



IN THE SUPREME COURT OF GIBRALTAR

Neutral Citation Number 2025/GSC/030

2024/ORD/019

BETWEEN:

THE KING

(on the application of HEPTA Limited)

Claimant

-and-

DR JOSEPH GARCIA MP

(Minister with Responsibility for Crown Lands)

Defendant

Lewis Baglietto KC with Moshe Levy and Samuel Marrache (instructed by Hassans) for the Claimant

Neil Costa with Kyle Bautista (instructed by Isolass) for the Defendant

Judgment date: 16 July 2025

JUDGMENT

DUDLEY CJ:

1. By its application for judicial review the claimant (“Hepta”) challenges a purported decision by the defendant, the Deputy Chief Minister who is the minister with responsibility for Crown Lands (“the DCM”), refusing to accept any premium for the construction of a proposed development, because it is intended that it be 16 storeys high.

The Background

2. Hepta is the lessee of an area of land comprising Crown Property Nos 1303, 1305 and 1306 in the general plan of the City of Gibraltar (“the Property”). It is to be found at the northern end of Queensway Road, just west of Waterport Fountain and is the site in which for very many years was to be found a car dealership and garage, the Casa Antonio restaurant and the Bahia Bar. It is in a very notable part of Gibraltar, close to the city walls and not far from Casemates.
3. The Property was demised by HE the Governor as Lessor to Montagu Properties Limited under the terms to a lease dated 24 March 2005 for a term of 150 years commencing on the date of the lease (“the Lease”). The Lease allows for the development of a “Permitted Scheme”. Beyond that, Paragraph 3(a) of the Second Schedule to the Lease entitled “*Obligations of the Lessee*” states:

“Other than with regard to the Permitted Scheme to obtain the Lessor’s consent to the making of any external internal or structural alterations to any buildings on the Demised Premises such consent not to be unreasonably withheld PROVIDED THAT the Lessor may impose any conditions on the granting of such consent including the payment of any premium attributable to any additional land value as a result of any major alterations or development to the Demised Premises.”

Thereafter paragraph 5 of the same schedule imposes a restriction upon the use of the Property (“the User Clause”) as follows:

“Not to use or suffer or permit to be used the Demised Premises for purposes otherwise than as:-

- (i) showrooms, workshops garages, shops, stores and offices;*
- (ii) as a petrol station only as existing at the time of execution of this lease; and (sic.)*
- (iii) as a bar/cafeteria only as existing at the time of execution of this lease;*
- (iv) as a Flat in single occupation on the first floor.”*

4. The evidence of Mr Michael Carlton (“Mr Carlton”) who is a director and shareholder of Hepta, as to how it came to acquire the property is not in dispute. According to him in early 2015, Hepta saw an opportunity to purchase the Property and entered into discussions with Montagu Properties Limited for its sale. Hepta’s intention was to purchase the Property and develop it into a 16-storey development of mixed residential and commercial premises. However, because of the restrictive covenants in the lease, before proceeding, it sought the prior support and approval of His Majesty’s Government of Gibraltar (“HMGOG”) which in the event was forthcoming. In a letter dated 9 April 2015, from the Chief Minister, the Hon. Fabian Picardo KC MP (“the Chief Minister”) to the Directors of Hepta, the Chief Minister inter alia confirmed that:

“HMGOG agrees, subject to seeing and agreeing the designs and having agreed the above renewal elements, to lend support in principle at the planning stages of the development and in respect of the proposed application to the Development and Planning Commission but subject to the position being that the DPC is an independent body and ministers and government officials who sit on the DPC do so in their personal capacity and are not bound by HMGOG’s ‘corporate’ expressions of support. We understand that you are looking to invest in a development of a proposed 15 stories with mixed commercial, residential and office premises and this is, in principle, acceptable to HMGOG.”

There is a dispute between the parties as to what is to be understood by 15 storeys. According to Mr Carlton it is standard terminology in the construction/development industry to refer to X number of storeys being X + ground floor so that in the present case what was understood was 15 storeys above the ground floor, that is 16 in total. According to the DCM 15 storeys always meant 15 storeys in total and not 15 storeys plus a ground storey. This however is not a matter which in the context of these proceedings requires resolution.

5. Following the 9 April 2015 letter, and over a number of years, Hepta invested very substantial funds, acquiring the Lease from Montagu Properties Limited on 8 May 2015; procuring the services of architects;

going through the planning process; and negotiating with and/or evicting sitting tenants of the Property. All this so that the Development could be constructed. It is Mr Carlton's evidence and indeed it is a matter which makes commercial sense, that Hepta would not have proceeded with the purchase of the Property without HMGOG's prior support and approval of the development, particularly given the restrictions in the Lease.

6. On the 11 October 2017, Hepta sought outline planning permission from the Development and Planning Commission ("the DPC"). The DPC met on 20 February 2018, provided a range of feedback, and refrained from taking a decision so as to allow Hepta to consider the issues raised and revise the plans accordingly. Between February and December 2018, Hepta reworked the plans and went on to propose an 18-storey project of mixed commercial, residential and office premises.
7. At a DPC meeting of 12 December 2018, the application for outline planning permission was considered and approved. The approved minutes of the meeting reflect the DCM as making the following contribution:

"DCM commended the design proposed by the applicants and described it as innovative and bold but that they should consider a reduction in massing. DCM added that from a Government perspective mass bridges did not work. He also mentioned that seeing as this site is outside the City Walls the Commission should be flexible when considering this application and that opening the embrasures may be useful and could be made into a condition. DCM asked how tall this building would be.

[Hepta's architect] replied that this building would be 54 metres tall, similar to Ocean Village."

Thereafter, the Outline Planning Permit was provided on 19 March 2019.

8. On 17 October 2019 the GSLP/Liberal Government was re-elected, with one of the key policies of their manifesto being the delivery of a green Gibraltar.

9. On 25 October 2019, a survey was published by yoursay.gi in which the proposed development was identified as the most “loathed”, with 75% of respondents expressing that view. At about that time there was also opposition to the development on social media with a petition calling on the DPC to reverse the grant of permission.
10. In early 2020, Hepta out of caution, applied for an extension of its Outline Planning Permission but in any event, on 13 March 2020, submitted its application for full planning permission.
11. On 17 March 2020, a meeting was held between representatives of Hepta, the Chief Minister and the DCM in relation to the design of the building. As I understand it, it is not in issue that this was the first of a series of meetings between Hepta and various representatives of HMGOG which were held between March 2020 and May 2021 during which period Hepta amended the design so as to obtain HMGOG’s approval qua landlord.
12. At a meeting of the DPC held on 18 June 2020, the outline planning permission was not renewed. As I understand it, the renewal was unnecessary given that an application for full planning permission had been filed. At that meeting the DCM stated that there had been a change of circumstances following the 2019 general election with HMGOG now committed to a greener Gibraltar and that the height, size and massing of the development had now become a relevant consideration. The DCM also pointed out that there were outstanding landlord issues. For his part the Chairman of the DPC (Mr Origo, the Town Planner) explained that Hepta was discussing various elements of the design with HMGOG. The minutes reflect the following conclusion: *“[t]he Chairman concluded that Town Planning would definitely work with [Hepta] on environmental issues and the height of the building.”*
13. In July 2020, Hepta submitted a design statement in respect of its application for full planning permission for a building of 16 storeys plus ground floor. The application again came before the DPC on 28 January 2021. At that meeting the DCM commended aspects of the lower half of the building but

raised concerns in relation to height and massing. The DCM also raised the fact that there was an unresolved land issue in respect of the forecourt area of the building. As I understand it, that was a reference to the existing petrol station forecourt over which Hepta does not have title. I shall return to this issue.

