Hilary Term
[2024] UKPC 3
Privy Council Appeal No 0116 of 2021

JUDGMENT

John Mussington and another (Appellants) *v* Development Control Authority and others (Respondents) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua & Barbuda)

before

Lord Hodge
Lord Sales
Lord Leggatt
Lord Burrows
Lord Boyd

JUDGMENT GIVEN ON
27 February 2024

Heard on 8 November 2023

Appellants
Marc Willers KC
Leslie Thomas KC
Stephen Cottle
Thalia Maragh
Adam Riley
(Instructed by Sheridans (London))

1st and 3rd Respondents
David Dorsett
Carla Brookes-Harris
Rose Ann Kim
(Instructed by Teacher Stern LLP (London

2nd Respondent
Hugh C Marshall Jnr
Kema Benjamin
(Instructed by Marshall & Co (Antigua))

LORD BOYD:

1. The issue in this case is whether the appellants have standing to challenge the grant of a development permit for the construction of an airstrip on the island of Barbuda. The airstrip was the first phase in the construction of an airport that would include a terminal building.

2. The appellants are Barbudans resident on Barbuda. The first appellant is a marine biologist by training, and recently retired as the principal of Sir McChesney George Secondary School on the island of Barbuda. The second appellant is a retired teacher.

3. The first respondent, the Development Control Authority ("DCA") is the statutory planning authority for Antigua and Barbuda, with responsibility for the administration of the development control regime under the Physical Planning Act 2003. The second respondent is a statutory authority responsible for operating airports in Antigua and Barbuda and is responsible for the construction of the airport. The third respondent is the Attorney General as representative of the Government of Antigua and Barbuda.

4. On 29 April 2021 the Court of Appeal of the Eastern Caribbean Supreme Court Antigua and Barbuda dismissed the appellants' application for judicial review, holding that they had not established standing to bring their application.

The planning process in Antigua and Barbuda

5. The DCA was established by the Physical Planning Act 2003, section 4(5). Its functions include the regulation of development "having regard to the need to secure consistency and conformity with the development plan, if any": section 5(3)(b). The Chief Executive is the Town and Country Planner. Part III of the Act provides for the preparation of a development plan by the Town and Country Planner. Section 11 makes provision for consultation on the draft plan, including, in respect of land in Barbuda, with the Barbuda Council. The draft plan is then submitted to the Minister. If the Minister accepts the plan, with or without modifications, the Minister submits the plan for the approval of Parliament: section 12(4).

6. In December 2011, a "Sustainable Island Resource Management Zoning Plan for Antigua and Barbuda (including Redonda)" was prepared. It was considered and approved by the Cabinet, which decided that the plan was to be submitted by the Minister for the approval of Parliament. The plan is yet to be submitted and approved by Parliament. Where a plan has been prepared but not yet approved, the DCA shall, in

considering any application for development permission, give principal consideration to, and be guided by the plan: section 16(1)(c).

7. Part IV of the Act makes provision for the control of development of land. Section 17 provides that no person shall commence or carry out any development of land except in accordance with a development permit. Applications for a development permit are to be made to the DCA through the Town and Country Planner: section 19. Section 22 provides for publicity for applications. With regard to certain classes of development, the Town and Country Planner must, by written notice, require the applicant to give details of the application to such persons and publish details of the application as may be specified in the notice: section 22(1). That includes development in respect of which an environmental impact assessment ("EIA") is required: section 22(2)(f). Where an EIA is required the DCA may not grant a development permit unless it has first taken the EIA into account: section 23(7). An EIA is required for the proposed construction of an airport: Third Schedule. In determining an application for a development permit the DCA must take into account any report, representations or comment submitted as a result of the requirement to publicise the application: section 22(4). A development permit may be unconditional or be subject to such conditions as the DCA considers fit: section 26(1). In summary, the process affords interested parties an opportunity to comment on and make representations on applications for development permits, particularly where an EIA is required. These must then be taken into account by the DCA in determining the application.

