was irrational. Mr. Mendes has made it clear in his oral address, however, that the Claimant was not alleging bad faith. In my view, in the absence of bad faith, the Court ought not to examine the reasonableness of the Minister's policy. In any event, the policy itself was not challenged in the grounds for judicial review before the Court and the Claimant should not be allowed to challenge it now. The Court observes that even after the cross-examination of the witnesses, there was no application by the Claimant to amend its Fixed Date Claim and the reliefs and grounds thereof to include the ground of bad faith.

48. Further, although the Director said in cross-examination that the perception might be that the proposed building in the Broadgate Project was higher than the highest building in the Waterfront Project, the issue of perception was not the stated policy of the Minister. The limitation on the height of the building not only in terms of metres but also in terms of the number of floors was set out several times in the correspondence from the Division. Indeed, the letters from the Division conveying Outline Permission included the condition of a maximum height in terms of metres not exceeding a specified number of floors.

49. From the evidence before the Court the Minister's policy was that no building should be higher than the Waterfront Project in terms of height in feet/metres and as to the number of floors. The Defendant stated that the Waterfront Project was considered the latest signature building in the City of Port of Spain. The Waterfront Project was intended to be a major financial and international centre. I agree with Mr. Martineau that this was a matter of policy for the decision-maker and the Court ought not to examine the reasonableness of the policy in the absence of bad faith, perversity or ulterior motive. Accordingly, the policy could not be said to be irrational.

50. Further, it cannot be argued that the Minister's policy was not rationally connected to the legislation. Firstly, by virtue of section 9(3) of the Act, a development order that grants permission for any development, may, where approval is granted for the erection, extension or alteration of any buildings, require the approval of the Minister to be obtained with respect to the design or external appearance thereof. Secondly, Part II (Buildings and other

Structures) of the Second Schedule to the Act (Matters for which Provision may be made in Development Plans) provides for the regulating and controlling, either generally or in particular areas, of certain matters that include the size and height of buildings. Accordingly, I agree with Mr. Martineau that levels (number of floors) and height are rationally connected to the relevant legislation.

51. Further, the Claimant has contended that the decision was irrational having regard to the time limit of one (1) year specified in the fifth Outline Permission which had not expired when the Notice of Refusal was given. It was also argued on behalf of the Claimant that the decision was illegal since it was wrong in law to have refused final permission without allowing the one (1) year time limit in the fifth Outline Permission to have elapsed.

52. The Defendant, on the other hand, argued that the fact that the Claimant had received the fifth Outline Permission which had not yet expired did not make the refusal of permission irrational because:

    i. Outline Permission was conditional on there being a maximum of twenty-four (24) floors;
    ii. Outline Permission was specifically for WASA purposes; and
    iii. The Claimant was free to make a fresh application for Final Planning Permission in respect of the fifth Outline Permission [the one (1) year in respect of the fifth Outline Permission was still subsisting].

53. Having considered the cases previously cited on the issue of irrationality, the Court agrees with the Defendant. Section 6 of the Town and Country Planning (General Development) Order made under section 9(1) of the Act provides for the grant of outline and final planning permission. It provides that outline permission may be granted with conditions and subject to the subsequent approval of the Minister.

54. Specifically, section 6(6)(b) of the said Order provides that notice to an applicant of the determination of an application to undertake development must be given by the Minister

within two (2) months, or such extended periods as may at any time be agreed upon in writing between the applicant and the Minister. In accordance with the said Order, the Minister could not have been expected to wait until the time limit in the fifth Outline Permission had expired before determining the Application for Final Approval.

55. Having considered the above arguments and the cases previously cited on the issue of irrationality and illegality, I can see nothing on the facts and in the law which would suggest that the determination of the application for final approval, before the time limit of one (1) year set out in the fifth Outline Permission had elapsed, was irrational or illegal. In my view, Mr. Martineau has correctly submitted that the Claimant could have made an application for final approval in respect of the fifth Outline Permission. The Notice of Refusal could not and did not affect the validity of the fifth Outline Permission and nothing stated in the Notice of Refusal purported to have any negative impact on the fifth Outline Permission. Accordingly, the Claimant's case on this issue must fail. In addition, the Claimant has argued that the Notice of Refusal was given at a time when there were ongoing discussions between the parties. In my view, this factor on its own, even if it were true, would not ground a case against the Minister on the basis of irrationality or illegality. Further, in my view, these are all irrelevant considerations.

56. The Claimant has also contended that the Director by her own admission failed to take into account the Agreement to Lease whereby the Government after Cabinet approval agreed to lease from the Claimant a building twenty-seven (27) storeys high in the Broadgate Project. Mr. Mendes on behalf of the Claimant submitted that in doing so the Director failed to take into account a relevant consideration.[6]

[6] See paragraphs 15-18 of this judgment.