14. At that DPC meeting, the Chairman made the point that notwithstanding that the application for full planning permission had been submitted after the General Election, given that the application had been submitted before the outline planning permission had expired, as a matter of procedure the DPC had to look at the application in line with its previous decision by which it had granted outline planning permission. He went on to state that whilst members of the DPC were entitled to change their views, the applicant had abided by all the planning requirements and conditions. As I understand the minutes, he made the point that, whilst Government's policy could have changed, the Gibraltar Development Plan remained the same, with this providing for high rise developments outside the city walls drawing parallels with blocks in Ocean Village, which as he put it are "*just as far away from the city walls as this proposed building*".
15. It appears that in response to those issues the DCM made the point that there were still landlord issues to be agreed and that "*Government, as landlord, [could] still enforce a reduction in height, even if the planning permission [was] granted.*" In the event, Mr Carlton agreed to defer the application so that Hepta could work with HMGOG to find a solution to the issues. Hepta's reasoning in adopting such an approach is to be found at paragraph [21] of Mr Carlton's First Witness Statement in which he states:

"...it was always obvious to Hepta that it was undesirable to proceed with an application for full planning permission if HMGOG, as the landlord, was not in agreement with the plans. The reason for this is because of the clauses in the Lease ... which require the landlord's consent to development of the Property and any change in user. To proceed with an application and then rely on judicial proceedings to challenge any refusal from HMGOG was not a step which Hepta wished to take. Given that DCM had expressed concerns regarding the Development's height, massing and design, I therefore agreed on

behalf of Hepta to defer the application and said that Hepta wanted to work together with HMGOG to find a solution to these issues.”

16. Following the deferment of the application, on 9 April 2021, a virtual meeting was held between the DCM, Minister Cortes and representatives of Hepta. At that meeting Hepta made available a letter dated 9 February 2021 which its architects had sent to the DPC in which they said:

“The question of ownership was also brought into the discussion, and our client fully understands the implications of what was being said. Whilst in material planning terms one thing has nothing to do with the other, in practice we understand that this very much falls into the equation. On this matter therefore, our client humbly accepts the position and hopes that subject to the resolution of the design and planning approval, he is able to reach a mutually beneficial deal with [HMGOG].”

At that virtual meeting it was agreed that Mr Carl Viagas (“Mr Viagas”) would relay the views of HMGOG and would assist Hepta at a technical level. Mr Viagas’ role in contrast to that of Land Property Services Limited (“Land Property Services”) is explained by the DCM in his First Witness Statement, as follows:

“...I highlight that whilst Mr Carl Viagas is a member of the DPC and advises the Office of the Deputy Chief Minister on heritage, architecture and planning issues, he does not represent HMGoG in its capacity as landlord. Such matters are handled and communicated by Land Property Services as HMGoG’s land and property agents.”

17. Following a series of meetings, in May 2021 Mr Fa (a senior civil servant) sent an email addressed inter alia to Hepta’s lawyer at Hassans, Mr Farrell. The email sets out an internal minute prepared during an earlier meeting. It is fairly summarised by the DCM (with some limited added commentary) in his First Witness Statement at paragraph [25] as follows:

“The said email of Mr Fa of 18 May 2021 set out the position of HMGoG, namely that:

- (a) no alternative plot to be provided by HMGoG to Hepta in consideration for a reduction in the density of the Development;*

- (b) the scheme would need to be reduced in density, height and glazing;*
- (c) HMGoG was prepared to take into account certain costs when calculating premium;*
- (d) HMGoG wished to see the Premises developed;*
- (e) HMGoG was supportive of the design applied to the lower floors;*
- (f) Mr Viagas offered to meet with Hepta's architect to produce a redesigned Development that would have a lower height and reduced density;*
- (g) if HMGoG were to agree to make the petrol station forecourt available to Hepta, then Hepta would need to agree terms with the existing leaseholder. To be clear, HMGoG has never agreed to assign neither the petrol station forecourt nor the terrace area outside of El Bahia bar to Hepta (the 'Additional Areas');*
- (h) HMGoG would not relocate the existing leaseholder;*
- (i) HMGoG reserves the right to request a premium in respect of the Additional Areas should it agree to assign the same to Hepta;*
- (j) the forecourt should remain open at ground level (cantilevered);*
- (k) any risk of the land being contaminated was to be borne by Hepta;*
- (l) HMGoG would not cover the cost of redesigning the Development;*
- (m) the amount of glazing in the Development would need to be reduced;*
- (n) the maximum amount of storeys for the Development was to be 15; and*
- (o) the Development had to be staggered and/or stepped back."*

18. That email was followed by at least another six meetings involving HMGOG representatives at various levels of seniority. Mr Carlton's understanding of the general purpose of the meetings is to be found at paragraph [27] of his First Witness Statement:

“At these meetings, details of the plans were repeatedly discussed with WSRM [Hepta’s architects] in order to agree on the concept and design with HMGOG. Mr Viagas would report back to DCM to keep him informed and get his comments in order to make sure that the plans for the Development met HMGOG’S requirements. Mr Viagas would then report back from the DCM at the next meeting so that WSRM could amend the plans to reflect DCM’s comments. In this way, the design was changed on numerous occasions, based on specific feedback given to us from Mr Viagas. The effect of these meetings was that the designs changed significantly from the originals in accordance with what we were being told by Mr Viagas as DCM’s representative.”

19. On 10 December 2021, Mr Kevin De Los Santos (“Mr De Los Santos”) a senior director at Land Property Services, emailed Mr Carlton in the following terms:

“I write to thank you for your email dated 3 December to the Deputy Chief Minister.

The Government has now had the opportunity to view and discuss your proposals internally and such discussions have indeed included both the Chief Minister and the Deputy Chief Minister.

Even though there has been an improvement to the design, unfortunately the revised scheme does not go far enough in terms of its massing to address the Government’s vision for the area.

The Landlord is therefore unable to support the revised new proposals at this stage, but understands nonetheless that you have a need to progress your separate planning application.

The Government would suggest that you should therefore continue the application process through the Development and Planning Commission (DPC), which as you know is in any case an independent statutory body with its own views.

In the event that the application is approved at DPC, your proposal would still require separate negotiations with the Government as landlord as to premium and other matters.

However, I have been asked to make it clear that the Government continues to welcome the redevelopment of the site.”

20. In the event, according to Mr Carlton, Hepta was not prepared to make an application for full planning permission without HMGOG’s consent to the

design and decided to continue meeting with Mr Viagas, revise the plans and seek HMGOG's agreement.

21. On 17 December 2021, amended plans were submitted to Town Planning with Hepta subsequently informed at various meetings that HMGOG did not support the design. After further amending the design, Hepta's architects submitted the plans to the DPC for consultation purposes, for it to provide feedback.
22. On 15 March 2022, Mr Farrell emailed Mr Fa in relation to views expressed by the Deputy Town Planner to the effect that outline planning permission had expired. By email dated 22 March 2022, marked "Without Prejudice" Mr Fa replied in the following terms:

"Throughout HMGoG's dealings with your client developer, HMGoG has maintained that the DPC is an independent statutory body. This is reinforced by our overarching position: that any new development project would require DPC approval and separate to that, also HMGoG approval in the form of landlord consent. I stress the independence of DPC and HMGoG as treatment of your client's outline planning application is a matter for the DPC and not HMGoG. I would therefore suggest that your client takes this up directly with DPC."

