BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1835 of 2017

BETWEEN:

GUY SANER **CLAIMANT**

AND

THE CHIEF TOWN PLANNER
THE MINISTER RESPONSIBLE FOR TOWN AND COUNTRY PLANNING **RESPONDENTS**

Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court

Date of Decision: 19 January 2018

Ms. Faye Finisterre in association with Professor Eddy Ventose, Ms. Christine Toppin-Allahar and Ms. Lyanne Lowe for the Claimant.

Ms. Jennifer P. Small in association with Ms. Roselyn Marshall-Mapp for the Respondents.

Mr. Shane Brathwaite in association with Ms. Jennifer Devonish for Ms. Natalie Olivia Sandiford, an interested party.

DECISION

INTRODUCTION

[1] The claimant ("Mr. Saner") is the owner of beachfront property located on the west coast of Barbados. Ms. Natalie Olivia Sandiford ("Ms. Natalie Sandiford") and Mr. Euclid Sandiford (together called "the interested parties") own land adjoining Mr. Saner's. Ms. Natalie Sandiford is currently engaged in construction work ("the development") on her property ("the site").

[2] Purportedly, the development is being carried out pursuant to planning permission granted to Ms. Natalie Sandiford by the second respondent, the Minister Responsible for Town and Country Planning ("the Minister") on 1 June 2017 pursuant to ***section 18*** of the ***Town and Country Planning Act Cap 240*** ("***the TCPA***")("the Permission").

[3] Mr. Saner filed an application for judicial review pursuant to the provisions of the ***Administrative Justice Act Cap 109B*** ("***the AJA***") on 1 December 2017; and an amended application on 6 December 2017. By the amended application, he seeks among other orders, a declaration that the decision of the Minister granting the planning permission was unlawful, and an order quashing that decision. The other orders sought relate only to the first respondent ("the Chief Town Planner") and are immaterial at this stage.

[4] Mr. Saner also made an application for discovery of various planning documents relating to the development; and one for urgent interim injunctive relief by which he seeks the following orders until final judgment:

> 2.1.1. a stay of the Second Respondent's decision to authorize Natalie Olivia Sandiford, a Third Party, from proceeding with the development at the Garden, Mount Standfast, St. James to wit: the renovation and extension of Plombagine Cottage;
>
> 2.1.2. an order prohibiting Natalie Olivia Sandiford, a Third Party from carrying out or continuing any development at the Plombagine Cottage site pursuant to the decision.
>
> 2.1.3. an order prohibiting any person on whom this Order is served from carrying out or continuing any development at the Plombagine Cottage site.

[5] I heard the application for interim relief on 21 December 2017. Counsel for Mr. Saner, Professor Eddy Ventose and Ms. Christine Toppin-Allahar who act in association with Ms. Faye Finisterre and Ms. Lyanne Lowe indicated then that the discovery application could be deferred.

THE PROCEDURAL HISTORY

[6] The application for interim relief came on before me on 8 December 2017 but had to be rescheduled to accommodate the service of documents by Mr. Saner on the respondents; the filing of affidavits by the respondents; and the filing of written submissions by Mr. Saner and the respondents. I made orders accordingly and scheduled the hearing for 18 December 2017. I later changed that date to 19 December 2017.

[7] Meanwhile, I adjourned the matter to 12 December 2017 to hear the parties' submissions as to how this Court ought to proceed, given that interim injunctive relief would affect the interested parties. On that date, I ordered Mr. Saner to serve the latter with a notice of the application and copies of all documents filed in respect of the matter. I also extended the time for the filing of written submissions by the parties.

[8] On 19 December 2017, Mr. Shane Brathwaite who acts in association with Ms. Jennifer Devonish, appeared on behalf of Ms. Natalie Sandiford. I made an order permitting Ms. Natalie Sandiford to file an affidavit and written submissions, and rescheduling the hearing of the application to 21 December 2017.

THE CLAIMANT'S CASE

[9] Mr. Saner sets out five grounds of relief against the Minister on the amended fixed date claim form. He asserts that the Minister's decision is unauthorised or contrary to law; and that the Minster irregularly or improperly exercised his discretion in making the decision; took into consideration irrelevant considerations; arrived at his decision in the absence of evidence on which findings or assumptions of fact relied on by him could reasonably be based; and made his decision based on an error of fact.

[10] Under the caption "FULL PARTICULARS OF FACTS AND MATTERS RELIED ON," Mr. Saner summarised his case against the Minister in this way:

> 12. The [Minister's] decision was based on an error of fact, the fact was material and a different decision might have been made but for the error.
>
> 13. Further or alternatively the [Minister] unreasonably permitted the development.

[11] The asserted facts on which the application is based in so far as it relates to the Minister's decision are particularised at paragraphs 9.1 to 9.7. They read:

> 9.1 The Applicant is the owner of a residential property ... located at the Garden St. James. ... .
>
> 9.2 To the North of the Applicant's property is a site with two buildings on it: existing timber house to the roadside and to the north-west section of the L-shaped lot is a mixed wall and concrete single-storey house known as Plombagine Cottage. The cottage is listed for rental by paying guests on www.airbnb.com as a 2 bedroom, one and a half bedroom vacation rental accommodating up to 5 persons.
>
> 9.3 In or about 2015 … Natalie Olivia Sandiford-submitted an application to the Chief Town Planner seeking planning permission numbered ref: 1250/08/2015C for a development of the Plombagine Cottage ("the application for development").
>
> 9.4 On or before June 1, 2017, the First Respondent referred the application for development to the Respondent for decision pursuant to section 18 of the Act.

9.5 In or around June 1, 2017 the Second Respondent granted planning permission for the said development ("the decision).

9.6 The owners of the Plombagine Cottage commenced construction works ostensibly in accordance with the said decision. These works included the renovations and addition to the Plombagine Cottage and an "extension" of the said Cottage ("the development") to include and ground and first floor extension to the South of the Cottage.

9.7 The Second Respondent failed to take account of relevant information because this information was not before him. The application for planning permission appears by the particulars entered in the register of applications to be one for an extension of the Cottage. In reality, this has transpired to be a total misrepresentation of facts to the Chief Town Planner as the construction has progressed to include a second storey (first floor) to the existing cottage as well as an entirely separate building almost of equivalent size to the Cottage to the South of the lot, also two storeys high – not an extension as represented to the Second Respondent.

THE AFFIDAVITS

[12] The claimant has filed two affidavits on which he relies. Both were sworn by Mr. William Robert Bain who deposed that he is a Chartered Town Planner and Mr. Saner's consultant. Mr. George Browne who deposed to being the Acting Chief Town Planner filed an affidavit on behalf of the Chief Town Planner. Mr. Timothy Maynard, Permanent Secretary in the Minister's Office filed one on behalf of the Minister. Ms. Pamela Sandiford also filed an affidavit on behalf of Ms. Natalie Sandiford. It is convenient to detail one

aspect of the evidence at this stage. I will come back to the remainder in due course.

THE PLANNING DOCUMENTS

[13] Ms. Natalie Sandiford's Application to the Chief Town Planner ("the Planning Application") and the Permission have been exhibited with the affidavit of Mr. George Browne and that of Ms. Pamela Sandiford. Mr. Saner has not challenged the authenticity of these documents and indeed, all parties made submissions on the basis of them.