8. Part V of the Act provides for enforcement. In short, where it appears to the Town and Country Planner that any development of land has been carried out without a development permit, or that any conditions or limitations on the permit have not been complied with, the DCA may take enforcement action by serving an enforcement notice: section 34(1). The enforcement notice may require the person on whom the notice is served to remedy the breach: section 34(8). That may include the restoration of land to the state the land had been in before the breach took place. In determining whether to serve an enforcement notice the DCA must take into account, so far as relevant, a number of material considerations set out in section 35(1). These include any statement of policy issued by the Minister relevant to the development, the nature and extent of the breach, the extent or likely extent of damage to the natural environment, the expense likely to be involved in compliance with the notice and the benefits to the community, if any, resulting from the development.

9. There is no statutory requirement to publicise an EIA. The Environmental Protection and Management Act 2015, however, provided for the establishment of an Environment Registry by the Environment Department: section 77. The list of documents to be held in the Registry included EIAs. Section 78 provided for public access to the Registry. The 2015 Act has been repealed and replaced by the Environmental Protection and Management Act 2019. Sections 77 and 78 of the 2015

Act have been replaced with similar provisions in the 2019 Act (sections 87 and 88). The Board was informed that to date no Environment Registry has been established.

The factual background

10. Work commenced on the airstrip around September 2017, while the majority of Barbudans were off the island following Hurricane Irma.

11. Mr Mussington visited the site on 1 November 2017. He met the project manager who confirmed that the area was being cleared for the construction of an airport. Mr Mussington asked him whether he had planning permission and whether an EIA had been carried out. He did not get a straight answer. A few days later Mr Mussington was visited by police officers. They advised him that they were delivering a warning from the Commissioner of Police not to trespass on the construction site or to return to it without permission.

12. Mr Mussington felt himself qualified to question the impact of the airstrip on the environment and whether proper procedures had been followed. He has an undergraduate degree in biology and chemistry and a postgraduate diploma in resource management and environmental studies. He has 30 years of experience in the field of marine biology with particular knowledge of coastal zone systems around Antigua and Barbuda. He has worked as a consultant marine biologist on a number of EIAs in the coastal zone of Antigua and Barbuda and other Caribbean islands.

13. Mr Mussington described some of what he found on his visit in an affidavit dated 28 June 2018:

> "As a Barbudan, I am familiar with the area which is being cleared and it is within my personal knowledge that this area is the feeding ground for the Barbudan Fallow deer habitat and breeding area for the red footed tortoise and other wild life such as the wild boar, Barbuda Warbler, other birdlife and associated ecologically important vegetation. I have also seen from my visit that ancient trees including the White Wood have been cleared for the airport development. This caused me extreme concern and distress. Years of history and what was a site of environmental beauty was being devastated in my opinion. I could not understand why this was happening and it made me concerned as to whether the proper procedures had been followed."

14. In a later affidavit (18 September 2018) Mr Mussington testified that he was very concerned about the impact on archaeology, hydrology and biodiversity of Barbuda. In addition to concerns for the red footed tortoise and Barbuda fallow deer he noted that there was no assessment of whether the operation of the airport would affect the Frigate Bird Sanctuary.

15. At the time of Mr Mussington's visit, the second respondent had not sought, and did not have, a development permit as required by section 17 of the Physical Planning Act 2003. An application for a development permit was made by the second respondent on 27 November 2017.

16. On 4 December 2017 the Department of the Environment ("DoE") wrote to the Town and Country Planner, Mr Frederick Southwell. The letter stated that, as part of the review process, a site visit had taken place on 28 November 2017. The DoE had been able to observe that the work was well advanced and that many of the negative environmental impacts had already occurred. The letter noted that this could have been avoided had the application been received and reviewed by the DoE prior to the commencement of work. The letter made significant criticisms of an EIA dated 26 June 2017 ("the first EIA") carried out by the developers. It stated that it "reflects significant gaps" and that critical aspects of the archaeology, biodiversity and geology at the site were not recognised and captured by the EIA. The letter continued:

> "several key elements such as ground penetrating radar analysis, hydrogeological study and prehistoric site assessments were not carried out during the conduct of the EIA."

17. The location of the airport had also changed – 10-12 acres of land had originally been cleared at a site north of the current location and had damaged an archaeological site called Plantation Well. An annex to the letter listed environmental risks/concerns as including breach of process with regards to three matters: that construction had commenced prior to application; that no Barbuda Council endorsement accompanied the application; and that the EIA had been presented with significant gaps. It also noted loss of archaeological and prehistoric sites and hydrogeological concerns.

