In The Supreme Court of Bermuda

CIVIL JURISDICTION

2007: No. 211

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

and

IN THE MATTER OF THE ADMINISTRATION OF JUSTICE (PREROGATIVE WRITS) ACT 1978

and

IN THE MATTER OF THE DEVELOPMENT AND PLANNING ACT 1974

and

IN THE MATTER OF THE MINISTER FOR ENVIRONMENT TELECOMMUNICATIONS AND E-COMMERCE, THE HON. D. NELETHA I. BUTTERFIELD, JP, MP

and

IN THE MATTER OF THE APPLICATION NUMBERED PLN: P0311/05 FOR PLANNING PERMISSION TO BUILD A TWO STOREY PARKING LOT ON THE GROUNDS OF THE FIRST CHURCH OF GOD, FIRST CHURCH LANE, NORTH SHORE, PEMBROKE

and

IN THE MATTER OF THE APPEAL TO THE DECISION OF THE DAB MADE IN THE MATTER OF THE APPLICATION NUMBERED PLN: P0311/05 FOR PLANNING PERMISSION TO BUILD A TWO STOREY PARKING LOT ON THE GROUNDS OF THE FIRST CHURCH OF GOD, FIRST CHURCH LANE, NORTH SHORE, PEMBROKE

and

IN THE MATTER OF THE DECISION OF THE MINISTER FOR ENVIRONMENT TELECOMMUNICATIONS AND E-COMMERCE, THE HON. D. NELETHA I. BUTTERFIELD, JP, MP MADE ON THE 27th FEBRUARY 2007 AND CONCERNING THE APPLICATION NUMBERED PLN: P0311/05 FOR

PLANNING PERMISSION TO BUILD A TWO STOREY PARKING LOT ON THE GROUNDS OF THE FIRST CHURCH OF GOD, FIRST CHURCH LANE, NORTH SHORE, PEMBROKE

BETWEEN:

LAURETTA LORNA STONEHAM
and
CLAUDETTE FLEMING
and
JANET FRANCIS

Applicants

and

THE ATTORNEY-GENERAL

1st Respondent

(Senator the Hon. Philip Perinchief)

and

THE MINISTER FOR ENVIRONMENT TELECOMMUNICATIONS AND E-COMMERCE, HON. D. NELETHA I BUTTERFIELD, JP, MP

2nd Respondent

and

THE DEVELOPMENT APPLICATIONS BOARD

3rd Respondent

RULING

Date of Hearing: 13 March 2008

Date of Ruling: 26 March 2008

Mr Darrell Clarke for the Applicants

Mr Martin Johnson, Attorney-General's Chambers, for the Respondents

The Proceedings

1. These are judicial review proceedings, brought with leave which was granted on 10 August 2007. The proceedings seek orders for:

(i) certiorari quashing the decision made by the second respondent ("the Minister") on 27 February 2007, on an appeal against the refusal by the third respondent ("the Board") of an application for planning permission to build a parking lot on the grounds of the First Church of God ("the Church") at First Church Lane, North Shore, Pembroke;

(ii) prohibition prohibiting the Minister from overturning the decision of the Board refusing planning permission, made on 28 September 2005; and

(iii) damages to be assessed.

2. In the normal course, the failure of a public body to act in accordance with public law principles of itself gives no entitlement at common law to compensation for any loss suffered. Nor does the careless performance of a statutory duty in itself give rise to any cause of action in the absence of a common law duty of care in negligence, or a right of action for breach of statutory duty. However, it is not necessary for that aspect of matters to be the subject of any ruling or further comment at this stage.

The Respondents' Application

3. The hearing before me arose in consequence of a summons issued on behalf of the respondents (together "the Respondents") seeking to set aside the grant of leave. The grounds of that application were, firstly, that the applicants ("the Applicants") had failed to make full and frank disclosure when applying for the grant of leave ex parte, and, secondly, that they had failed to take advantage of the statutory remedy of appeal provided for in section 61 of the Development and Planning Act 1974 ("the Act").

The History of the Planning Applications

4. On 25 February 2002, the Church had made application for planning permission to convert the single storey parking lot on its land at First Church Lane into a two storey parking facility. That application was refused by the Board on 24 July 2002. There followed an appeal by the Church against the decision of the Board

on 28 August 2002, and that appeal was disallowed by the Minister on 24 July 2003.