[14] On page 1 of the Planning Application, Ms. Natalie Sandiford is expressed to make an application "for permission to carry out the development described hereunder and on the attached plans and drawings." The plans and drawings referred to are not before me. These are among the documents to which the discovery application relates.

[15] The Planning Application bears reference number 1250/08/2015C. At item 3 on page 2, the applicant is required to describe the proposed development including the purpose for which the land and/or buildings are to be used, and to give details if they are to be used for more than one purpose. In response to that directive, there appear the words "RENOVATION & ADDITION TO RESIDENCE". At item 6, the applicant states "the purpose for which the land/and or buildings are now used" as "RESIDENTIAL".

[16] The Permission takes the form of a letter addressed to Ms. Natalie Sandiford and signed by Mr. Maynard. It is headed with the same reference number as the Planning Application and the words "Renovation and extension of a residence at Mount Standfast, St. James". Its opening paragraph reads:

> In accordance with Section 18 of the Town and Country Planning Act, Cap. 240, the Minister hereby grants planning permission, **subject to the Conditions, Reasons and Informative Clauses stated hereunder**, for the proposals contained in the Application No. 1250/08/2015 – Renovation and extension of a residence at Mount Standfast, St. James.

[17] 10 conditions, 10 reasons, and 6 informative clauses are set out under that paragraph. Of these, the first condition is of some relevance. It provides in part that:-

> … no subsequent enlargement, improvement or other alteration to **the dwelling house** nor works relating to any development within the curtilage of **the said dwelling house** including the erection of **any ancillary buildings** shall be carried out without the prior grant of permission by the Chief Town Planner on an application made in that behalf. [emphasis mine]

[18] It has been observed that on the Permission, the development is described as "Renovation and **extension of** a residence" and not "renovation and **addition to** a residence" as stated on the Planning Application. For present purposes, nothing turns on that. It is clear that the Permission relates to the Planning Application and that both documents contemplate the enlargement of a residence which would remain a single structure. This is confirmed by the

portion of the first condition on the Permission reproduced in the preceding paragraph. Additionally, the Permission is expressed to be for the proposals contained in the Planning Application.

THE LEGAL PRINCIPLES

[19] I will now outline the legal principles that must inform me. The basic rules which apply to an application for interim injunctive relief in judicial review proceedings were restated recently by Burgess JA in ***Worrell v Minister of Finance Civ. App. No. 8 of 2017, date of decision 3 March 2017*** and ***Dottin (The Commissioner of Police) v Belgrave (Governor general) et al Civ. App. No 14 of 2013, date of decision 31 March 2017***.

[20] In ***Dottin***, at paragraph 27, Burgess JA confirmed that the test enunciated in ***American Cyanamid Co v Ethicon [1975] AC 396*** as interpreted by the Court of Appeal in ***Toojays Limited v Westhaven Limited [2012] 2 LRC 65*** is applicable to cases initiated under ***the AJA***. That test comprises two limbs. As explained at paragraph 26 of ***Dottin***, the first requires the party seeking the injunction to demonstrate that "there is a serious question to be tried in the sense of not being frivolous or vexatious".

[21] In ***Dottin*** and ***Worrell***, the Court of Appeal acknowledged the relatively low threshold test laid down in ***American Cyanamid*** that in deciding whether there is a serious question to be tried, the court merely has to be satisfied that the claim is not frivolous or vexatious. However, this does not mean that there is no threshold at all.

[22] The required approach to dealing with issues of facts and law and the low threshold required to meet the standard of being not frivolous or vexatious was put in this way in an oft cited passage from Lord Diplock in ***American Cyanamid*** found at page 510. He stated:

> The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is not part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations. These are questions to be dealt with at the trial … So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[23] As ***Dottin*** states at paragraph 26, if the applicant crosses that threshold, the court must then advance to the second limb and determine "whether the balance of justice lies in favour of granting or refusing the interlocutory relief sought."

[24] In ***Worrell*** and ***Dottin***, the Court of Appeal accepted that in cases with a public law element, the second limb of the test is somewhat modified as indicated by Lord Goff in ***Regina v Secretary of State for Transport, ex parte Factortame Ltd. et al (no. 2) [1990] 3 W.L.R. 818***. Consideration of the balance of justice ought to proceed in two stages. At the first stage, the Court must consider the adequacy of damages and undertakings in damages. If damages are found not to be an adequate remedy, the Court should proceed to the second stage where it considers all the circumstances and determines where the balance of convenience lies. At that stage, the balance of convenience must be looked at more widely than in private law cases as the interest of the public must be taken into account.

[25] However, it is also a feature of this case that third-party interests may be affected by the outcome of the application for interim relief. The interested parties are uniquely associated with the challenged decision. Mr. Saner's Counsel cited ***R v Pollution Inspectorate, ex p Greenpeace [1994] 4 ALL ER 321*** for general guidance as to the required approach in these circumstances. In that case, the Court of Appeal of England and Wales held that where third party interests would be affected by the grant of a stay of the execution of an executive decision, the position must be the same as if interim injunctive relief had been sought against that third party and the

American Cyanamid principles would apply. The court endorsed the approach of Brooke J who in refusing the application at first instance had taken account of the interests of the third party in determining the balance of convenience. I consider this decision to be good sense and good law.

[26] Finally, it is a pre-condition to the grant of an interim injunction that there must be a cause of action that is amenable to the jurisdiction of the Court. That principle is espoused in the judgment of Diplock LJ in ***The Siskina [1977] 3 All ER 803*** at ***page 824*** in this way**:**

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.

DOES THIS COURT HAVE JURISDICTION?

[27] Ms. Jennifer Small appeared for the respondents in association with Ms. Roselyn Marshall-Mapp. Relying on that passage from **The Siskina**, and citing ***sections 18(4)***, ***69(1)*** and ***72*** of ***the TCPA***, they and Mr. Brathwaite submitted that this Court has no jurisdiction to hear the substantive claim, and therefore that it cannot grant the interim relief sought. To the contrary, Professor Ventose submitted that the statutory provisions do not oust the jurisdiction of the Court.

[28] This jurisdictional divide requires me to give mature consideration at this stage to a question that I would have preferred to have the benefit of fuller argument on. I will set out the material statutory provisions and then consider the submissions and relevant authorities. However, before so doing, I will provide some context.

[29] ***The TCPA*** came into force on 8 July 1968. Among the statutory purposes listed in its long title is one to make provision "for the grant of permission to develop land and for other purposes over the use of land". Planning permission is regulated in ***Part IV*** of ***the TCPA***. Planning permission is required for the carrying out of any "development", a term which is defined in ***section 13(1)*** of the ***TCPA*** to include the carrying out of any building on land, and the making of any material change in the use of any buildings or land. Generally, applications for planning permission are made to the Chief Town Planner. However, ***section 18(1)*** empowers the Minister to direct the Chief Town Planner to refer certain classes of applications for his determination. It is accepted by the parties that the Planning Application fell within one of these classes of applications and would have been referred to the Minister pursuant to ***section 18(1)***.

[30] ***Sections 18(4), 69(1)(c)*** and ***(3)(a)***, and ***72(1)(b)*** and ***(2)*** are directly at the centre of this discussion. S***ection 18(4)*** reads:

> The decision of the Minister on any application referred to him under this section shall be final.