18. On 20 February 2018 a number of Barbudan citizens, including the appellants, wrote to the Prime Minister stating amongst other things that the airport was being developed without the benefit of a development permit and without the benefit of any proper environmental impact assessment. They asked him to take all necessary measures to enforce planning control and stop the development of the new airport on Barbuda with immediate effect. There was no response to the letter. A letter before

action was sent to the third respondent on 11 May 2018 by attorneys acting for the appellants.

19. On 26 June 2018 Mr Mussington wrote to the Town and Country Planner requesting information about the development including whether an EIA had been completed satisfactorily. On the same date he wrote to the DoE requesting a copy of the Environment Division's review of the EIA. There was no response to either letter.

Proceedings in the High Court of Justice

20. The appellants commenced proceedings challenging the construction of the airstrip in July 2018. On 2 August 2018 Wilkinson J granted them leave to apply for judicial review and an interim injunction restraining the respondents and their servants or agents from causing or permitting any further works to be carried out on the airport at Barbuda until further order. The respondents successfully appealed to the Court of Appeal against the interim injunction, which was set aside on 11 September 2018 on the ground of procedural unfairness. During that appeal, the respondents disclosed new material showing, inter alia, that a fresh application had been made by the Government of Antigua and Barbuda on 13 July 2018 for a runway for Code 4C aircraft. The application had been granted by the DCA and a development permit had been issued on 18 July 2018. The new material also showed that a further EIA ("the second EIA") had been carried out in May/June 2018 and that hydrological, geological and ground penetrating radar reports were produced in July 2018. The second EIA and accompanying reports had not been disclosed by the respondents and were not before the Court. They have still not been disclosed or made public and were not before the Board on the hearing of this appeal.

21. In an affidavit dated 19 September 2018 Mr Southwell stated that he had granted the permit on 18 July 2018 on the strength of an oral conversation with the Senior Environmental Officer, Ato Lewis, who had told him that the DoE had reviewed the second EIA and found it satisfactory. The Chief Environmental Officer, Dianne Black-Layne, subsequently wrote to Mr Southwell on 10 August 2018 recommending conditional approval of the development and setting out the conditions that she considered should be imposed. In a letter dated 10 September 2018, Mr Southwell informed the second respondent that conditional approval was granted, subject to the conditions that the Chief Environmental Officer had recommended. No mention was made of the grant of the development permit on 18 July 2018. It is assumed that the permit dated 10 September 2018 was meant to supersede the prior permit. Section 33 of the 2003 Act makes provision for the modification or revocation of a development permit. There is no evidence before the Board that this procedure was followed in respect of the permit dated 18 July 2018.

22. The Board requested sight of the conditions attached to the development permit. In response the Board was informed that the DCA had granted conditional approval for the development of the airstrip in accordance with a letter dated 21 June 2021 to the DCA from the DoE. The conditions are said to include a requirement for an environmental management systems and environmental management plan. The letter does not appear to relate to the application made in 2018 but to a later application made in 2021 with the reference #215-2021. The development permit with conditions has not been exhibited to the Board.

23. The appellants made a fresh application for an interim injunction restraining the respondents and their servants or agents from causing or permitting any further works to be carried out on the airport at Barbuda until the final hearing of the claim or further order. On 24 September 2018 the appellants amended their claim form to challenge the 18 July 2018 decision to grant a development permit for the airport runway. On 11 October 2018 the appellants applied for permission to re-amend the claim form to challenge the decision to grant the development permit dated 10 September 2018. That application was never determined by the Court. The second respondent was successful in an application to strike out the claim against it but the Court of Appeal subsequently reinstated it as a respondent.

24. The appellants' application for an interim injunction and directions was heard by Wilkinson J on 3 April 2019 and 17 December 2019, following the reinstatement of the claim against the second respondent. As part of their case the appellants exhibited a report dated August 2019 prepared by Deborah Brosnan and Associates ("the Brosnan report"), commissioned for the Government, reviewing in detail the environmental impact of the airport and recommending mitigation measures. The Court found the report very instructive. The Court concluded however that the balance of convenience lay against the granting of an interim injunction. On 7 February 2020 Wilkinson J handed down judgment refusing the application.