57. In **Tesco Stores Ltd.** (supra)[7], Lord Keith of Kinkel said at p. 642:

> *"...It is for the courts, if the matter is brought before them, to decide what is a relevant consideration. If the decision-maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand and he must be required to think again. But it is entirely for the decision-maker to attribute to the relevant considerations such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the Wednesbury sense (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223)."*

58. **Tesco Stores Ltd** was applied in the case of **R (on the application of Batey) v Boston Borough Council and Another** [2008] EWHC 3516 (Admin) where Isaacs J said at paragraph 24:

> *"I remind myself at the outset that the weight to be attributed to considerations relevant to a decision is a matter for the decision-maker himself to determine as he thinks fit and the courts will not interfere unless he has acted in a* ***Wednesbury*** *unreasonable manner. However, it is for the court to decide, if the matter is brought before it, what is a relevant consideration in any particular case. In a planning context, the former is a matter of planning judgment; the latter is a question of law which involves no view about the part, if any, which the law should play in the decision-making process."*

59. The question is whether the Agreement to Lease was a relevant consideration that the Minister should have taken into account in arriving at her decision. I bear in mind that whether or not a consideration is relevant depends on the circumstances of the case.

[7] See paragraph 44 of this judgment.

60. I agree with Mr. Martineau that the parties to the Agreement to Lease were fully cognizant that the Town and Country Planning Division had its own role to play and that the Minister had an independent planning function which could not be dictated to by any other Minister. Indeed, Mr. Martineau has correctly submitted that the Minister had to be guided by planning considerations and not by any decision of the Ministry of Public Administration. In my view, if contracts/agreements to lease between applicants for planning permission and third parties are deemed to be relevant considerations, then the Minister will find herself making planning decisions in accordance with those third party contracts and not in accordance with proper planning considerations. Further, the fact that the third party is the Government or another Ministry does not as a matter of right elevate the status of the Agreement to Lease. The Minister must exercise her discretion as to planning permission independently of any other Minster or governmental authority. I further agree with Mr. Martineau that the Agreement to Lease had no rational connection with the purposes of the Act.

61. In my view, the policy is the overarching factor and if the application does not conform to it, then unless there is some exceptional reason to depart from the policy, the application must fail**.** (See **R v Secretary of State for the Home Department ex p Urmaza** [1996] COD 479; The Times Law Reports, July 23, 1996.)

62. I have also examined the terms of the Agreement to Lease. Clause 10 of the Agreement to Lease provided that it did not operate as a lease until the grant of the lease. Clause 4.1 stipulated *inter alia* that the Landlord (the Claimant) will grant and the Tenant (the Government acting through His Excellency the President) will accept the grant of the lease on a date (the Lease Commencement Date) which shall be not later than ninety (90) days after notice of issuance of the Certificate of Practical Completion.

63. I have also considered Clause 2.2 of the Agreement to Lease which stipulated that the Landlord will procure that the Development be carried out in accordance with *inter alia* Requisite Consents. According to the Definition Section of the Agreement to Lease, the term Requisite Consents included the approval of any Governmental Authority which by the same

Definition Section included any governmental department in the Republic of Trinidad and Tobago.

64. I have also examined Recital B of the Agreement to Lease which stated inter alia that the Landlord (the Claimant) had agreed (subject to all necessary approvals from all competent authorities being obtained) to carry out the Development.

65. Having regard to the terms of the Agreement to Lease, it was always subject to the approval of the Minister as to Final Planning Permission. In my judgment, the fact that the Government with Cabinet approval had entered into the Agreement to Lease with respect to a twenty-seven (27) storey building in the Broadgate Project was not a consideration which the Minister was obligated to take into account.

**LEGITIMATE EXPECTATION**

66. The Claimant has submitted that in light of the terms of the fifth Outline Permission, the request by the Claimant for discussions on the question of the height of the building having regard to the Agreement to Lease which provided for a twenty-seven (27) storey building, and the failure of the Minister to respond to the request for further discussions, the Claimant legitimately expected that the Minister would not refuse planning permission on this ground [height] until one (1) year had elapsed from the date of the fifth Outline Permission and/or further discussions had between the parties.

67. In my view, Mr. Martineau has correctly submitted that by the Claimant's letter of the 14th May, 2010 the Claimant never *requested* a meeting but indicated that they made themselves "*readily available to meet with you at your earliest convenience to treat with this most imperative and critical issue….*" In other words, they were intimating that they were ready to discuss.

68. Legitimate expectation is a principle whereby a citizen can challenge a decision which deprives him of a reasonable expectation founded on a reasonable basis that his claim would be dealt with in a particular way.

69. The Claimant has submitted that the facts in the instant case placed it in the category of cases identified in **R v Devon County Council ex p Baker** [1995] 1 All E.R. 73 at page 89 as the final category of legitimate expectation which encompassed those cases in which it was held that a particular procedure, not otherwise required by law in the protection of an interest, must be followed consequent upon some specific promise or practice. Fairness required that the public authority be held to it. The authority was bound by its assurance whether expressly given by way of promise or implied by way of an established practice.

70. In the case of **Attorney General v Lopinot Limestone Ltd** (1983) 34 WIR 299 the Trinidad and Tobago Court of Appeal held that the Minister's decision was null and void because the company had a legitimate or reasonable expectation that the Minister would fulfil the undertaking given on his behalf that the site would be visited and that the company would on that occasion be able to answer any queries etc. regarding its planning application before the Minister arrived at his decision. Accordingly, that legitimate expectation had been disappointed.