23. On 6 May 2022, Mr Carlton emailed the DCM and Minister Cortes in the following terms:

"As you are aware we have been liaising with you and your respective departments regarding the revised design for [the Property] during the last year. We have taken advice and recommendations from you, Dr Garcia, via Carl Viagas specifically who you appointed for this purpose, and have incorporated these into the revised design, as you are aware. We are now at the point where we are ready to submit our final design statement to DPC seeking full planning permission.

Whilst we have tried as far as reasonably possible to incorporate all suggestions and recommendations during the process of these consultations, it is difficult to appease every one's taste and ideas. I appreciate that you both have your own views with regards to the potential development of this site, which may be contrary to what we are currently presenting. In the overall scheme of things however, we

believe that we have listened carefully and worked hard to achieve a good balance between what we have been able to commercially make work, and the views represented collectively by the Development and Planning Commission. We also feel that this investment is both good and necessary for Gibraltar, and we are very excited to be able to realise this project.

As you know we have tried, through your various departments, to engage with you directly, with the aim of presenting this ahead of the public DPC meeting and incorporate any further modifications or suggestions you may have. With this email I am reaching out to you both personally in case you feel there is any merit in meeting up.

I will of course understand If you feel if this is not necessary, and I look forward to hearing from you.”

Neither the DCM nor Minister Cortes nor any civil servant on their behalf replied to that email. Given that the present claim is largely predicated upon a meeting which took place only 5 days later, a reply to Mr Carlton’s email before or after the meeting may well have served to avoid this litigation.

24. It is not in dispute that on 11 May 2022, Mr Carlton and Mr Navarro (an architect engaged by Hepta) met with Mr Viagas and Mr De Los Santos at the offices of Land Property Services to discuss Hepta’s latest revised plan. The design was for a mixed-use 16-storey building with 84 apartments, 1500 square meters of commercial floor space, 19 stores, public open space at ground level, partial underground covered parking and parking on ground and first floors (“the Revised Plan”). It is also not in dispute that later that month Hepta submitted the Revised Plan to the DPC. Whether in fact the Revised Plan was agreed to at that meeting by the representatives of HMGOG is a core matter in issue in this claim. No minutes of the meeting are available, presumably because none were taken. It is of course regrettable that no minutes were taken, especially given the reasonable expectation that public officials would have ensured that a formal record was kept.

25. Mr Carlton’s evidence in respect of that meeting is set out at paragraphs [31] and [32] of his First Witness Statement as follows:

“31. Hepta next met with LPS on 11 May 2022 at their offices. At that meeting, Hepta and HMGOG agreed final versions of the [Revised Plan] for a development on the Property...

32. In light of HMGOG’s agreement to the Revised Plan, [Hepta] submitted these to the DPC, reflecting the feedback received from the DPC and HMGOG...”

26. For his part, the DCM in his First Witness Statement did not specifically deal with the 11 May 2022 meeting, albeit at paragraph [45] in relation to the Revised Plan he said:

“Mr Viagas has advised me and I verily believe that at no point did he confirm that HMGoG, as landlord, was satisfied with the revised plan for the Development and that the opposite was stated in terms of massing.”

27. The DCM, did however, come to deal with the 11 May 2022 meeting in his Second Witness Statement of 23 October 2023. At paragraph [17] the DCM asserts that:

“In respect of the 11 May 2022 meeting, Mr Kevin De Los Santos informs me, and I verily believe, that this meeting was to discuss options for the design of the Development. Mr De Los Santos further informs me that at no time was anything agreed in the course of that meeting.”

And at paragraph [20]:

“Mr Viagas informs me, and I verily believe, that at the meeting of 11 May 2022, the Claimant was advised to submit the 11 May 2022 Design to the [DPC] without HMGoG’s approval and so that the disagreement as to the Development’s design could be resolved between the Claimant and HMGoG as landlord.”[Existing underlining]

It is the case for the DCM that the position as stated to him by Mr Viagas is consistent with that adopted by Mr Fa in his email of 22 March 2022.

28. Following the submission of the Revised Plan, on 14 September 2022, the DPC considered Hepta’s application for full planning permission. The DPC

voted to approve the application and granted full planning permission for the development, subject to conditions, none of which related to height or massing.

29. The minutes of that DPC meeting bear some consideration. They reflect the absence of the DCM and Mr De Los Santos. Although Mr Viagas was present, the minutes do not reflect any contribution by him. In similar vein the minutes reflect that there were “*no comments*” by the representative of Land Property Services. For his part, Minister Cortes expressed concerns as to the number of electrical vehicles charging points; the developer’s ability to make the project “*a nearly zero energy building*”; and expressed the view that the massing was excessive. Minister Cortes also said that he “*might abstain from voting.*” With five votes in favour, one against and five abstentions, the application was approved subject to conditions. Beyond what may be inferred from the body of the minutes, these do not show how each member in fact voted.

30. According to Mr Carlton, with full planning permission obtained, Hepta then sought to agree with HMGOG a premium for the development albeit it first wanted to resolve issues involving sitting tenants. It is not in dispute that on 27 June 2023, Mr Farrell emailed Mr De Los Santos to seek an “*off the record*” “*informal*” discussion “*over a coffee*”. On 5 July 2023, Mr Carlton, together with Victor Chandler (the other director and shareholder of Hepta) and Mr Farrell met with Mr De Los Santos to discuss the premium. Again, according to Mr Carlton, at that meeting Mr De Los Santos informed Hepta that HMGOG was seeking a premium of £8 million to approve a 16-storey development and £2 million for a 10-storey development. It is Mr Carlton’s evidence that Hepta considered the amounts being sought as unreasonable and excessive and the possibility of bringing judicial review proceedings was raised.

31. Relying upon information provided to him by Mr De Los Santos, the DCM’s evidence as to the 5 July 2023 meeting is somewhat different. To his Second Witness Statement, the DCM exhibits a WhatsApp message from Mr Farrell

to Mr De Los Santos of 5 July 2023 in which after agreeing a time and venue at Queensway Quay, Mr Farrell states:

“... discussion is based on landlord’s position on what it wants to see there despite the planning permit and the impact on the premium”

Mr De Los Santos replied with a thumbs up emoji, to which Mr Farrell in turn replied:

“I’ve prepared Michael [presumably Mr Carlton] so there are no surprises”

32. It is the DCM’s evidence that the meeting was an informal, without prejudice meeting held at Mr Farrell’s request to relay some economic sense to Hepta’s directors, and that the sum of £2 million was mentioned in the context of other developments and only as purely indicative of the premium which might be sought for a lower build. It is also the DCM’s evidence, that at no time did Mr De Los Santos intimate that he was in receipt of instructions from HMGOG on the matter. In support of that evidence reliance is placed upon an email from Mr De Los Santos to the Chief Minister and the DCM dated 12 July 2023, in which he states:

“Please find below email from Hassans following my meeting with them last week where I expressed GOG’s discontent with the height and massing of the project.”

33. In that email, Mr De Los Santos forwarded an email from Mr Farrell dated 11 July 2023 marked *“Without Prejudice”* in which Mr Farrell explains how the amendment of the original outline design for the development had come as a result of HMGOG’s *“green”* manifesto commitment and significantly went on to say:

*“After many months, a design was agreed to the satisfaction of HMGOG, which said design subsequently received a **full planning permit** in September 2022.”* [Existing emphasis.]