25. At para 26 of the judgment Wilkinson J noted that a matter of standing had been raised. The Court observed that section 25(2)(a) of the 2003 Act provided that the DCA shall give consideration to any representations made by a person with regard to the application or the probable effect of the application. Wilkinson J concluded that it appeared that Mr Mussington and Ms Frank would be captured by this provision in their interaction with the DCA. Any further discourse on the issue would be reserved for trial.

26. The appellants appealed to the Court of Appeal. The second respondent counter-appealed on the issue of standing. On 29 April 2021 the Court of Appeal handed down judgment dismissing the appeal, allowing the counter-appeal and dismissing the claim outright on the ground that the appellants had not established on the face of their application standing to bring the judicial review claim.

The Civil Procedure Rules

27. The relevant parts of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("CPR") are as follows:

> "Who may apply for judicial review
>
> 56.2 (1) An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.
>
> (2) This includes –
>
> (a) any person who has been adversely affected by the decision which is the subject of the application;
>
> (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
>
> (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
>
> (d) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application;
>
> (e) any statutory body where the subject matters falls within its statutory limit; or
>
> (f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.
>
> Judicial Review – application for leave
>
> 56.3 (1) A person wishing to apply for judicial review must first obtain leave.

…

(3) The application must state –

…

(h) whether the applicant is personally or directly affected by the decision about which complaint is made;

(i) if the applicant is not personally or directly affected – what public or other interest the applicant has in the matter;"

The Decision of the Court of Appeal

28. The judgment of the Court of Appeal, with which Pereira CJ and Michel JA concurred, was given by Webster JA. The Court noted that CPR r 56.2 did not define "sufficient interest" but listed six categories of persons or bodies who satisfy sufficient interest. The list was not exhaustive but the Court had not been directed to any case where an applicant did not rely on one of the categories. In this case the appellants had relied on sub-paragraph (a) and submitted that they were persons adversely affected by the development and therefore had sufficient interest to apply for judicial review. The case of *Walton v Scottish Ministers* [2012] UKSC 44; [2013] PTSR 51; 2013 SC (UKSC) 67, to which the Court had been referred, did not assist. It was not a judicial review case. The issue had been whether the appellant in *Walton* was a "person aggrieved" under the Roads (Scotland) Act 1984. It had nothing to do with the requirement for an applicant to have a sufficient interest to apply for judicial review under the UK equivalents of CPR r 56.2. The case did not alter the common law position that a busybody or person who is applying "simply as a citizen" cannot question the decisions of a public body using judicial review. Not every interest would qualify under rule 56.2. There must be a sufficient interest.

29. The Court found that the appellants were not adversely affected by the airport development in the sense contemplated by rule 56.2. They were not persons with the appropriate qualifications to bring the application on behalf of others who have a sufficient interest. In short, the Court found that the appellants fitted the legal description of busybodies.

Grounds of appeal

30. The appellants submit, first, that the Court of Appeal misdirected itself on the relevance of *Walton*. Secondly, they maintain that in failing to produce the EIAs in the judicial review proceedings the respondents had failed in their duty of candour to assist the Court. If it were established that the EIA was inadequate, that would assist the Court in determining whether the appellants had standing to complain about the damage to the island's environment, including the groundwater supply. Thirdly, there was a failure to appreciate the relevance of the statutory framework, in particular those parts of the Physical Planning Act 2003 which provided for public consultation on large developments requiring an EIA. Fourthly, it was inappropriate to determine the issue of standing at the interlocutory stage.

Respondents' position

31. The respondents raise two matters which may be dealt with as preliminary issues; first, whether or not the appeal is academic and, secondly, whether the third respondent is a proper party to the proceedings.

Is this appeal academic?

32. The respondents submit that the appeal before the Board is academic and that the Board should accordingly refuse to hear the appeal. The airstrip had been substantially completed, as had the terminal building and it was contemplated that the airport would shortly be operational. Even if the airstrip was built in violation of development control the airstrip could not be "unbuilt". Nor is it proposed that it be destroyed so that the land be returned to its undeveloped state. That was now an impossibility. Since the hearing, the Board has been informed that the DCA had granted a certificate of completion dated 20 November 2023 certifying that the Government had successfully complied with the DCA's requirements for the development of the airstrip. On the same date the DCA issued a certificate of completion in respect of the terminal building.