5. On 24 March 2005 a further application for planning permission was made by the Church under planning reference P0311/05. According to the affidavit sworn by the first named applicant, Ms Stoneham, in support of the application for the grant of leave to issue judicial review proceedings, this application essentially duplicated that which had been made in 2002. This application was also refused by the Board on 28 September 2005.

6. According to Ms Stoneham, an appeal against that decision was again made by the Church, shortly after the Board's refusal. However, again according to Ms Stoneham, neither she nor the other objectors were informed of the appeal by the Church against the decision by the Board. On 27 April 2007, approximately 19 months after the Board's refusal, the Minister allowed the appeal and granted the permission sought. It was only then that the objectors became aware of the position.

7. Apart from the failure to notify the objectors of the appeal to the Minister, there are issues which arise in relation to changes which were made to the planning application between the time of the appeal and the Minister's decision to uphold the appeal. There are also issues in relation to the state of the Planning Department file, and whether all material documents were on the file at all material times.

The Discovery Application

8. I refer to this because of the weight which Mr Clarke for the Applicants sought to attach to it, and his submission that the need for discovery represented a special circumstance sufficient to justify pursuing judicial review proceedings despite the existence of an alternative remedy in the form of a statutory appeal. A summons seeking discovery pursuant to Order 24 rule 3 of the Rules of the Supreme Court 1985 ("RSC") was filed in the Supreme Court Registry on 31 October 2007. I

pause to comment that applications for discovery in judicial review proceedings are governed by the provisions of Order 53 rule 8 RSC, but this may be academic, since Order 53 permits applications for discovery pursuant to Order 24.

9. In any event, the discovery summons came before a judge in chambers on two different occasions, on each of which counsel for the Respondents was present but Mr Clarke was not, and on each of which occasions the summons was dismissed. Mr Clarke has filed an affidavit in which he explains that he had no knowledge of either hearing. His affidavit concluded by indicating his wish to make an application for discovery at this hearing on the basis of the past summons. I indicated that my view was that since there is no extant discovery summons, such application could not properly be made, but said that Mr Clarke could argue the need for discovery as part of his submissions that there were exceptional circumstances which would affect the operation of the normal rule in judicial review proceedings in regard to the availability of an alternative remedy.

Lack of Full and Frank Disclosure

10. There was some five complaints by Mr Johnson in regard to the lack of disclosure, although there appears to be some overlap with the alternative remedy argument. They can be taken relatively quickly. First, it is said that the Applicants failed to provide material evidence that they had satisfied the requirements of rule 18 of the Development and Planning (Application Procedure) Rules 1997. That rule sets out the method of making an objection, and the complaint made by Mr Johnson is that the Applicants failed to provide material evidence to the effect that they did indeed satisfy the requirements of rule 18. There seems to be no doubt but that the Applicants were objectors, and were treated as such; Ms Stoneham was given notice of the Minister's decision of 27 April 2007, as were the other individual objectors, and her affidavit indicated (paragraph 11) that the Applicants are neighbours who own property in close proximity to the Church and are among the approximately seventy objectors to the proposed application. I do not see that there is anything to this objection.

11. The second complaint is that the Applicants had failed to disclose that some of the objectors had signed a standard form of objection letter indicating that they were Pembroke residents living near to the Church, when in fact they lived in other parishes. The objection seems to be valid, according to the affidavit of Kevin Monkman sworn on 7 September 2007, but I do not see how it is material for the purpose of these proceedings. The complaint is not made in respect of any of the Applicants, and is effectively past history in relation to the planning objection procedure.

12. The next two grounds concern an alleged failure to disclose the alternative remedy under section 61 of the Act, or that the Applicants were out of time for an appeal under section 61. But in fact, Ms Stoneham's affidavit did refer to the appeal procedure under section 61, and purported to be in support of an application "for leave outside of the time period". There was no such application made for an extension of time within which to appeal to the Supreme Court from the decision of the Minister, but Ms Stoneham's affidavit does indicate that she was aware of the alternative remedy under section 61 of the Act, that the objectors were at that point out of time for an appeal, and that there was power to extend time. I cannot see that there is anything in either of these complaints.