I have not been referred to any contemporaneous documentary evidence by which the assertion that the design had been *“agreed”* is rebutted.

34. On 11 November 2023, Mr Farrell emailed Mr De Los Santos in the following terms:

“I refer to our previous exchanges (both via email and in person) in connection with the above development.

It is now critical that I receive written notification of HMGOG’s position in its capacity as landlord in respect of the premiums being sought. My understanding, following our exchanges, is as follows:

- *For landlord’s consent in respect of development rights for a ground plus 15 storey building as per the Full Planning Permit (including the petrol pump forecourt as part of a new single building lease demise) - £8 million*
- *For landlord’s consent in respect of development rights for a ground plus 10 storey building (which may require either a re-application to the DPC or a variation to the existing Full Planning Permit) and which also includes the petrol pump forecourt as part of a new single building lease demise - £2 million*

I must stress the need to receive HMGOG’s written position as landlord within 7 working days from the date of this email. Hepta Limited will have no further recourse other than to commence legal proceedings against HMGOG as landlord. This matter can no longer be left in abeyance.”

35. The reply from Mr De Los Santos by email of 17 November 2023 is at the heart of the present claim. It is an email marked “WP/STC” evidently and not in dispute meaning “Without Prejudice and Subject to Contract”. It reads:

*“Thank you for your email. As already communicated to you in a couple of meetings, HMGoG’s position as Landlord is for the proposed development to be reduced in height and massing. **Landlord’s consent for the 15 storey has not been approved, therefore the premium is irrelevant.** The Government is however amenable to enter negotiations if the proposed development is reduced in height and massing. With respect to height, the same not to be more than 10 storeys, that is to say ground plus a further 9 storeys. The massing is to be reduced substantially, the concept of the ground floor public open area presented by your clients in their first submission is welcomed by the Government. The premium quoted for additional development rights for the sum of £2m would include the*

forecourt always when the massing is kept to a minimum and the concept of having an open area retained. The Government as Landlord would need to have sight of proposed plans before approving any additional development rights.” [My emphasis]

Of note that when filing its application for Judicial Review the email was redacted and only that part in bold provided, on the basis that that was “the Decision” which was being challenged. In his First Witness Statement, Mr Carlton explained the redaction on the basis that although Hepta’s position is that the email is not covered by Without Prejudice privilege, it was redacted out of an abundance of caution.

36. Mr Carlton’s evidence is that it is his understanding that the decision was taken by the DCM on behalf of HMGOG and communicated to Land Property Services as HMGOG’s agent and by them to Hepta’s lawyer.

The Amendment of the Claim and Additional Background

37. There is a further aspect to the case in that by Application Notice dated 11 September 2024, Hepta seeks to amend its claim. That amendment is best understood by reference to paragraph 7 of its *Statement of Facts* which with the amendment underlined reads:

“On 8 May 2015, Hepta purchased the Property with the intention to develop it into a 15-storey development of mixed residential and commercial premises (the ‘Development’). The Development is to be constructed over the Property but would also include negligible amounts of land around its perimeter between 10 and 60 cm wide which potentially do not belong to Hepta (the ‘Additional Area’). It was known to all parties that if the Additional Area was required then Hepta would need the conveyance of the Additional Area in order to construct the Development. The Development also includes a more substantial overhang which encroaches on the area external to the Property all around the Development, the most substantial of which is in respect of the second floor. In consenting to the Development, HMGOG agreed to give a licence and/or its permission for any overhang over its land...”

I agreed for the amendment application to be dealt with on the trial of the action, not least as it is said to be advanced on the basis that it is “wholly

precautionary”. It is submitted for Hepta that the original Claim Form and evidence filed with it make clear that HMGOG agreed to the Revised Plan at the meeting on 11 May 2022. That once that is established, it is axiomatic that such consent includes consent to the conveyance of any additional land around the perimeter of Hepta’s existing Property, as well as a licence and/or permission for the overhang of the development.

38. Although the Application Notice does not touch upon it, a material issue for the purposes of the construction of the development is that it also requires the acquisition by Hepta of a substantial piece of land at the eastern end of the development area in what at present is occupied by a petrol station forecourt and a terrace area outside the former Bahia Bar. As I understand it, the development envisages a second-floor overhang of the proposed building over this additional land.
39. In this regard, the position taken by Hepta is spelt out in Mr Carlton’s Second Witness Statement. In effect it is that HMGOG’s consent to the Development included its consent and approval to any steps which they would need to take in order to ensure that the Development could proceed with the additional areas and the relevant overhang. That the only remaining question was the amount of premium which would be paid and not whether HMGOG would convey any land and/or provide a licence or permission for any overhang.
40. There is a further nuance as regards the petrol station forecourt. In this regard, Mr Carlton’s evidence is that this is a matter over which HMGOG has no power but rather is a private matter between the existing leaseholder and Hepta. That in any event, Hepta has agreed the purchase of the lease subject to this claim succeeding. It is of note that the leaseholder of the petrol station forecourt holds those premises on a five years lease with a user clause restricting its use to that of a *“Petrol Filling and Service Station.”*

The Contrasting Positions of the Parties

41. Fundamentally, Hepta's case is that on 11 May 2022, HMGOG agreed to the Revised Plans and that by so agreeing it made a representation to Hepta which was "*clear, unambiguous and devoid of relevant qualification*" [*R v Inland Revenue Commissioners Ex p. MFK Underwriting Agencies Ltd [1990] 1 WLR 1545 QB* at 1570] which gave rise to a legitimate expectation, namely that HMGOG would grant Hepta all that was necessary - from HMGOG's perspective - for the development (in line with the Revised Plans) to be realised. And that by the email of 17 November 2023, the DCM frustrated that expectation.
42. Hepta's alternative case is that HMGOG having on 11 May 2022 agreed to the Development and thereafter the DPC having granted full planning permission, it was irrational and perverse for it to refuse to consent to a reasonable premium; the change of the User Clause and if necessary, the conveyance or licence needed for the development to proceed.
43. For his part, the DCM resists the claim on multiple grounds, namely that:
- (i) the claim is a matter of private law between landlord and tenant which is not susceptible to judicial review;
 - (ii) the purported decision was not a decision;
 - (iii) Hepta has not exhausted all of its remedies;
 - (iv) the claim is out of time;
 - (v) the claim does not identify any errors of law;
 - (vi) the circumstances do not give rise to a legitimate expectation;
 - (vii) the purported decision was not irrational;
 - (viii) the court cannot grant the relief sought; and
 - (ix) the DCM is the wrong defendant.

The Central Issues

44. Although between them the parties have identified eleven issues in dispute, the matters that I consider require determination can be narrowed to the following:

- (i) is the dispute amenable to judicial review;
- (ii) is the DCM the correct defendant;
- (iii) has Hepta exhausted its remedies;
- (iv) can the email of 17 November 2023 properly be regarded as a decision;
- (v) do the circumstances give rise to a legitimate expectation; and
- (vi) was the (purported) decision irrational.

Amenability to Judicial Review

45. There are two English High Court decisions which bear particular consideration and which adopt slightly different approaches to the issue of amenability to judicial review in respect of the disposal or management of land by a public authority. These are, *R v Bolsover DC, ex p Pepper* [2000] 10 WLUK 101 and *R(Molinaro) v RB of Kensington & Chelsea* [2001] EWHC Admin 896.