33. In granting permission to appeal the Board was satisfied that the appeal raised a question of law of general public importance. The issue of standing is not academic; it relates directly to a live issue between the parties which is yet to be determined, namely whether the grant of the development permit was outwith the power of the first respondent. The fact that the airstrip is complete does not render the question moot. If, as a result of any subsequent procedure, a court finds that the DCA acted outwith its power then it will be for the court to determine what remedy, if any, should be afforded to the appellants. The remedies potentially available would include an order requiring the land to be restored to its original state.

Is the third respondent a proper party to the proceedings?

34. The Attorney General submits that he is not a proper party to the judicial review proceedings as the Government of Antigua and Barbuda did not take any of the impugned decisions: *Bahamas Hotel Maintenance & Allied Workers Union v Bahamas Hotel Catering & Allied Workers Union* [2011] UKPC 4.

35. The Board is satisfied that the Attorney General, as the nominal representative of the Government of Antigua and Barbuda, is a proper party to the proceedings. The decision to build an airport on Barbuda was taken by the Cabinet. The Government made the application for the development permit on 13 July 2018. It is the holder of the development permit and has a clear interest in any remedy that may be imposed if the appellants are successful.

Standing

Eastern Caribbean Rules

36. The Eastern Caribbean CPR r 56.2 provides a very liberal and relaxed test of standing in judicial review proceedings: *Attorney General v Martinus Francois ("Francois")* Civil Appeal No 37 of 2003, per Rawlins JA at para 151. All that applicants require to show is that they have "sufficient interest" in the subject matter: CPR r 56.2(1). CPR r 56.2(2) contains a non-exhaustive list of persons who will be accorded standing. That is clear from the use of the word "includes" at the start of CPR r 56.2(2): *Treasure Bay (St Lucia) Ltd v Gaming Authority* SLUHCV 2011/0456 25 September 2014, per Ramdhani J para 73. The same point was made by Fraser J in the Jamaican Supreme Court (*Young v Kingston and St Andrew Municipal Corporation* [2020] JMSC Civ 251 at para 62) in interpreting identical provisions of the Jamaican Civil Procedure Rules:

> "Whilst persons who are 'adversely affected' are listed as one of the sub-sets of interested persons at Part 56.2 (2), the governing criteria is found in Part 56.2 (1) which states that these are persons with sufficient interest in the subject matter of the application. It is to be noted that Part 56.2 (2) in seeking to define eligible persons uses the phrase 'includes'. This to my mind, means the groups of persons eligible to bring a claim is not closed, but would extend to other eligible persons who qualify as interested persons."

37. In *Dumas v Attorney General of Trinidad and Tobago* Civil Appeal No P218 of 2014, Jamadar JA undertook an extensive examination of the common law countries' approach to standing, including the Caribbean nations. He noted that the approach by the courts to develop, and where necessary, enlarge the rules of standing was evident throughout the common law: para 53. He included in that analysis the Scottish cases of *Walton* and *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868. At para 94 he commented that the value of the analysis is not to provide any direct precedent, as there were legislative and contextual differences in all of the jurisdictions, but to demonstrate trends and approaches across the common law. He concluded at para 95 with a set of general considerations that can be articulated as arising out of the more permissive approach to standing in public interest litigation as follows:

> "(i) Standing goes to jurisdiction and is to be determined in the legal and factual context of each case. It is a matter of judicial discretion.
>
> (ii) The merits of the challenge and the nature of the breach raised are important considerations.
>
> (iii) The value in vindicating the rule of law (the principle of legality) is a significant consideration.
>
> (iv) The importance of the issue raised.
>
> (v) The public interest benefit in having the issue raised and determined.
>
> (vi) The bona fides and competence of the applicant to raise the issues.
>
> (vii) Whether the applicant is directly affected by, or has a genuine and serious interest and has demonstrated a credible engagement in relation to the issue raised.
>
> (viii) The capacity of the applicant to effectively litigate the issues raised.