[31] Along with the portions of s***ection 69*** just identified, I will also set out ***section 69(4)*** to which I will refer later. These provide:

> **69** (1) Except as provided by the following provisions of this Part, the validity of
>
> (a) …
>
> (b) …
>
> (c) any such action on the Part of the Minister as is mentioned in subsection (3).
>
> shall not be questioned in any legal proceedings whatsoever.
>
> (2) …
>
> .
> (3) The action referred to in paragraph (c) of subsection (1) is action on the part of the Minister of any of the following descriptions, namely
>
> (a) any decision of the Minister on an application for planning permission referred to him under section 18;
>
> …
>
> (4) Nothing in this section shall affect the exercise of any jurisdiction of any court in respect of any refusal on the part of the Minister to take any such action as is mentioned in subsection (3).

[32] The portions of section 72 referred to and additional ones I consider helpful, read:

> 72. (1) Any person aggrieved-

(a) …

(b) by any action on the part of the Minister to which this section applies who desires to question the validity of that action, on the grounds that the action is not within the powers of this Act or that any of the relevant requirements have not been complied with in relation to that action,

may, within six weeks from the date on which … the action [is] taken, … make an application to the High Court under this section in accordance with any rules of court.

(2) This section applies to … any such action as is mentioned in subsection (3) of the same section 69.

(3) Subject to subsection (4), on any application under this section, the High Court-

(a) may by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;

(if satisfied that the order or action in question is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation thereto, may quash the order or action.

…

(6) For the purpose of this section, the expression "the relevant requirements", in relation to any order or action to which this section applies, means any requirements of this Act or of any order, regulations or rules, which are applicable to that order or action.

[33] Counsel for the respondents reproduced ***sections 18(4)*** and ***69(1)*** in their written submissions and cited ***R v Minister of Housing and Lands, ex parte***

Knitwear Limited High Court Suit no 1559 of 1985 (date of decision, 17 April 1991). In that case, the applicant sought among other orders, a declaration that the decision of the Minister refusing its planning application was null and void. The application had been referred to the Minister by the Chief Town Planner pursuant to ***section 18(1)***. Williams CJ held that ***section 69*** precluded judicial review of the Minister's decision. In dealing with a particular aspect of an affidavit in support of the application, he stated at ***paragraph 63***:

> This … is a matter that seems to go to the substance of the Minister's decision which according to section 18(4) is to be final. Even a challenge on the Wednesbury principle (which the applicant has not made) is ruled out by the provisions of section 69 that any decision of the Minister on an application for planning permission referred to him under section 18 "shall not be questioned in any legal proceedings whatsoever".

[34] In dismissing the application, Williams CJ stated that ***section 69*** forbade him granting any relief that would bring into question the Minister's decision. He made no reference to ***section 72*** neither did Counsel for the respondents in their written submissions. However, at the close of her oral submissions, Ms. Small indicated that she was adopting Mr. Brathwaite's submission on this issue.

[35] Mr. Brathwaite urged that the effect of ***sections 69(1) and (3)***, and ***72(1)(b)*** and ***(3)*** is to make ***sections 69*** and ***72*** applicable to the Minister's decision.

Counsel for Mr. Saner took no issue with this submission and I found Mr. Brathwaite's analysis in that regard to be sound. ***Section 18(4)*** provides that "[t]he decision of the Minister on any application referred to him pursuant to section 18 shall be final". ***Section 69(1)(c)*** is the first section in ***Part IX*** of **the TCPA**. It provides that any action on the part of the Minister as mentioned in ***subsection (3)*** "shall not be questioned in any proceedings whatsoever". ***Subsection (3)*** includes at paragraph (a) "any decision of the Minister on an application for planning permission referred to him under ***section 18***". ***Section 69(1)(c)*** is expressed to apply except as provided by the provisions that follow in that part of ***the TCPA***. ***Section 72*** follows in ***Part IX***. Subsection ***(2)*** of that provision makes the section applicable to Ministerial decisions pursuant to ***section 18***.

[36] Mr. Brathwaite went on to characterise ***section 72*** as a partial ouster clause and to submit that such clauses are distinguishable from total ouster clauses which have been held not to preclude judicial review. He submitted that partial ouster clauses are given effect to by the courts but that there must be strict compliance with any time-limits specified. He urged that the Court lacked jurisdiction to hear Mr. Saner's claim since it was not filed within the six months' period allocated by ***section 72***.

[37] Counsel cited ***Smith v East Elloe Rural District Council [1956] A.C. 736 (Smith)***, ***R v The Secretary of State for the Environment ex parte Ostler (1997) 1 QB 122*** (***ex parte Ostler***), ***R v Cornwall County Council ex parte Huntington et al [1994] 1 All ER 694*** (***ex parte Huntington***); ***Bethel and Others v The Attorney General of the Commonwealth of Bahamas (2013) UKPC 31***; and ***Knitwear*** in support of his submissions that this Court has no jurisdiction. He also referred me to ***Anisminic Ltd. v Foreign Compensation Committee (1962) 2 AC 147*** and ***Attorney General v Joseph and Boyce CCJ Appeal No CV 2 of 2005*** to exemplify his point in respect of what he characterised as total ouster clauses.

[38] Professor Ventose added ***Thomas v The Attorney General of Trinidad and Tobago*** **[1982] AC 113** to ***Anisminic*** and ***Joseph and Boyce*** in submitting that ***sections 18*** and ***69*** do not oust the jurisdiction of the Court. He submitted further that ***section 72*** was concerned with applications under ***the TCPA*** and not ***the AJA***, and that ***section 72*** contemplates proceedings by a person who had made the planning application to which the ***section 18*** decision relates.

[39] Further, Counsel urged that the time limit set out in ***section 72*** is a procedural bar which can be disregarded if a party does not plead reliance on it. He stated that the respondents had given no indication in their affidavits (or written submissions) that they were relying on ***section 72***, and that Ms.

Natalie Sandiford could not advance arguments in respect of that provision since, in his view, she is not a party to the proceedings.

[40] Two things are clear to me from my review of the authorities. The first is that superior courts guard their supervisory jurisdiction over inferior bodies jealously. Where a clause that purports to oust that jurisdiction manifests some ambiguity, a court may construe it to preserve its jurisdiction and avoid an injustice. However, the corollary is also true. Where the words of a statute are clear, a court must give effect to the intention of Parliament as manifested in those words, even if the result is a yielding up of its jurisdiction.

[41] It seems also to be settled law that statutory provisions that purport to oust the jurisdiction of the court may be held not to do so where the decision is ***ultra vires***, or attended by jurisdictional error. The widely acknowledged authority for that proposition is ***Anisminic***, though as Gibson CJ reminded in ***Divungula*** v ***The Chief Immigration Officer et al High Court Suit No. 1043 of 2015 (date of decision, 19 February 2015)***, the legal position was posited prior to ***Anisminic*** by the Federal Supreme Court of Appeal in ***Sowatilall v Fraser (1960) 3 WIR 70***.

[42] ***Thomas*** and ***Joseph and Boyce*** reflect a general approach that constitutional clauses that purport to oust the court's jurisdiction will not be held to be effective where the body to whom it applies acts beyond its jurisdiction; or

contravenes the affected person's right to a fair hearing or such other guaranteed rights for which redress is provided by the Constitution.