71. On the other hand, Mr. Martineau on behalf of the Defendant submitted that the principle of legitimate expectation required a clear and unambiguous representation or circumstances or conduct from which that legitimate expectation could be inferred. He submitted that there was no such clear and unambiguous representation in this case. Neither could it be inferred from the circumstances of this case that there would have been further discussions or that Minister would have waited until the time limit of one (1) year given in the fifth Outline Permission had expired before deciding on the application for final approval.

72. According to **R v Monopolies and Mergers Commission ex p Argyll Group Plc** [1986] 1 W.L.R. 763 at page 774 letters F-H good public administration is concerned *inter alia* with

speed of decision and requires decisiveness and finality unless there are compelling reasons to the contrary.

73. In the case of **R v East Kent Hospital NHS Trust and Another ex p Maureen Smith** [2002] EWHC 2640 (Admin) Mr. Justice Silber made the following important points at paragraphs 44 and 45 of his judgment:

> *"As Schiemann J, as he then was, (with whom Lloyd LJ agreed) pointed out in explaining these dangers in Shropshire Health Authority (page 223):-*
>
> > *'A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process, which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others, that they will be consulted about any changes. If the courts are to be too liberal in the use of their power of judicial review to compel consultation on any change, there is a danger that the process will prevent any change – either in the sense that the authority will be disinclined to make any change because of the repeated consultation process which this might engender, or in the sense that no decision gets taken because consultation never comes to an end. One must not forget there are those with legitimate expectations that decisions will be taken'.*
>
> *So I approach the issue of whether there should have been re-consultation by the defendants in this case, on the proposals now under challenge on the basis that the defendants had a strong obligation to consult with all parts of the local community. The concept of fairness should determine whether there is a need to re-consult if the decision-maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change. In determining whether there should be further re-consultation, a proper*

*balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. <u>This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt</u>."*(emphasis mine)

74. The facts of this case show that the Claimant was adequately engaged by the Division. At the meeting held between the parties on the 12th October, 2009 the issue of height was discussed between the parties.[8] The Division's letter of the 10th May, 2010 had made it clear that the instruction of the Minister had been received and the maximum height for the building would be twenty-four (24) floors. The Claimant was requested to adjust its plans in accordance with the Minister's instruction. The Division indicated that once the plans were so adjusted, the Minister's permission could be promptly issued. The Claimant's letter dated the 14th May, 2010 drew reference to the Agreement to Lease of which the Minister was already aware, and which in any case in the judgment of the Court, the Minister was not bound to take into consideration. In my judgment, therefore, there was nothing new and there was no fundamental change in the Claimant's project that warranted further discussions between the parties. The Court agrees that good public administration required finality and a timely decision. The Claimant did not adjust its plans in conformity with the policy and there was no clear and unequivocal representation and no circumstances that supported its contention that it legitimately expected to have further discussions with the Minister or the Division before the decision was made. The claim therefore fails on the ground of legitimate expectation.

**ABUSE OF PROCESS AND UNFAIRNESS**

75. The Claimant claimed that the Defendant abused her power in refusing planning permission before the time limit of one (1) year in the fifth Outline Permission had expired, without warning that she intended to do and without giving the Claimant an opportunity to meet the

[8] See Turner Alpha's Meeting Notes at "J.M.B. 9" annexed to Ms. Bowen's first affidavit. I agree with Mr. Martineau that the issue of the number of floors was a point of discussion.

condition. The Claimant also contended that the Defendant acted unfairly in failing to notify the Claimant of her intention to renege on the promise of a one (1) year period to comply with the condition and to give the Claimant an opportunity to be heard before making her decision.

76. I have already determined that there was no irrationality or illegality on the part of the Defendant in issuing the Notice of Refusal before the one (1) year limit in the fifth Outline Permission had expired. I have also agreed with the Defendant that no case of legitimate expectation could be made out although the one (1) year limit in the fifth Outline Permission had not expired. At the date of the Notice of Refusal the Claimant was still entitled to comply with the conditions contained in the fifth Outline Permission within the period specified. In my view, no abuse of process or unfairness has been made out by the Claimant because the Defendant made her decision as to final approval before the one (1) year limit in the fifth Outline Permission had expired and without engaging in further discussions with the Claimant.

77. The Claimant's claim for judicial review therefore fails. In the circumstances, I do not consider it necessary to determine the issue of alternative remedy although it was argued before me. The Court set a costs budget in the sum of $450,000.00 on the 9th November, 2011, pursuant to Part 67.8 of the CPR, and I am of the view that the sum is fair and reasonable having regard to all the circumstances of this case including the complexity of the matter and the work involved.

**ORDER**

THE COURT HEREBY ORDERS THAT:

1) The Claimant's Claim filed on the 24th November, 2010 is hereby dismissed.

2) The Claimant shall pay to the Defendant budgeted costs of the Claim in the sum of $450,000.00.

……..

**MAUREEN RAJNAUTH-LEE**
**JUDGE**