> (ix) Whether the action commenced is a reasonable and effective means by which the courts can determine the issues raised.
>
> (x) The imperative to be vigilant so as to prevent an abuse of process by busybodies and frivolous and vexatious litigation.
>
> (xi) Whether the issues raised are a general or specific grievance and whether there are other challengers who are more directly impacted by the decision challenged, or more competent to litigate it.
>
> (xii) The availability and allocation of judicial resources."

These general considerations were quoted with approval in the High Court of Barbados in *Comissiong v Stuart* BB 2017 HC 30 by Richards J at paras 133 and 134.

38. There is thus no material difference between the law of the Eastern Caribbean and England and Wales: *Treasure Bay* per Ramdhani J, para 74 (quoting *Halsbury's Laws of England,* 5th ed, vol 61 (2010), para 656). The same point was made by Webster JA in the judgment of the Court of Appeal in this case, at para 17, where he noted that:

> "Part 56.2 of our Civil Procedure Rules … contains the same requirement of a sufficient interest in the subject matter of the application as in RSC 53(5), and the same considerations relating to standing apply in the Eastern Caribbean."

AXA and Walton

39. The question of standing was addressed by the United Kingdom Supreme Court in two Scottish cases; *AXA* and *Walton*. In *AXA* the Court took the opportunity to depart from the previous restrictive approach to invoking the supervisory jurisdiction of the Court of Session and to align the approach to the law in England and Wales. Having explained that a rights-based approach to standing was incompatible with the performance of the court's function of preserving the rule of law, Lord Reed continued with observations which have general application (para 170):

> "For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say 'might', because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context."

40. In *Walton* Mr Walton brought an action under the Roads (Scotland) Act 1984 challenging the validity of schemes and orders made by the Scottish Ministers to allow the construction of a new road network around Aberdeen. In order to bring a challenge under that Act the applicant had to show that he was a "person aggrieved" by the decision; Roads (Scotland) Act 1984, paragraph 2 of Schedule 2. Mr Walton argued that the Scottish Ministers had failed to comply with the Strategic Environmental Assessment Directive, or in any event with the common law requirements of fairness. The Ministers did not challenge Mr Walton's entitlement to bring proceedings, but in obiter comments the Extra Division, while refusing the appeal on substantive grounds, questioned whether he fulfilled the criteria of "person aggrieved".

41. Mr Walton appealed to the Supreme Court. The Court dismissed the appeal but Lord Reed noted that the Court could not avoid the need to consider the Extra Division's observations on the issue, as their obiter nature was unlikely to detract from their potential influence both in relation to statutory applications and in applications for judicial review: para 82. He went to consider the meaning of "person aggrieved" in the context of statutory appeals under the Town and Country Planning Acts. At para 85 he

cited a number of Scottish authorities and a review of the English authorities by Woolf LJ in *Cook v Southend-on-Sea Borough Council* [1990] 2 QB 1. Lord Reed concluded at para 86:

> "It is apparent from these authorities that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made."

42. He also stated that a person may nonetheless be aggrieved where, for example, an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in a public inquiry: para 87. Lord Reed concluded that Mr Walton was not a mere busybody. He resided in the vicinity. He was an active member of local organisations concerned with the environment and was chairman of the local organisation formed to oppose the road development on environmental grounds. He had demonstrated a genuine concern about what he contended was an illegality in the grant of consent for the development which was bound to have a significant impact on the natural environment. He was undoubtedly a person aggrieved within the meaning of the legislation: para 88.

43. Lord Reed noted the observation of the Extra Division that Mr Walton would have lacked standing even if he had invoked the Court's supervisory jurisdiction. He observed that in *AXA* the Court had clarified the approach to be taken to the question of bringing an application in the supervisory jurisdiction. In doing so the Court intended to put an end to an unduly restrictive approach which too often had obstructed the proper administration of justice, an approach which, he suggested, had too often ignored the Court's constitutional function of maintaining the rule of law. In order to bring an application for judicial review an applicant had to have a sufficient interest. A distinction needed to be drawn between the mere busybody and the person affected by, or having a reasonable concern in, the matter. What constitutes sufficient interest would depend upon the context: para 93. At para 94 he commented:

> "In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was

> equally affected by an unlawful act, no-one was able to bring proceedings to challenge it."