[43] Nonetheless, there is a line of authorities from the United Kingdom starting before ***Anisminic*** and continuing beyond it that have upheld statutory provisions which make the exercise of the court's jurisdiction subject to a time limit. Mr. Brathwaite tapped this line of cases.

[44] Before considering these authorities, it is useful to note that ***Sowatilall*** and ***Anisminic*** were concerned with judicial decisions of statutory bodies and involved a determination in relation to the rights of the affected persons. The post-***Anisminic*** cases that Mr. Brathwaite referred to - ***ex parte Ostler*** and ***ex parte Huntington*** - suggest that the law might be otherwise where one is concerned with a purely administrative function.

[45] However, the starting point is ***Smith***, a decision of the House of Lords which preceded ***Anisminic***. The appellant sought an order that a compulsory purchase order made by a district council in respect of land owned by him was made wrongfully and in bad faith. The proceedings had been instituted more than six months after the order had been made and confirmed by the relevant authorities. The defendants applied to have the proceedings set aside for lack of jurisdiction on the ground that under the ***Acquisition of Land (Authorisation Procedure) Act, 1946 Schedule 1, Part 4, paragraph 16***, the

compulsory purchase order could not be challenged in any legal proceedings. The appellant appealed the order setting aside the writ and argued that ***para 16*** had no application since the compulsory purchase order had been challenged on the basis that it had been made and confirmed wrongfully and in bad faith. ***Paragraph 16*** was in these terms:

> Subject to the provisions of the last paragraph, a compulsory order or a certificate, under Part 3 of this Schedule shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the foregoing paragraph.

[46] ***Paragraph 15***, the paragraph to which ***paragraph 16*** was subject, read in part:

> 15.-(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof, or of any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in sub-s. (1) of s. 1 of this Act, or if any person aggrieved by a compulsory purchase order or a certificate under Part 3 of this Schedule desires to question the validity thereof on the ground that any requirement of this Act or of any regulation made thereunder has not been complied with in relation to the order or certificate, he may, within six weeks from the date on which notice of the confirmation or making of the order or of the giving of the certificate is first published in accordance with the provisions of this Schedule in that behalf make an application to the High Court…. .

[47] ***Paragraph 15*** went on to specify the interim and final remedies available to the court on an application under the provision. The House held by a slim

majority that the action could not proceed since it was brought after the expiration of the statutory time period, thereby upholding the effectiveness of the ouster provision. Viscount Simonds, Lord Merton and Lord Radcliffe considered that there was nothing ambiguous about ***paragraph 16*** and that it imposed a general bar to legal proceedings subject to ***paragraph 15***. Lords Reid and Merton dissented. Lord Reid reasoned that Parliament could not have intended to deprive the court of jurisdiction where bad faith was involved and that the general words of ***paragraph 16*** had to be limited to accord with the principle that a wrongdoer cannot rely on general words to avoid the consequences of his own dishonesty. Lord Merton opined that had Parliament intended ***paragraph 15*** to apply in cases of bad faith, it would have made that plain.

[48] At page 859, Viscount Simonds commented on the interpretational relationship between paragraphs 15 and 16 in this way:

> I have examined para 16 by itself without reference to para 15. But para 16 opens with the words "Subject to the provisions of the last foregoing paragraph". It is necessary, therefore, to see whether the earlier has any bearing on the meaning of the later paragraph. I think that it has not, for, in my opinion, the width or narrowness of the grounds of challenge permitted by para 15 does not touch the construction of para 16. Be they wide or be they narrow, it is subject to them that the general bar to legal proceedings is imposed.

[49] ***Ex parte Ostler*** came before the Court of Appeal of England and Wales almost ten years after the House's decision in ***Anisminic***. The court upheld the validity of the time-barred ouster clause in issue which was contained in ***paragraph 4*** of ***Schedule 2*** to the ***Highways Act 1959***. That paragraph read:

> Subject to the provisions of the last foregoing paragraph, a scheme or order to which this Schedule applies shall not, either before or after it has been made or confirmed, be questioned in any legal proceedings whatever, and shall become operative on the date on which the notice required by paragraph 1 of this Schedule is first published, or on such later date, if any, as may be specified in the scheme or order.'

[50] The preceding paragraph was in these terms:

> If a person aggrieved by a scheme or order to which this Schedule applies desires to question the validity thereof, or of any provision contained therein, on the ground that it is not within the powers of this Act or on the ground that any requirement of this Act or of regulations made thereunder has not been complied with in relation thereto, he may, within six weeks from the date on which the notice required by the foregoing paragraph is first published, make an application for the purpose to the High Court.

[51] The "nice question" as Lord Denning MR characterised it which the court had to determine was whether ***Smith*** remained a good authority after ***Anisminic***, thus allowing for the statutory scheme to be upheld. The court held that it did. At page 94, the Master of the Rolls with whom Shaw LJ agreed characterised the words "shall not … be questioned in any legal proceedings whatever" as "strong words" and observed in relation to ***Smith***

and ***Anisminic***, that the latter was "on a very different provision". At page 95, he noted that in ***Anisminic*** some of the Law Lords had "thrown some doubt on Smith" but he went on to hold that ***Smith*** was still good law. He distinguished it from ***Anisminic*** on three grounds which he expressed in this way at pages 95 to 96:

> First, in the *Anisminic* case the Foreign Compensation Act 1959 ousted the jurisdiction of the court altogether. It precluded the court from entertaining any complaint at any time about the determination. Whereas in Smith … the statutory provision has given the court jurisdiction to enquire into the complaints so long as the applicant comes within six weeks. The provision is more in the nature of a limitation period that of a complete ouster. That distinction is drawn by Professor Wade in his book on Administrative Law, and by the late Professor de Smith in the latest edition of Halsbury's Laws of England.
>
> Second, in the *Anisminic* case, the house was considering a determination by a truly judicial body, the Foreign Compensation Tribunal, whereas in Smith … the House was considering an order which was very much in the nature of an administrative decision. … There is a great difference between the two. In making a judicial decision, the tribunal considers the rights of the parties without regard to the public interest. But in an administrative decision (such as a compulsory purchase order) the public interest plays an important part. The question is, to what extent are the private interests to be subordinated to the public interests.
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> Third, in the *Anisminic* case the House had to consider the actual determination of the tribunal, whereas in Smith … the House had to consider the validity of the process by which the decision was reached.

[52] Goff LJ agreed that the appeal ought to be allowed. He noted that ***Smith*** had not been overruled by ***Anisminic*** and that none of their Lordships had said that it was wrong. He considered that there were substantial differences between the two cases and found them to be distinguishable on two grounds. At pages 90 to 91, he stated:

> … it seems to me that the *Anisminic* case is distinguishable on two grounds. First, the suggestion made by Lord Pearce that the *Anisminic* case … dealt with a judicial decision, and an administrative or executive decision is different. I think it is. It is true that the Secretary of State has been said to be acting in a quasi judicial capacity, but he is nevertheless conducting an administrative or executive matter, where questions of policy enter into and must influence his decision.
>
> Where one is dealing with a matter of that character, and where, as Lord Denning MR has pointed out, the order is one which must be acted on promptly, it is, I think easier for the courts to construe Parliament as meaning exactly what it said, that the matter cannot be questioned in any court, subject to the right given by para 2, where applicable, and where applicable is made in due time, than where, as in the *Anisminic* case, one is dealing with a statute setting up a judicial tribunal and defining its powers and the question is whether it has acted within them. …
>
> The second ground of distinction is that the ratio in the *Anisminic* case was dealing simply with a question of jurisdiction, and not a case where the order is made within jurisdiction, but it is attacked on the ground of fraud or mala fides. …
>
> … I think there is a real distinction between the case with which the House was dealing in *Anisminic* and Smith on the ground that, in the one case the determination was a purported determination only, because the tribunal, however eminent, having misconceived the effect of the statute, acted outside its

> jurisdiction, and indeed without any jurisdiction at all, whereas here one is dealing with an actual decision made within the jurisdiction though sought to be challenged.