46. *Pepper* concerned the challenge of a decision of Bolsover District Council not to sell an area of recreation land required for access to a parcel of land upon which planning permission for residential development had been granted to a developer (Pepper). Over a period of time there had been some “subject to contract” negotiations for the sale of part of the recreation land to Pepper for use as an access. However, the council’s executive committee resolved that it would not sell the land to Pepper. The principal basis of challenge as identified at paragraph [4] of the judgment of Keene J. was premised upon an argument of legitimate expectation “*either that the respondent would sell the land needed for access or, alternatively, that the respondent would at least give the applicant an opportunity to make representations on the decision whether or not to sell.*”

47. Keene J. dismissed the claim for judicial review on the basis that the council’s decision was not amenable to judicial review. At paragraphs [33] and [34] of his judgment, he said:

“33. Normally a decision by a local authority to sell or not to sell land which it owns is to be seen as a private law matter unless a public law element is introduced into the decision making process by some additional factor. That is because the starting point is that the local authority, in so deciding, is simply acting as a landowner in such cases and is not performing any public function. There may sometimes be some additional factors present; for example, if the authority has a policy which relates to the retention or disposal of certain types of land, that may make a decision a public law matter...”

*34. Indeed, the private law nature of the process adopted by the parties in the present case is emphasised by repeated references from both the respondent and from those acting for the applicant to the matter being “subject to contract”. That well-known phrase has the effect of preventing a binding contract for the sale of the land from coming into existence during negotiations (see *Attorney General v Humphreys Estates Ltd* [1987] 2 All ER 387). In such cases both parties contemplate that a formal contract will be required before they are bound. Until that occurs either party can withdraw from the deal, as indeed two would-be developers did in respect of the access land in the present case in the early 1990s. As a matter of private law, it is clear that in the present case there was no formally concluded contract for the sale of this land. Though considerable agreement on matters of detail had been reached, the applicant could have withdrawn at any time, yet the applicant's argument in these proceedings amounts to saying that he had nonetheless a legitimate expectation which prevented the local authority from withdrawing from the contractual negotiations.”*

And at paragraph [36] he concluded:

“36. I can see nothing in the present case which brings the respondent's decision into the area of public law scrutiny by the courts. This was essentially a matter of private contract law. There was nothing which introduced a public law element into it. The respondent, in making its decision now under challenge, was not performing a public function, nor was it doing so in the events leading up to the January 2000 decision. There was never any concluded contract in writing for the sale of the access land, and hence the applicant seems to have no private law remedy. That does not mean he must be provided with one in private law. In my judgment, both parties in this case contemplated that their relationship would be governed by public law. Judicial review does not apply in this case.”
[My underlining]

(There is an evident typographical error in the report with the underlined terms “private law” and “public law” transposed.)

48. In *Molinaro* the claimant applied for judicial review of the local authority's decision not to allow him to change the use of premises leased by him from it. The lease allowed the premises to be used only as a retail delicatessen, in accordance with local planning policy. Over the years, Molinaro began selling food to be eaten on the premises and applied for planning permission for a change of use. This was granted on appeal, but the local authority refused to permit the change of use under the lease. As set out at paragraph [19] of the judgment of Elias J. the local authority's decision was challenged on three grounds:

- (i) that the permitted user clause was invalid because the effect was to restrict the rent that could be obtained for the premises contrary to certain statutory provisions;
- (ii) the decision to refuse to amend the terms of the lease (or to agree to a surrender and re-grant on new terms) was unlawful given that allowing the use of the premises as a restaurant would have resulted in consequential financial benefits to the local authority and therefore in breach of its fiduciary duties and irrational; and
- (iii) that by its correspondence the council created a legitimate expectation that the claimant would have his application for a claim of use considered without the council having regard to its own planning policies as set out in the Neighbourhood Use Policy. The council, it was said, led the claimant to believe that the only issue would be whether the change of use was reasonable.

In the event, Elias J. held that the decision was reviewable but rejected the claim on the merits.

49. In *Molinaro* the local authority relying upon *Pepper* argued that the claims were not amenable to judicial review because they advanced private law claims. Elias J. after citing the relevant paragraphs of Keene J. in *Pepper* said:

- “64. ... In any event, I would, with great respect, differ from some of the wider observations of Keene LJ in the [Pepper] case, although for reasons I return to below, not the decision itself.
65. In my view, the fact that a local authority is exercising a statutory function ought to be sufficient to justify the decision itself being subject in principle to judicial review if it is alleged that the power has been abused. Nor do I see any logical reason why an abuse of power made pursuant to some policy should be treated differently to one made on a specific occasion.
66. Of course, in many circumstances the nature of the complaint is one that identifies no public law principle. In such cases the fact that the defendant is acting pursuant to statute is irrelevant. For example, if the Council sues for the rent due from a tenant, no public law issue arises. Indeed, in general questions of construction of the contract or breach will attract no special public law principles, and judicial review is not an appropriate procedure to resolve such disputes. The fact that a public body is a party to the proceedings is, in such cases, irrelevant to the action formulated or to the relief granted. There is no justification then for treating the local authority in any different way to private bodies.
67. But public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest, and the public has an interest in ensuring that the powers are not abused. I see no reason in logic or principle why the power to contract should be treated differently to any other power. It is one that increasingly enables a public body very significantly to affect the lives of individuals, commercial organisations and their employees.
68. Moreover, there are a host of important cases where decisions relating to contracts have been subject to the principles of judicial review to prevent the power being unlawfully exercised...
69. In my opinion, the important question in these cases is the nature of the alleged complaint. If the allegation is of abuse of power the courts should, in general, hear the complaint. Public law bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. But sometimes the application of public law principles will cut across the private law relationship and, in these circumstances, the court may hold that the public law complaint cannot be advanced because it would undermine the applicable private law principles.
70. I would respectfully suggest that the [Pepper] case can be justified on that basis. As the learned judge pointed out, it would have undermined the operation of the private law of contract, and would have put public bodies at a significant disadvantage, if the doctrine of legitimate expectation could be used to defeat the right of public

bodies to withdraw from a proposed contract whilst leaving the other party free to do so.

71. *However, in other cases, including some I have cited, public law principles have been superimposed upon the private law relationships. The two are not necessarily incompatible. The facts of each case will need to be carefully considered to determine whether they can properly co-exist.*

72. *In this case I would in principle have given relief in respect to the legitimate expectation claim had I found it to be sustained. ... If there had been conspicuous unfairness of the kind alleged, in my judgment the court should not stand idly by and tell the claimant that because a private individual could exercise his contractual discretions arbitrarily, or unfairly, the public body could do likewise.*

73. *In my judgment, it would not have undermined the contractual relationship to superimpose public law duties in the circumstances of the particular complaint. Indeed, if representations made independently of the contract can give rise to legitimate expectations, there is no reason in principle why representations in the context of the contract should not do so, at least provided that by permitting this, the courts are not undercutting or distorting the contractual terms between the parties.”*

50. The narrower approach in *Pepper* starts from the premise that there has to be a “public function” and in the context of transactions involving the disposal or management of land, that the public authority is ordinarily “*simply acting as a landowner in such cases and is not performing any public function.*” Therefore, under the *Pepper* approach, there is a need for some “*additional factor*”. For my part and respectfully, I prefer the moderately wider test of Elias J. in *Molinaro* because the *Pepper* approach is capable of allowing decisions by public bodies involving a misuse of power to go unchallenged. It simply cannot be right for a public body – given its duty to act in the public interest – to act unfairly or irrationally just because private individuals or companies can do so.