13. Lastly, there was a complaint that the Applicants had failed to disclose that some of the residents in close proximity to the Church had consented to the development. Again, this does not seem to me to be at all material, so that I do not think there is anything in any of the complaints of lack of full and frank disclosure.

The Alternative Remedy

14. It is well established that judicial review is a remedy of last resort, so that where a suitable statutory appeal is available, the Court will exercise its discretion in all but exceptional cases by declining to entertain an application for judicial review; see, for instance, the judgment of Sedley LJ in *R (on the application of Lim and another) -v- Secretary of State for the Home Department* [2007] EWCA Civ 773

(paragraph 13). This is perhaps but one of the latest in a long line of judicial pronouncements to the same effect, and I do not see that any useful purpose would be served by setting out extracts from judgments other than the one to which I have referred above, all of which repeat the principle in the same or similar terms.

15. There is no question but that there is an alternative remedy, where there has been an appeal to the Minister from a decision of the Board. Such an appeal to the Minister is made under section 57 of the Act, and section 61 of the Act gives any party to proceedings before the Board who is aggrieved by the decision or direction of the Minister the right to appeal to the Supreme Court on a point of law within twenty-one days or such longer period as the Supreme Court may allow after receipt of notification of such decision or direction. There is provision under section 61(2) of the Act for the Supreme Court to make such order as it thinks fit on any appeal under the section.

16. In his submissions, Mr Johnson referred to a number of cases in which appeals from the Minister had been made to the Supreme Court, pursuant to the provisions of section 61of the Act. He was not able to refer to any case in which a person aggrieved by the decision of the Minister had sought to pursue judicial review proceedings instead of following the appellate procedure provided for in section 61 of the Act, but did produce one authority where a party aggrieved by a decision of the Board had sought to pursue judicial review proceedings instead of following the appellate procedure provided for in section 57 of the Act. That was the case of *Hollis -v- Development Applications Board and Alexander Swan*, [2001] Bda LR 34. That case had come before me, and I had concluded that the statutory appeal procedure contained in the Act and the relevant rules were suitable to determine the real issue in the proceedings. I therefore set aside the grant of leave.

Exceptional Circumstances - Discovery

17. Mr Clarke for the Applicants submitted that exceptional circumstances exist in the present case, and said that it had been necessary for his clients to proceed by means of judicial review because they needed discovery. In that regard, he said that there was a need to know what was in the Planning Department file, and to know what had happened between the rejection of the planning application by the Board and the decision of the Minister on appeal.

18. But the technical availability of discovery does not mean that this will routinely be granted in judicial review proceedings. In this regard I quote from the two leading administrative law text books as follows:

Judicial Review of Administrative Action by de Smith Woolf and Jowell (5th edition, paragraph 15-031)

> "Order 53 explicitly provides for the making of interlocutory applications in respect of discovery of documents, interrogatories and cross-examination of deponents. These were innovations in the 1977 reforms, and they might have amounted to a potentially significant development. This has not been the reality. Unlike proceedings commenced by action, discovery is not automatic and the court retains a discretion to refuse these facilities. In practice, unless the applicant can show a prima facie breach of public duty, discovery will not usually be granted. The courts have, however, encouraged public bodies to adopt the practice of filing an affidavit which discloses all relevant matters.
>
> Where the challenge is on the grounds of *Wednesbury* irrationality, full discovery of the type which is a matter of routine in private law proceedings will seldom be ordered. Applications for discovery "in the hope that something might turn up" are regarded as an illegitimate exercise, at least in the absence of a prima facie reason to suggest that the deponent's evidence is untruthful. Generally, discovery to go behind the contents of an affidavit will be ordered only if there is some material before the court which suggest that the affidavit is not accurate. Even reports referred to in affidavits, routinely inspected in private law

proceedings, will not be the subject of discovery under Order 53 unless the applicant shows that the production of the documents is necessary for fairly disposing of the matter before the court."

Administrative Law by Wade and Forsyth (9th Edition, page 655)

"Order 53 remedied in part the procedural deficiencies previously associated with the procedure for obtaining the prerogative remedies. In particular, it made uniform interlocutory facilities – discovery of documents, interrogatories and cross-examination – available although subject to control of the court.