44. Lord Hope of Craighead considered the question of standing in the context of environmental law. At para 152 he stated as follows:

> "An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf."

45. *AXA* and *Walton* have been taken as authoritative as to standing in judicial review in England and Wales. In *R (Good Law Project Ltd) v Prime Minister* [2022] EWHC 298 (Admin), at [23], the Divisional Court (Singh LJ and Swift J) said that they had found helpful statements as to the correct approach to standing in *AXA* and *Walton*. Similarly in *R (Good Law Project Ltd) v Prime Minister* [2022] EWCA Civ 1580; [2023] 1 WLR 785, para 69, the Court of Appeal (Sir Geoffrey Vos MR, Dingemans and Elisabeth Laing LJJ) noted that it was common ground that the law as to standing was set out in *AXA* and *Walton*.

46. In *Duff v Causeway Coast and Glens Borough Council* [2023] NICA 22 the Court of Appeal in Northern Ireland applied *Walton* to the question of whether or not an applicant for judicial review had standing to challenge the grant of planning permission. At para 21 Keegan LCJ distilled the following principles from *Walton*:

> "(i) A wide interpretation of whether an applicant is a 'person aggrieved' for the purpose of a challenge under the relevant

Scottish statutory provision is appropriate, particularly in the context of statutory planning appeals (para 85).

(ii) The meaning to be attributed to the phrase will vary according to the context in which it is found, and it is necessary to have regard to the particular legislation involved, and the nature of the grounds on which the applicant claims to be aggrieved (para 84).

(iii) A review of the relevant authorities found that persons will ordinarily be regarded as aggrieved if they made objections or representations as part of the procedure which preceded the decision challenged, and their complaint is that the decision was not properly made (para 86).

(iv) The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be 'aggrieved': where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry (para 87).

(v) Whilst an interest in the matter for the purpose of standing in a common law challenge may be shown either by a personal interest or a legitimate or reasonable concern in the matter to which the application relates, what constitutes sufficient interest is also context specific, differing from case to case, depending upon the particular context, the grounds raised and consideration of, 'what will best serve the purposes of judicial review in that context.' (Paras 92 and 93).

(vi) Para 94 also refers to the need for persons to demonstrate some particular interest to demonstrate that he is not a mere busybody. The court was clear that 'not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was

> equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.'
>
> (vii) The interest of the particular applicant is not merely a threshold issue, which ceases to be material once the requirement of standing has been satisfied: it may also bear upon the court's exercise of its discretion as to the remedy, if any, which it should grant in the event that the challenge is well-founded (paras 95 and 103).
>
> (viii) Lord Hope added at para 52 that there are environmental issues that can properly be raised by an individual which do not personally affect an applicant's private interests as the environment is of legitimate concern to everyone and someone must speak up on behalf of the animals that may be affected.
>
> (ix) Individuals who wish to do this on environmental grounds will have to demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity (para 53). It will be for the court to judge in each case whether these requirements are satisfied."

47. Lady Chief Justice Keegan's summary needs little addition. It is however clear from Lord Reed's judgment that there is little, if any, difference between the concept of "person aggrieved" in the Roads (Scotland) Act 1984 and standing for judicial review purposes. Accordingly the attributes that are ascribed to the "person aggrieved" in subparagraphs (i), (ii), (iii) and (iv) of Keegan LCJ's summary apply with equal force to standing in judicial review. Moreover the reference to "speaking for animals" in subparagraph (viii) applies to all aspects of flora and fauna as well as other environmental factors, such as perhaps geological or archaeological features.

The Board's reasoning for deciding the appellants have standing

48. Applying this guidance to the present case it is apparent that the Court of Appeal erred in taking too narrow an approach to the issue of standing. In particular, the Court was wrong to dismiss the case of *Walton* as having no relevance to the proper interpretation of CPR r 56.2. It is therefore open to the Board to reach its own conclusion on the issue of standing.