51. In any event, in my judgment this is a case in which even adopting the approach in *Pepper* it is evident that the claim is amenable to judicial review. HMGOG, in choosing to manage the land which Hepta seeks to develop, by reference to planning considerations and its policy of a green

Gibraltar brings about the “*additional factor*” which allows for the public law review of the purported decision.

The DCM as Defendant

52. Mr Costa relies upon section 75(1) of the Gibraltar Constitution which provides that the person vested with powers to make dispositions of Crown Lands is HE the Governor acting on the advice of the Chief Minister. He submits that notwithstanding that the DCM is Minister, *inter alia*, for “*Lands and Oversight of Government Projects*”, he has no role in the disposition of Crown Lands, and no power to amend the terms of the Lease, whether in regard to the User Clause or in any other respect. Mr Costa does not go on to proffer any explanation as to what therefore the DCM’s responsibilities are in relation to Crown Lands.
53. On behalf of Hepta it is submitted that the DCM is the correct party for the very simple reason that he was the decision maker. That, as Mr Carlton explains in his evidence, the DCM was the Minister making the decision as to whether or not the development would proceed. That it was he who appointed Mr Viagas as HMGOG representative and it was he who instructed Land Property Services.
54. As I understood his submissions, Mr Costa does not on terms assert that the proper Defendant would have been HE the Governor. For my part I struggle to understand how he could have been, in circumstances in which he had no involvement whatsoever in taking the purported decision. Indeed, it is not in dispute that the language of section 75(1) reflects the constitutional arrangement whereby although the disposition of Crown Lands is made by HE the Governor, the decision for the sale or grant of leases and of their terms is a matter for HMGOG. That much is apparent from the fact that the section provides that HE the Governor “*shall exercise this power in accordance with the advice of the Chief Minister.*”

55. In my judgment section 46(3) of the Constitution affords some assistance. It provides that Ministers holding responsibility for any business of the Government of Gibraltar are “*collectively responsible to the Parliament with respect to any matter for which a Minister is responsible under this section.*” This provision reinforces the principle of collective ministerial responsibility, meaning decisions made by individual ministers are, in effect, decisions of the government as a whole (for which they are answerable to Parliament). In the present context although any variation of the User Clause and or disposition of land would involve advice from the Chief Minister to the Governor, the administrative responsibility evidently lies with the DCM qua Minister with responsibility for Crown Lands with operational responsibility and ministerial accountability resting with him. In my judgement, therefore, the DCM, being the office holder charged with the subject matter, he is the proper party to these proceedings. This approach mirrors constitutional practice in the United Kingdom, where a Secretary of State is routinely named as the defendant in judicial review proceedings, the rationale being that the Secretary of State represents the responsible department and is ultimately accountable, even if decisions involve multiple layers of internal or collective advice.

Exhaustion of Remedies

56 It is submitted for the DCM, that Hepta has instituted these proceedings without first having exhausted all of its remedies.

57 It is trite that judicial review should only be used where no adequate alternative remedy is available. In *R. (on the application of AL) v Serious Fraud Office [2018] EWHC 856 (Admin)* a divisional court of the High Court of England and Wales constituted by Holroyde LJ, Green J considered the scope of alternative remedies and at paragraph [55] said:

“...The law governing alternative remedies is well established and it is unnecessary to set out the case law in detail. The High Court retains jurisdiction to supervise all decisions of a public nature, and this would, in principle, include the decisions of the SFO. But the High

Court will exercise that jurisdiction only when it is proper to do so and it may decline to do so where there exists an alternative way in which the dispute in question can be resolved. There is no fixed or definitive list of the alternatives that the court will consider sufficient. They may be judicial, but they need not be: See e.g R (Glencore Energy UK Ltd) v Revenue and Customs Comrs [2017] STC 1824, paras 40, affirmed on appeal [2018] STC 51. The factors that the High Court will take into consideration include: the nature of the alternative remedy and in particular whether it is statutory and whether it was the intention of Parliament that it amounts to the mechanism or forum in which disputes were to be resolved; the utility and ease with which the alternative remedy can be invoked (relative to judicial review); cost and expense; the need for fact findings; utility and finality; the desirability of an authoritative ruling on the point of law arising and the strength of the issues (cf the judgment of the High Court in the Glencore case at para 42).”

58. The submission advanced by Mr Costa is that in the present case the alternative remedy is to be found in clause 7 of the Lease which provides:

“If any differences shall arise between the parties hereto touching their respective rights or obligations under this Lease the matter in dispute shall be determined unless otherwise provided for by a single arbitrator to be appointed by agreement between the parties (and failing such agreement to be appointed in accordance with the provisions of Section 10 of the Arbitration Ordinance) and the provisions of the Arbitration Ordinance shall apply to any such reference and arbitration.”

It is not in issue that the court has an inherent power to stay proceedings brought in breach of an agreement to decide disputes by an alternative method [*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334]. However, in the judicial review context, it is relevant to consider whether the contractually agreed procedure provides an adequate alternative remedy [*R. (on the application of Med Chambers Ltd) v Medco Registration Solutions Ltd* [2017] EWHC 3258 (Admin)].

59. In part, premised upon an assertion found in Hepta’s Skeleton Submissions, that Hepta “maintains that it has a strong claim for proprietary and/or promissory estoppel in private law” Mr Costa submits that Hepta should pursue its private law claims rather than these proceedings. For Hepta it is submitted that estoppel and legitimate expectation are legally distinct

doctrines, with different elements and remedies, and as regards promissory estoppel that it would not afford relief capable of compelling the DCM to act in the manner sought. It is also said that a private law claim cannot resolve the issues fully, because there is no private law cause of action akin to that of irrationality, meaning that, depending on the outcome of the private claim, there is a real possibility that the parties would have to come again before the courts on the basis of the same facts. That therefore, it is appropriate to bring judicial review proceedings.

60. I have not been addressed with sufficient detail as regards the limitations or advantages of a private law resolution of the present dispute by way of arbitration. And in particular, as to what relief would be available if Hepta were to succeed on a claim on the basis of estoppel, to properly assess whether it would provide an adequate alternative remedy. In any event, there is in my view a glaring limitation in the arbitral route. Hepta would be confined to claims arising under, and limited to the subject matter of the Lease. The proposed Development extends beyond the land demised by the Lease and it is evident that an arbitrator appointed pursuant to clause 7 would lack jurisdiction to consider the claim in so far as it relates or is impacted by land not held by Hepta. In those circumstances, arbitration cannot be a procedure which provides an adequate alternative remedy and consequently, it is appropriate for this court to exercise its supervisory jurisdiction.

Was there a decision?

61. Before considering whether the statement in the email of 17 November 2023 constituted a decision, it is necessary to resolve the preliminary question of whether that communication is protected by the Without Prejudice rule.

62. Mr Costa properly submits that written and oral communications made during a dispute between parties, which are made for the purpose of settling a dispute and which are expressed or are by implication made “without prejudice”, cannot generally be admitted in evidence. He further submits

and I accept, that the purpose of without prejudice correspondence is to encourage parties to settle their dispute without recourse to litigation. That parties should not be discouraged from doing so by a fear that anything they say might later be used to their prejudice in litigation if negotiations fail to reach a compromise.