[53] In ***Bethel***, Lord Carnwath cited ***ex parte Ostler*** parenthetically and without disapproval as an example of a time-limited ouster clause that had been upheld. Mr. Brathwaite relied on ***Bethel*** to support his submission that partial ouster clauses are to be distinguished from complete ouster clauses such as what obtained in ***Anisminic*** and that partial ouster clauses may be considered effective. In ***Bethel***, Lord Carnwath expressed the view that courts may find time-limited ouster provisions less objectionable than complete ouster clauses. In that case, the Privy Council considered ***section 6(3)*** of the ***Acquisition of Land Ac***t of the Bahamas which is in these terms:

> Subject to a right of appeal to the Supreme Court as to the legality of the proposed acquisition which shall be filed within thirty days of the publication of the notice or the posting of the same, the notice shall be conclusive evidence that the land is needed for public purpose."

[54] Delivering the opinion of the Board which held that the appellant's challenge to the purpose of an acquisition outside the statutory period could not be sustained, Lord Carnwath stated at paragraph 18:

> In the Board's view the meaning of section 6(3) is clear: if no appeal is made to the Supreme Court within 30 days of publication of the notice, it becomes "conclusive evidence" that the land is needed for a public purpose. The Court of Appeal were wrong with respect to hold that this was no more than a "rebuttable presumption". They were concerned that to hold

> otherwise would result in a deprivation of a right of access to the courts, guaranteed by the constitution. However, there is a marked difference between a complete ouster of the court's jurisdiction and exclusion after a defined period. There is nothing objectionable in principle in limiting the right of access to the court to a relatively short period, in view of the importance attached to certainty in relation to a major development of this kind (see for example *R v Secretary of State for the Environment Ex p Ostler* [1977] 1 QB 122, upholding an absolute six-week period for any legal challenge under the equivalent English legislation).

[55] The Board went on to state at paragraph 19 that "such clauses should be construed strictly" and applying that construction it rejected the respondent's submission that the bar extended to a challenge to the legality of the acquisition. Though registering the fact that time-limited clauses may be considered less objectionable, a significant aspect of the court's reasoning as contained in paragraph 18 is that the provision was "clear".

[56] The other post-***Anisminic*** case cited by Mr. Brathwaite is ***ex parte Huntington***. In it, the Court of Appeal of England and Wales was concerned with ***paragraph 12*** of ***Schedule 15*** of the ***Wildlife and Country Side Act 1981*** which provided:

> (1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 and 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.

> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings.

[57] Simon Brown LJ first reviewed the relevant law at pages 694 and 695. He stated:

> I turn to the authorities. Those most directly in point are Smith v East Elloe RDC [1956] 1 ALL ER 855, [1956] AC 736, Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147, R v Secretary of State for the Environment, ex p Ostler [1976] 3 All ER 90, [1977 QB 122, R v Sec of State for the Environment ex p Kent [1990] JPL 124- the first two decisions of the House of Lords, the last two of this court.
>
> …
>
> These decisions, and in particular the first three, were subjected to close analysis by Mann LJ in the Cornwall application and I can do no better than quote with respectful approval this concluding passage from his judgment ([1992] 3 All ER 566 at 575):
>
> "In my judgment, the decision in Ex p Ostler presents the same insuperable obstacle to [the applicant] as it did to the applicant in EX p Kent [1990] JPL 124. The question as to the ouster clause in the 1981 Act is one of construction and so far as this court is concerned, it has been authoritatively decided. The intention of Parliament when it uses an Anisminic clause is that questions as to validity are not excluded (see [1969] 1 All ER 208 at 244, [1969] 2 AC 147 at 208 per Lord Wilberforce). When paragraphs such as those considered in Ex p Ostler are

> used, then the legislative intention is that questions as to invalidity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but that otherwise the jurisdiction of the court is excluded in the interest of certainty. This was the view of Lord Denning MR (with whom Shaw LJ agreed) and that view is binding on this court. I would, however, have independently formed the same view for the legislative intention seems to me to be plain from the language employed when the two sub-paragraphs of para 12 are taken together. [He was there referring to sub-paragraphs (1) and (3).] The language does not admit of differentiations between degrees (if such there be) or grounds of invalidity, nor does it admit of differing constructions according as to whether the decision to make an order is judicial or administrative in character.

[58] Simon Brown LJ went on to reject the argument that the earlier cases could be distinguished on the basis that the applicants had moved after the statutory time limit while the case before them concerned a decision in respect of which the statute did not provide a right of application. He put it this way:

> The right to apply to the High Court is a right to challenge the validity of a confirmed order; the challenge proposed here is to the validity of an unconfirmed order. Since, the submission ran, this cannot be done under the statutory right of application to the High Court it can, therefore, as in the Anisminic case, be done by way of judicial review.
>
> McClough J rejected this argument. The three earlier cases, as he put it, made-
>
> > "clear that what prevented the decisions under challenge from being questioned in any legal proceedings except those brought under the provisions enabling an application to be made to this court within six weeks was the existence of the statutory scheme as a whole. It is the intention of Parliament in all these provisions that the

> High Court should only become involve when all the administrative steps have been completed."

[59] I might add that the law as explained in ***ex parte Ostler*** and ***ex parte Huntington*** has received strong academic validation and continues to be applied by the Court of Appeal of England and Wales. In ***Administrative Law 10th ed.***, ***Wade and Forsyth*** in wrote in these terms at pages 621 to 622:

> A prominent feature of many modern statutes is a provision which allows judicial review to be sought only within a short period of time, usually six weeks, and which thereafter bars it completely. These provisions have become common, particularly in statutes dealing with the compulsory acquisition and control of land. They are therefore of great importance in administrative law.

[60] The authors go on to emphasise the policy rationale behind these types of clauses and accept the post-***Anisminic*** decisions in relation to them to be good law and good sense. They state at pages 624 to 625:

> The question therefore is whether an order protected by a time-limited ouster clause can be challenged in proceedings brought after the expiry of the time limit on any of the grounds which would render it ultra vires, such as bad faith, wrong grounds, or violation of natural justice in accordance with the principle of the *Anisminic* case.
>
> Both reason and authority dictate a negative answer. Public authorities would be in an impossible position if their compulsory purchase, housing, planning and similar orders were exposed to invalidation by the court after they had invested much public money, for example, in building on land compulsorily purchased. It is true that the remedy is discretionary, and that the court might therefore confine it to cases where this objection did not apply. But it is now clear that

> the court will, despite the *Anisminic* dicta, make a distinction between absolute ouster clauses and time-limited ouster clauses. The latter might well be regarded not as ousting the jurisdiction of the court but merely as confining the time within which it can be invoked.