49. Barbuda is a small island. Both the appellants live in the village of Codrington, about two kilometres from the airport and not far from the end of the runway. The airport will result in air traffic with attendant noise, general disruption and environmental damage. An issue of concern arising from the Brosnan report was in respect of hydrogeology. It was noted that a resistivity study required to be conducted to identify aquifers on or in close proximity to the site that might be adversely affected by the operation of the runway. This was important in identifying the impact of runoff from the airstrip on Barbuda's aquifers which are used for the extraction of potable water. The possibility that drinking water might be affected by the airstrip's operation might be of serious concern to residents on Barbuda. The issue of hydrogeology was an issue raised by Mr Mussington from his visit to the site in November 2017.

50. The potential noise and disruption that will flow from the operation of the airport in close proximity to the appellants, together with possible concern over the quality of drinking water as a result of the airstrip's operation clearly demonstrate that both appellants are substantially affected in terms of CPR 56.2(2)(a).

51. Sufficient interest is also demonstrated from the failures to follow due process. Construction was started without a development permit contrary to section 17 of the 2003 Act. Wilkinson J noted that section 17 of the 2003 Act was mandatory.

52. It appears that neither of the applications was publicised so there was no opportunity for people to comment or make representations. The respondents, in later submissions, have pointed to a village meeting on 2 March 2015 which discussed and approved a development project for Barbuda which included the airport. A judicial review challenging the vote at the meeting was refused. The respondents note that this was "not a consultation that was strictly compliant with the Physical Planning Act 2003". Nevertheless, the respondents assert, the residents would have been made aware that a new airport was in the offing.

53. The Physical Planning Act 2003 sets out a procedure whereby applications for development permits are to be publicised and representations can be made on the proposals themselves which the DCA is required to take into account in determining whether to grant a development permit and, if so, whether conditions should be attached to the grant. These provisions cannot be circumvented by pointing to a consultation at a village meeting about wider development proposals more than two years before work commences on site.

54. The provisions on publication of applications become all the more important in applications which require an EIA. The appellants submit that the respondents have failed in their duty of candour to the Court in failing to disclose the EIA. There is however a more fundamental question: whether there is an obligation to publish the EIA

at the time the application is made to the DCA so that those with an interest can make informed and meaningful representations. Such an approach would enable the DCA to carry out properly its function under section 22(4) of the 2003 Act.

55. From the beginning the appellants have sought to bring the failure to follow due process to the attention of the respondents both directly in letters to Mr Southwell, to the DoE and to the Prime Minister and through the courts. In effect they have challenged the respondents' failure to adhere to the rule of law.

56. As his affidavits have shown, Mr Mussington has demonstrated a particular concern for the ecology of the development site. Webster JA dismissed both appellants' interests on the basis that there was no evidence that they have any expertise in the subject-matter of the application. As to Mr Mussington's qualification as a marine biologist he commented that the application had nothing to do with the sea. Respectfully he concluded that the appellants fitted the legal description of busybodies.

57. Where an application for judicial review involves issues of environmental concern it is not necessary that the applicant demonstrates an expertise in the subject matter. All that is required is that they demonstrate some knowledge or concern for the subject. So an amateur ornithologist or bird-watcher might raise a concern about the potential loss of a bird's habitat; or a fisherman about the effect of a hydro-electric scheme on fish; or a local historian about the effect on an archaeological or historical site; or a local resident on the loss of a local beauty spot frequented by the local community. In *Walton* Lord Hope in effect asked the rhetorical question, "Who speaks for the ospreys?". The answer is whoever can demonstrate a genuine interest in their fate.

58. The Board is satisfied that the appellants have demonstrated sufficient interest in the environmental issues and the breaches of the 2003 Act raised by the application for the development permit. In particular Mr Mussington's scientific background, his knowledge of the flora and fauna in the area, his status as a local resident, and his experience of conducting environmental assessments amply demonstrate a sufficient interest in the subject matter of the application for judicial review.

59. Such an approach is consistent with Antigua and Barbuda's obligations on the international plane under the "Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean", the Escazú Agreement. Antigua and Barbuda was the first country to sign the agreement on 27 September 2018. It was ratified on 4 March 2020. Amongst other important provisions Article 7 provides for public participation in the environmental decision-making process.

Conclusion

60. The Board will humbly advise His Majesty that the appeal should be allowed.