63. Relying upon the eight non exhaustive examples set out at paragraph [52] of the judgment of Walker LJ in *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436, Mr Costa submits that none of those exceptions appear in the present case. It is unnecessary to set out those eight non exhaustive examples, and so far as it goes, Mr Costa’s submission is accurate. However, it fails to address the fundamental point of whether in fact the communication is caught by the Without Prejudice rule.
64. In *Cutts v Head* [1984] Ch. 290 Oliver LJ at page 303 quoted the remarks of Lindley LJ in *Walker v Wilsher* (1889) 23 QBD 335 regarding the meaning of the words “without prejudice”, as follows:

“... they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted.”

Thereafter, at page 306 he described the policy behind the rule as follows:

“It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, ... be encouraged fully and frankly to put their cards on the table...The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.”

65. The use of “*Without Prejudice*” as a label to a communication is not determinative in itself, rather the court has to make an objective assessment as to whether the communication was made in a genuine attempt to settle a

dispute [*Jones v Tracey and others (Re Costs) [2023] EWHC 2256 (Ch)*]. There is therefore a pre-requisite that there was a dispute in existence at the time when the statement was made. In my judgment as at 17 November 2023, there was a dispute. Although there were no extant legal proceedings, that there was a dispute is clear given the statement in Mr Farrell’s email of 11 November 2023, that:

“Hepta Limited will have no further recourse other than to commence legal proceedings against HMGOG as landlord.”

66. That, however, is not the end of the matter. For the without prejudice rule to engage, the statement made on behalf of HMGOG by Mr De Los Santos must be capable of being described as a statement made against HMGOG’s own interest. In my judgment nothing in the email of 17 November 2023 falls within any such characterisation. It follows that the email can properly be admitted in evidence and the statement *“Landlord’s consent for the 15 storey has not been approved, therefore the premium is irrelevant”* amounts to a decision.

67. A further potential issue arises given the reference in the email to the decision having been previously *“communicated to you in a couple of meetings”*. It is a feature of this case that there is a sparsity of minutes of meetings between HMGOG officials and Hepta representatives and there is no documentary evidence which makes good that assertion. In retrospect I should have invited the parties to file further evidence in respect of that statement to better consider whether the claim may have been filed out of time. In the event and for reasons which will become apparent, it is unnecessary to consider this issue further.

Legitimate Expectation

68. At the heart of the claim is whether, as a matter of fact, the Revised Plan was approved by HMGOG on 11 May 2022, and if so, whether such approval gives rise to the legitimate expectation contended for by Hepta.

Did HMGOG Approve the Revised Plan?

69. In the absence of any minutes of the meeting held on 11 May 2022, the assertion that HMGOG approved the Revised Plan is primarily based on Mr Carlton’s statement set out at paragraph [24] above which is contradicted by the DCM’s hearsay evidence which is set out in the paragraphs that follow.
70. Mr Baglietto submits that Mr Carlton’s evidence is not contradicted by direct evidence and relies upon *Regina (Terra Services Ltd) v National Crime Agency and others [2021] 1 W.L.R. 1* in which the court constituted by Lord Burnett LCJ and Jay J at [13] of their Judgment said:

“Hearsay is admissible in judicial review proceedings but direct evidence will usually be better than a second-hand account uncritically relayed by an intermediary.”

I evidently accept that proposition.

71. Mr Carlton’s evidence that Hepta would not have filed the plans with the DPC without the assurance from HMGOG that the Revised Plans were acceptable to it is consistent with its approach in July 2020 when Hepta chose, in the absence of agreement of HMGOG, to defer its planning application.
72. Moreover, although the DCM and Mr De Los Santos did not attend the DPC meeting of 14 September 2022 in which the full planning application was considered, it is of note that the minutes do not reflect either the representative of Land Property Services or Mr Viagas contributing towards the discussions. Whilst Minister Cortes expressed reservations as to “*massing*”, it appears that he did not vote against the project, but rather abstained. In the ordinary course of events, and had HMGOG not agreed to the Revised Plan, one would have expected Mr Viagas and the representative from Land Property Services to have simply made the point that HMGOG (qua landlord) had not approved the Revised Plan.

73. On the basis of the foregoing, I am satisfied that it is more likely than not that at the meeting held on 11 May 2022 HMGOG, through its representatives, approved the Revised Plan.
74. There is a further piece of evidence which supports that finding, namely the 11 July 2023 “Without Prejudice” email in which the assertion by Mr Farrell that “*a design was agreed to the satisfaction of HMGOG*” is to be found. Had the Revised Plan not been agreed, I would have expected an unambiguous rebuttal by way of reply. However, in reaching my determination I do not rely upon this email because I have not been specifically addressed as to whether without prejudice privilege attaches to this communication, and if so, whether or not it has been waived.
75. An aspect of the case which was not touched upon was whether Mr Viagas and/or Mr De Los Santos had actual or ostensible authority to bind HMGOG and approve the Revised Plan. It is implicit in the evidence of the DCM that neither Mr Viagas nor Mr De Los Santos had actual authority. However, there is no evidence before me to suggest that Hepta were put on notice that they lacked authority to agree to the Revised Plan. The point has not been taken, presumably because Mr Viagas and Mr De Los Santos (the latter qua director of Land Property Services) are senior HMGOG officials and, in the absence of any notification to the contrary, they plainly had ostensible authority to agree the Revised Plan on behalf of HMGOG.

Did the Approval create a legitimate expectation?

76. It is for Hepta to establish that HMGOG, by approving the Revised Plan, committed, clearly, unambiguously and without relevant qualification to “*agree a reasonable premium for the Development, and a change of the User Clause, and the conveyance of the Additional Area to Hepta if necessary and a licence and/or HMGOG’s permission for the overhang of the Development over its land.*”

77. Hepta's argument collapses under the weight of its own assertion. The commitment it relies upon is riddled with uncertainties. The most obvious being the premium. But other issues arise. Is Hepta to retain the Lease? If so, on what terms is it to acquire the additional land, and would that attract a separate premium? Would the terms of that demise mirror that of the Lease? If, as is far more likely, Hepta were to surrender the Lease and obtain a new lease in respect of all of the development area, what would be the term of that lease and what covenants would it contain?
78. Moreover, the assurance said to arise from the approval of the Revised Plan must be seen in the context of ongoing negotiations with various communications marked "*subject to contract*". As Elias J. in *Molinao* explained at paragraph [70] as the basis upon which *Pepper* could be justified, and applying that reasoning to the present case, to allow Hepta to rely upon the assurance (leaving to one side its many ambiguities) would undermine the operation of the private law of contract.
79. During the course of submissions Mr Baglietto relying in part upon *R. (on the application of Bibi) v Newham LBC (No.1) [2002] 1 W.L.R. 237* advanced an alternative argument by which as I understood it, he sought narrower declaratory relief requiring HMGOG not to resile from its approval of the Revised Plan.
80. In *Bibi* the applicants and their families, having arrived in the United Kingdom as refugees, were accepted by the council as unintentionally homeless and in priority need. The council, in the erroneous belief that it had a duty to do so, promised to each of them legally secure accommodation within 18 months. Subsequently the House of Lords held that local housing authorities were not obliged to secure permanent accommodation for homeless persons. In *Bibi* the English Court of Appeal adopted the analysis by Lord Fraser of the phrase "*legitimate expectation*" in *Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629* at 636:

“It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In Salemi v MacKellar (No 2) (1977) 137 CLR 396, 404, Barwick CJ construed the word ‘legitimate’ in that phrase as expressing the concept of ‘entitlement or recognition by law’. So understood, the expression (as Barwick CJ rightly observed) ‘adds little, if anything, to the concept of a right.’ With great respect to Barwick CJ, their Lordships consider that the word ‘legitimate’ in that expression falls to be read as meaning ‘reasonable’. Accordingly ‘legitimate expectations’ in this context are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.”