[61] Quite recently, the legal position was acknowledged in ***Connors et al v Secretary of State for Communities and Local Government et al [2017] EWCA Civ. 1850 (date of decision, 17 November 2017)***, at paragraphs 102 and 105.

[62] Regional judiciaries and academics have also acknowledged the more accommodating approach to time-limit clauses. In ***The Public Service Commission et al v Shillingford Civ App No 10 of 1998, Court of Appeal of Dominica (date of decision, 29 April 1991)***, after reviewing the authorities Byron JA, as he then was, provided the following useful summary of the law:

> These cases reflect important principles. They emphasise that the Court must examine the relevant statute and interpret it in accordance with the strict legal principles of construction. When a statutory provision takes away the jurisdiction of the High Court to enquire into the validity of orders made by inferior tribunals it is necessary to distinguish (1) whether the order is administrative or judicial and (2) whether the clause ousting jurisdiction does so absolutely or merely imposes a limited time within which proceedings to test the validity of the order can be instituted. Where the order is administrative and the clause merely limits the time within which the proceedings may be instituted the time limit will be absolutely enforced. Where the order is judicial and the ouster clause absolute the Court will enquire whether it is a real order or a purported order and one which is in fact null and void and of no effect.

[63] Among Caribbean scholars, ***Francis Alexis*** acknowledges the position in this way in ***Changing Caribbean Constitutions 2nd ed at 17.161:***

> At times an Act seeks to oust the jurisdiction of the Courts, not altogether, but only after a certain time, say, six weeks, three months, six months; this is a time limit clause, not an outright ouster clause. The Court tends to interpret time limit clauses literally, letting them bar review at the expiry of the allotted time.

[64] Turning to ***the TCPA***, I am satisfied that the statutory provisions under review manifest a clear legislative intent to provide a special statutory regime for judicial review of decisions of the Minister made pursuant to ***section 18(1)*** of ***the TCPA***. ***Section 69(1)(c)*** provides that the decisions of the Minister "shall not be questioned in any legal proceedings whatsoever". Those are strong words but they are subject to the allowance made in ***section 72(1)(b)***. That sub-section gives "aggrieved" persons a six-week period from the date of the decision within which to institute proceedings on the grounds it specifies. ***Section 72(3)(a)*** go on to stipulate the available remedies.

[65] These provisions constitute a complete statutory code for judicial review of the decisions of the Minister made pursuant to ***section 18***. I have detected no ambiguity and therefore no basis on which it is open to me to construe them in such a way as to allow for court action outside of the six-week time limit or pursuant to **the AJA** as has happened in this case, or in any way other than provided for in ***section 72*** of **the TCPA**.

[66] I must confess that Professor Ventose's submission as to who may be considered as "persons aggrieved" for the purposes of ***section 72*** has caused me some anxiety; as has the realisation that the effect of the position I have taken in respect of these provisions would be to exclude the possibility of challenge by persons who may only become aware of a ***section 18*** planning decision after the expiration of the six-week period. But, it is not for me to modify the clear words of section ***69(1)(c)*** to avoid such eventualities. The scope of ***section 72*** does not touch the interpretation of the former provision.

[67] It is clear too that I must reject Professor Ventose's submission to the effect that the time bar in ***section 72*** is merely procedural or that it can be waived by the respondents. In respect of statutory schemes akin to that under consideration, the court has no power to extend the time for making provisions. The bar is substantive and not procedural. If it is not observed the claim must fail. For this reason, it matters not whether ***section 72*** was "pleaded" or not by the respondents.

[68] Also, it must be open to Ms. Natalie Sandiford to make submissions in this respect. She has an obvious interest in the subject matter of these proceedings. Pursuant to an order of this Court made without objection by Mr. Saner's Counsel, she has been served with notice of these proceedings and permitted to file written submissions. This is provided for by ***CPR***

56.9(2)(b) which provides that the Court may "allow any person … appearing to have a sufficient interest in the subject matter of the application to be heard whether or not served with the application".

[69] I am fortified in my view on ***sections 18***, ***69*** and ***72*** of ***the TCPA*** by a review of their legislative history. ***Sections 69*** and ***72*** formed part of ***the TCPA*** when it was enacted in 1965 but for ***paragraph (e)*** of ***section 69(3)*** which was added in 1998 by an amendment brought about by section 43 of the ***Coastal Zone Management Act, 1998-39***. At the date of the enactment of *the* ***TCPA***, time-limit review clauses were well known to the law. ***Wade and Forsyth*** inform at page 622 that the first example of that type was provided in the ***United Kingdom by the Housing Act 1930***. At that time also, ***Smith*** was the dominant authority in respect of this type of provision and favoured its effectiveness. Given the strong historical influence of English law on our law and the highly persuasive force of decisions of the House of Lords in this jurisdiction, I must take it that Parliament was aware of that case and the meaning it had generally given to clauses akin to ***sections 69*** and ***72***.

[70] Parliament enacted ***the AJA*** in 1983. ***The*** **AJA** provides generally for judicial review of administrative acts or omissions, terms which are defined by section 2 to include the decisions of Ministers made pursuant to any statutory power or duty. On the face of it, this includes Ministerial decisions made

under ***the TCPA***. However, ***the AJA*** does not repeal any of the provisions contained in ***the TCPA***.

[71] The only reference to ***the TCPA*** in ***the AJA*** is to be found in the Second Schedule. In effect, ***section 16(1)*** of ***the AJA*** provides that the law relating to natural justice applies to a decision of the Minister to approve a development plan under ***section 9*** of ***the TCPA***, and a decision given upon a review under ***section 19*** of that Act. ***Section 69(1)(a)*** and ***(3)*** make the same statutory scheme that is applicable to ***section 18*** decisions applicable to those made pursuant to **section 19**. ***Section 69(1)(a)*** and ***section 71*** establish a similar scheme in respect of proceedings to question the validity of development plans.

[72] The ***AJA*** has not expressly repealed any of the provisions of ***the TCPA***. An application of the maxim that a general provision does not derogate from a special one must mean that ***the TCPA*** provisions remain intact. The maxim is expressed more fully with copious reference to authority by **Francis Bennion** in **Bennion on Statutory Interpretation 5th ed.**, **section 88**. He states there:

> Where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one. Accordingly the earlier specific provision is not treated as impliedly repealed.

[73] In my judgment, there is good evidence of the parliamentary intention to preserve the statutory scheme contained in ***the TCPA*** notwithstanding the introduction of ***the AJA***. The 1998 amendment to ***section 69*** came 15 years after the enactment of ***the AJA*** and it presumes the continued existence of ***section 69***.

[74] It cannot therefore be contended that the judicial review schemes in the ***TCPA*** have been impliedly repealed by ***the AJA***. Indeed, that argument was not put by Professor Ventose. I understand him to suggest that there now exists a dual regime and that ***section 72*** of ***the TCPA*** does not preclude the making of an ***AJA*** application in relation to ministerial decisions made pursuant to ***section 18*** of that Act.

[75] I agree with that submission but only to a point. It seems to me that some duality of jurisdictions exists since ***section 69(4)*** expressly acknowledges the existence of "any jurisdiction of any court" in respect of a Minister's refusal to act. It also seems to me then that an individual is entitled to pursue an application for an order of mandamus pursuant to the provisions of ***the AJA*** where the Minster refuses to make a decision on an application referred to him pursuant to ***section 18***. Beyond that, the effect of ***section 69*** is to deny access to the Court in respect of a decision of the Minister pursuant to section 18 unless via the portal provided in ***section 72***.

[76] In the circumstances, I agree with Mr. Brathwaite and Counsel for the respondents that I have no jurisdiction to hear Mr. Saner's substantive claim and therefore, cannot grant him interim injunctive relief sought.

IS THERE A SERIOUS ISSUE TO BE TRIED?

[77] I should add that in any event, when regard is had to the grounds and particulars of the substantive claim, and the evidence, the Court is not satisfied that there is a serious question to be tried. My reasons for so concluding follow.

THE STATED CASE

[78] As pleaded, Mr. Saner's claim against the Minister is that the latter's decision was based on an error of fact; and that he unreasonably permitted the development. An examination of the "particulars of facts and matters" that he relies on, as set out on the fixed date claim form manifests a fundamental deficiency. I reproduced those particulars at paragraph 10.

[79] The only assertions in the particulars which purport to support the claim against the Minister are those contained in paragraph 9.7. There, Mr. Saner asserts that the Minister "failed to take account of relevant information because this information was not before him". He then goes on to assert that what was stated on the Planning Application "transpired to be a total misrepresentation of facts to the Chief Town Planner". He states this to be

the case since the construction has progressed to include a second storey to the existing residence as well as an entirely separate building.

[80] The stated case does not specify the relevant information of which the Minister failed to take account, neither does it contain any statements specifically indicating why his decision is unreasonable. The case appears to rest exclusively on the assertion that Ms. Natalie Sandiford is carrying out development not applied for on the Planning Application.

[81] Indeed, the nub of Mr. Saner's Counsels' submission is that were the Minister made aware that the development involved the construction of an additional building, he would have brought to bear other considerations in respect of the Planning Application. They urge that in such a case, he might have refused the application or have granted permission with additional or other conditions.

[82] At paragraphs 9.3 to 9.5 of his pleaded case, Mr. Saner acknowledges that the Minister granted permission for the development applied for on the Planning Application. If Ms. Natalie Sandiford is carrying out any development that is not within the scope of the Permission, that cannot establish that the Minister's decision was unreasonable or that he acted under an error of fact. There is no assertion that the Minister acted improperly or incorrectly in

respect of the application that was before him and for which he gave permission.

[83] Mr. Saner's Counsel cited ***Connolly & Havering LBC v Secretary of State for Communities & Local Government [2009] EWCA Civ 1059*** as an example of a case in which a mistake of fact formed the basis of a successful challenge. In that case, the court held that a planning inspector's decision could be quashed, where the local authority had failed to supply the inspector with material information about the planning history of the site which might have made a difference to the outcome of the application.

[84] Mr. Saner's pleaded case is distinctly different. It is that the Minister granted permission for the development applied for. It contains no assertion of any material information that was not drawn to the Minister's attention. If subsequent to the grant of Permission Ms. Natalie Sandiford has carried out some development without permission, how can that be said to have affected the Minister's decision-making process? That may point to a breach of the existing conditions on the Permission. It may even expose her to whatever consequences ***the TCPA*** provide for in respect of unlawful developments; but it provides no basis on which an argument can be constructed that the Minister's decision was based on an error of fact, or that it is unreasonable.

THE EVIDENCE

[85] Nothing in the evidence brings Mr. Saner's case to the required legal threshold. What is the evidence? I have already detailed the planning documents. I think it is enough to categorise the remainder of the evidence and demonstrate that evidence of that kind is incapable of supporting Mr. Saner's case. However, out of an abundance of caution, I will provide details.

[86] In his first affidavit, Mr. Bain deposed that prior to the development, there were two houses on the site, "an existing timber house to the roadside" and "a mixed wall and concrete single-storey house known as Plombagine Cottage". His further evidence is that it appears that a new building is being erected on the site; and that in September 2017, Ms. Natalie Sandiford responded to a complaint on a holiday rental website on which she advertised the cottage, that the cottage is not under construction but "we are adding another unit next to the cottage". In his second affidavit, he refers to and exhibits a number of photographs said to have been taken at various stages of the development on the site ("the photographs"). He indicates the directions from which the photographs were taken but gives no evidence as to exactly what they depict.

[87] I have been unable to discern from the photographs whether or not a third building is being constructed. Mr. Browne deposed that his Department

visited the site on 28 September 2017 and that building works had started on the southern section of the residence to renovate and make extensions to it. His evidence is that the development for which planning permission was granted consists of two dwelling units and constitutes a residence. His further evidence suggests that the development is being carried out in accordance with the Permission and that Mr. Bain's statement that there are three buildings on the site is erroneous and a misrepresentation.

[88] Mr. Browne and Ms. Pamela Sandiford deposed that the "renovation and extension" entail converting the existing timber and stone house to concrete and extending it by adding an additional floor and a two-storey extension on the southern side of the building. Ms. Pamela Sandiford's further evidence is that Ms. Natalie Sandiford decided to approach the construction in two phases, starting with part of the extension to the south of the property.

[89] Relying on Mr. Browne's evidence, Counsel for the respondents echoed his contention that Mr. Saner is mistaken. However, I am not required at this stage to resolve any conflict in the evidence as to the number of buildings on the site, and I make no findings in that respect. As I have already stated, whether or not a third building is being constructed on the site provides no evidence to support a finding that there was an error of fact on the part of the Minister, or that his decision was unreasonable.

[90] I turn to Mr. Saner's evidence as it relates to planning policy. He deposed that there are two publications which inform planning decisions and guide the public. He identified these as the Applicant's Handbook and Guide to Planning 2nd Edition; and the Applicant's Handbook and Guide to Coastal Planning, 2010. Mr. Saner's Counsel made references to these documents during the course of their submissions and the parties agreed that Mr. Saner would put them into evidence. Nonetheless, I do not find it necessary to refer to those documents further.

[91] Mr. Bain deposed further that for residential purposes, the aggregate ground floor area of the building "shall not exceed 40% of the net site area of the plot on which the building is situated". He went on to state though that "[the Minister] may relax the plot coverage standards as he deems fit". His evidence is that he had not seen the approved site plan to confirm it, but he believes that the site may be overdeveloped. The essence of Mr. Browne's evidence on this point is that the 40% limit on plot coverage is not normally associated with the type of planning application made by Ms. Natalie Sandiford; and that the Chief Town Planner can grant planning permission with a larger plot coverage.

[92] Again, I am not required at this stage to resolve any conflict between these witnesses. What is significant is that even on Mr. Bain's own evidence, the

issue of plot coverage cannot form the basis of any complaint against the Minister's decision. He stated that the Minister may relax what he asserts is the 40% limit "as he deems fit" and there is no assertion that the Minister acted improperly, unlawfully, or unreasonably in that respect.

[93] At paragraphs 24 and 25 of his first affidavit, Mr. Bain exposes the fallacy on which Mr. Saner's case rests. He deposed as follows, at paragraph 24:

> The description of the development on the application as a "renovation and addition" to an existing building and not a new building, explains why the conditions normally imposed with respect to a new building have not been imposed in this case.