81. Premised upon the statement of principle that a legitimate expectation can go beyond enforceable legal rights, Mr Baglietto submits that the expectation created by the approval of the Revised Plan is capable of arising even though there is no enforceable contract between the parties. And by analogy with *Bibi* he submits that it is wrong to say that the substantive relief which Hepta seeks must be one where all the terms of any future lease must be agreed, because in *Bibi* the court ordered relief relating to suitable accommodation on a secure tenancy, where there was no detail of what precise accommodation that would be. That it is therefore open to the court to order relief, be it in the form of a mandatory order or declaration that HMGOG is under a duty to consider the steps which Hepta seeks for the development to go ahead, on the basis that they have a legitimate expectation that HMGOG have already approved the Revised Plan.

82. In my judgment the analogy with *Bibi* is strained. In *Bibi* the issue was whether there was a legitimate expectation to a secure tenancy of council accommodation, the provision of which was underpinned by a statutory framework. In contrast in this case, there can be no legitimate expectation because what flows from the approval of the Revised Plans is fraught with uncertainties. If, as I have determined the approval of the Revised Plan does not give rise to the legitimate expectation in the terms upon which it is sought in the Claim Form, in my judgment it would be wrong to grant a more limited declaration as to do so would constrain the terms upon which HMGOG may negotiate a commercial transaction and would risk an improper encroachment by this court upon the functions of the executive.

83. For these reasons in my judgment, approving the Revised Plan did not create the legitimate expectation contended for by Hepta. It is also not appropriate to grant the narrower declaration to the effect that Hepta has a legitimate expectation that the Defendant has approved the Revised Plan, or such like relief.

Irrationality

84. Hepta also advances its claim on the ground of irrationality.

85. The classical formulation of an irrational decision is to be found in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223*, namely one that “is so unreasonable that no reasonable authority could ever have come to it.” In *Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 HL* Lord Diplock at page 410 explained the term “*Wednesbury unreasonableness*” to mean, “a decision which was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.” Subsequent authorities have rephrased the “*Wednesbury unreasonable*” test, to whether the decision is outside the range of reasonable decisions open to the decision-maker [*R (Law Society) v Lord Chancellor [2018] EWHC 2094 (Admin)*]. In *R (Pantellerisco) v Secretary of State for Work and Pensions [2021] EWCA Civ 1454*, the English Court of Appeal was content to follow the approach in *Law Society*, noting that this was not intended to be essentially different from the *Wednesbury* formulation.

86. For Hepta it is submitted that HMGOG having approved the Revised Plan and the DPC having subsequently granted full planning permission, it was irrational and perverse for it to refuse to consent to a reasonable premium and a change of the User Clause and if necessary, a conveyance or grant of a licence/permission for the Development to proceed. This because HMGOG having approved the Revised Plan there is no commercial or other

reason for HMGOG to refuse to negotiate a reasonable premium and because there has not been a material change in circumstances since the Revised Plan was approved.

87. It is further submitted that once the DPC granted full planning permission, it became irrational for HMGOG to then withhold consent to the development on the public interest grounds already considered by the DPC. This because the DPC is the statutory body tasked with carrying out and implementing HMGOG's planning policy. In support of the latter proposition, reliance is placed upon Section 4(a) of the Town Planning Act 2018, which provides:

“The Commission shall-

- (a) with a view to the promotion of the health, safety, convenience, physical, environmental, economic and general welfare of the community, undertake the preparation of planning schemes for the physical development of such areas as the Government may direct, as well as for the type of buildings suitable for erection therein;”*

It is argued on behalf of Hepta that, the DPC having granted full planning permission for the development by reference to the *“health, safety, convenience, physical, environmental, economic and general welfare of the community”*, it is Wednesbury unreasonable for HMGOG to seek to override that decision by refusing consent on what essentially are the same grounds. That the effect of HMGOG's decision is to put itself above the DPC, and thereby undermine the statutory body tasked with taking planning decisions. That HMGOG therefore wishes to create two distinct planning schemes for private developments in Gibraltar, one for the general public and one by which it can give effect to its own separate planning policy when it disagrees with the DPC.

88. In support of the submission advanced reliance is placed upon *R. v Warwickshire CC Exp. Powergen Plc (1998) 75 P. & C.R.* 89. The facts of that case bear some consideration. Powergen applied for planning permission for a supermarket, for which access from an adjoining road was

needed. The Warwick District Council refused permission. One of the reasons was that having consulted Warwickshire County Council, which was the local highway authority, the proposal was considered to be detrimental to the interests of highway safety. After an appeal, the Secretary of State's Inspector gave outline planning permission, conditional on Powergen completing the highway works. This required that Powergen reach an agreement with Warwickshire County Council, under certain statutory provisions, but the County Council refused to enter into an agreement. Powergen then applied for judicial review of that refusal. The English Court of Appeal held that it was "*Wednesbury unreasonable*" for a highway authority, whose road safety objections had been fully heard and rejected on appeal, then, quite inconsistently with the Inspector's independent factual judgment on the issue, nevertheless maintain its original view.

89. The submission that HMGOG is creating two distinct planning systems is misconceived. Subject of course to any pre-existing contractual obligations, if person A applies for planning permissions in respect of land held by person B and obtains it, it evidently does not mean that B has to allow A to construct whatever may have been approved by the DPC. In fact, the effect of what is being submitted is that HMGOG is in a materially different position to B and that it cannot withhold its agreement to that which may have been approved by the DPC. Moreover, *Powergen* provides no support to the submission advanced on behalf of Hepta because in *Powergen* the challenge arose from a failure by Warwickshire County Council to accept a determination made on appeal. In the present case the issue is materially different because, absent a contractual obligation, Government qua landlord (like any other landlord) is not bound to vary a user clause and allow a development in its land simply because the development has been approved by the DPC.
90. I have not been referred to, nor am I aware of, any statutory provision governing the considerations or factors which need to be taken into account by HMGOG when disposing of land or determining its use. But it is evident

that in any land transaction entered into by government there will be a range of considerations, not exclusively financial, which may require the balancing of competing interests and which will involve social and political value judgments.

91. HMGOG having approved the Revised Plan and Hepta having obtained full planning permission, it undoubtedly appears unusual that HMGOG thereafter failed to engage in negotiations allowing for a change of user; the demise of additional land and generally negotiating the premium and the terms of a lease. However, for the reasons I have given, the approval did not create a legitimate expectation and therefore government was entitled to change its policy and reassess its position in respect of the development. What remains is that Hepta had the benefit of full planning permission and that of itself is wholly insufficient to make good the proposition that HMGOG's decision is "*Wednesbury unreasonable*".

92. It is not for the court to substitute its own view for that of the executive in matters involving policy choices and the balancing of competing interests unless the decision can be shown to be irrational. The question before this court is not whether HMGOG is right or wrong in the decision it has taken, but rather whether the decision is outside the range of reasonable decisions open to it. Given the factual matrix I can understand why Hepta feels aggrieved, however in my judgment it cannot be said that HMGOG's decision is irrational.

Conclusion

93. The claim is dismissed and I shall hear the parties as to costs.

Anthony Dudley

Chief Justice

Date: 16 July 2025