[94] Mr. Bain went on to identify four conditions which he considered would normally be imposed in the case of a third building being constructed. He then stated at paragraph 25 that there was a relaxation in standards in this case because the development was misrepresented to the Minister and, at paragraph 30, he opined:

> Had [the Minister] known that the development was in fact an addition of a third building on the site (the error of fact), he would likely have arrived at a different decision or would have imposed more stringent and usual conditions associated with new buildings on coastal property. However, having had regard to incorrect factual information, [the Minister] made a decision that is unreasonable" and inconsistent with planning policy.

[95] Taken together, the respondents' evidence is that the Minister was aware that the Planning Application involved renovating or rebuilding an existing residence to create a two-unit residence; the Planning Application included a

Site Plan, Floor Plans, Elevations and a Location Plan; that the Minister approved the applications after carefully considering it; and that he took account of the advice as required and was guided by all relevant considerations. Mr. Maynard deposed that the Minister does not agree that he was misinformed; and that he denies that he irregularly or improperly exercised his discretion.

[96] That evidence gives rise to several issues of fact but, again, I am not called upon to resolve them. I must return to the fallacy in Mr. Bain's evidence which is the same as that evident in Mr. Saner's pleaded case. The Minister did not have before him any application, and gave no permission, for the construction of an additional building. Mr. Saner takes no issue with the conditions on the Permission as they relate to the actual development for which the planning permission has been granted.

[97] There was some assertion in Mr. Bain's evidence that Mr. Saner was not notified of the Planning Application. His Counsel submitted that such notification would be required in cases involving a change of use. They accepted that no notification would have been required with respect to the Planning Application since it did not involve a change of use.

[98] That is the extent of the evidence that is relevant to this issue. Taking Mr. Saner's case at its highest, and assuming the facts to be as asserted by Mr.

Bain, there is no evidence of any error of fact that existed at the time of the Minister's decision. Additionally, there is nothing in the evidence on which a claim that the Minister acted unreasonably can be grounded.

[99] Mr. Saner has complained that he has not had sight of the plans and drawings which were submitted with the application. His Counsel submitted that these are part of the planning application and that one cannot know the full extent of what was applied for until they are seen. Even if that is so, this Court cannot be required to grant interim injunctive relief on a speculative basis as to what these plans and drawings may or may not show.

[100] At paragraph 295 of their written submissions, immediately after their submissions in relation to the alleged error of fact, Counsel for Mr. Saner submitted that "[w]ithout repeating the above analysis, it appears equally arguable that the Second Respondent made findings or assumptions of fact that could not be reasonably based on the evidence". Counsel did not indicate what those findings or assumptions were neither is there anything in the evidence that addresses that. However, if it is that the submission is in some way dependent on the submissions that were advanced in respect of the alleged error of fact it must be doomed to fail for the same reasons that I have already developed. No clear submissions were advanced in amplification of paragraph 295 and I find no merit in that submission.

[101] I am not persuaded that what is before me at this stage discloses that there is a serious question to be tried. The existing evidence does not meet the relatively low legal threshold that must be met. The material available to the Court at this stage fails to disclose that Mr. Saner has any real prospect of succeeding in his claim.

THE SECOND LIMB

[102] The second limb of the ***American Cyanamid*** test does not arise. However, I will state that were I called upon to embark on it, I would have been inclined to exercise my discretion against the grant of interim injunctive relief. As between Mr. Saner and the respondents, damages have no role to play. Mr. Saner has alleged nothing on his claim form to suggest that there is any harm or loss to him for which a monetary compensation would be appropriate. Equally, there is no question of harm or loss to the respondents.

[103] I would have had to consider Ms. Natalie Sandiford's interests also. Ms. Pamela Sandiford's evidence is that any injunction would cause hardship on the former and on her workers and suppliers who have received monetary advances with an expectation of being paid the balances on completion. She also stated that a delay in completion of the project would affect her sister's ability to enjoy her property and she demonstrated that it would also operate to her financial detriment.

[104] Counsel for Mr. Saner submitted that any harm to Ms. Natalie Sandiford could be made good in money. I considered the position to be rather more complicated. Apart from the general inconvenience which she would suffer if the relief is granted, the contractual rights of her contracted workers and suppliers would also be affected.

[105] Mr. Saner's delay in making this application would have weighed heavily against the grant of the injunction, given that Ms. Natalie Sandiford has advanced her project substantially since he first developed some concern. Mr. Bain's evidence is that Mr. Saner advised him that he started paying attention to the development at the end of July 2017. It is clear from the photographs said to have been taken on 20 July 2017 that the foundation for what Mr. Saner alleges to be a third building had been established. He offers no explanation for his inactivity between that period and 2 November 2017 when Mr. Bain started to make inquiries at the Planning Office on his behalf. Mr. Bain deposes that Mr. Saner stated that he became particularly interested when he observed that a two-storey building was being constructed which overlooked directly into his master bedroom patio.

[106] The photographs of December 7 2017 show an advanced structure with blockwork rising beyond the first floor and near to, if not at, ring-beam for the second floor. Ms. Pamela Sandiford deposed that it is at an advanced

stage with finishing works being carried out on the first floor, including installation of tiles, windows, doors, plumbing and electrical works. This evidence has not been refuted. I make no finding in respect of it but I am satisfied from Mr. Bain's photograph that some aspects of the development are at an advanced stage.

[107] Counsel for Mr. Saner submitted that if the injunction is not granted, the final outcome of the substantive action "is likely to be watered down due to the possible completion of the development". They urged further that public interest would not be served "by permitting the flawed permission to reign over a development that may otherwise have been denied had the proper considerations been taken into account".

[108] I was not persuaded by that argument. If Mr. Saner succeeds in his claim and the Permission is held to be unlawful, the consequences for Ms. Natalie Sandiford must be the same regardless of the stage of completion of the development. If I were to refuse the injunction and it is subsequently granted at trial, the public interest would be vindicated and Mr. Saner would suffer no irreparable harm. It is Ms. Natalie Sandiford who might suffer significantly if the injunction is refused and subsequently granted. Mr. Brathwaite has indicated that she is aware of that risk and that it is one she is prepared to take. She was steadfast in her refusal to give any undertaking even to

facilitate a delayed hearing of the application. It is no part of this Court's duty to protect her from that risk.

[109] Taking account of all the factors, Mr. Saner's delay in seeking this relief, the advanced stage of the development, the inconvenience to Ms. Natalie Sandiford, the contractual rights that might be affected by the grant of the relief sought, the fact that there would be no harm to Mr. Saner or the respondents; and that the public interest would not be significantly compromised, I am inclined to the view that the balance of justice would have favoured the refusal of the application.

DISPOSAL

[110] I have determined that the application for interim injunctive relief must fail because (i) ***section 69*** of ***the TCPA*** bars Mr. Saner from the substantive relief he seeks; and (ii) in any event, he has not satisfied this Court that there is a serious question to be tried. I have also opined that were I required to determine the issue, I would have held that the balance of justice favours the refusal of the application.

[111] The application is therefore dismissed. I will hear the parties on the question of costs.

OLSON DeC. ALLEYNE
JUDGE OF THE HIGH COURT