In practice, however, discovery was ordered only in limited circumstances. The applicant needed to show that discovery was 'necessary… for disposing fairly of the cause', and this he rarely succeeded in doing without access to the documents. This will continue to be the case with disclosure of documents – the new name for discovery – only being required when the court so orders."

19. It does not, therefore, seem to me that Mr Clarke is right in terms of discovery justifying the attempt to proceed by way of judicial review. Particularly it is to be noted that the Court has a variety of powers pursuant to Order 55 rule 7 RSC in relation to the hearing of an appeal. If it were indeed the case that the Court was of the view that discovery were needed, one would expect that the appropriate order could be made on application in proceedings by way of an appeal under section 61 of the Act.

20. And generally, there does not seem to be any other basis for concluding that judicial review proceedings will afford the Applicants some advantage when compared with the statutory appeal procedure. Certainly, it cannot be said that speed of resolution is one such advantage. These proceedings were filed some seven and a half months ago, and it will obviously be some time before they could be brought on for hearing. I would also note that while the appeal under section 61 of the Act is limited to a point of law, it appears now to be accepted

that any ground of challenge which might be used in judicial review proceedings may also be used on appeal on a point of law – see de Smith, paragraph 15 – 075.

Exceptional Circumstances – the Appellate Procedure

21. In the case of *R -v- Birmingham City Council ex parte Ferrero Ltd.* [1993] 1 All ER 530, Taylor LJ, having referred to the normal rule in relation to alternative remedy, and having quoted from the leading authorities, said this (page 537):

> "These are very strong dicta, both in this court and in the House of Lords as cited, emphasising that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure it is only exceptionally that judicial review should be granted. It is therefore necessary, where the exception is invoked, to look carefully at the suitability of the statutory appeal in the context of the particular case."

And at page 538

> "Accordingly, in the present case, there was available an appeal specifically provided by Parliament to enable a party aggrieved by a suspension notice to challenge it. The appeal was at least as expeditious, if not more so, than judicial review. It was more suited than judicial review to the resolution of issues of fact."

And finally, on the same page

> "With respect to the learned judge, he did not, in my view, ask himself the right questions….. He should have asked himself what, in the context of the statutory provisions, was the real issue to be determined and whether a s15 appeal was suitable to determine it."

22. In this case, I have already referred to what I understand to be the gravamen of the Applicants' complaints. These are that the entire appeal process was conducted without notice to them, that the Church made a revised form of application to deal with those matters which had caused the Board to refuse permission, again without notice to the objectors, and, finally, a complaint in regard to the changing state of the Planning Department file. This last point does not seem to me to deserve the emphasis which Mr Clarke sought to place on it.

The real complaint at the root of these proceedings is the manner in which the appeal was conducted without reference to the objectors.

23. As I have said, Mr Johnson in his submissions referred to a number of Bermuda cases which had been concerned with appeals to the Supreme Court taken under section 61 of the Act. A number of these were concerned with breaches of the rules of natural justice, and the case of *Green -v- Minister of the Environment and Darling* [1992] Bda LR, 37 in the Supreme Court and 16 in the Court of Appeal, seems to me to be particularly instructive.

24. This case concerned an appeal from the Board to the Minister, where the Minister had undertaken a site visit. The applicant for planning permission (who was the second respondent to the appeal under section 61 of the Act) had been present when the Minister had carried out her site visit. The appellants, who were objectors, had not been informed of the site visit. Sir James Astwood, Chief Justice, had said in his judgment:

> "In my view, the Appellants should have been informed of the site visit and have been given an opportunity to be heard, if any submissions were made at the site, as Justice must not only be done but must be seen and perceived to be done."

That judgment was overturned by a majority in the Court of Appeal, but on the particular facts of the case. In his judgment for the majority, Huggins JA (with whom the President had agreed) said:

> "The gravamen of the complaint is that there was opportunity for the Second Respondent to make representations to the Minister when she was at the site and when the Appellants were not there. There is no evidence that the Second Respondent in fact accompanied the Minister during her view. We are told only that they met, and there is evidence that no representations were made to the Minister by the Second Respondent."

As both judgments in the Court of Appeal indicated, a considerable part of the argument before the Court had been directed to the question whether the Minister was acting in an administrative or quasi judicial capacity. Huggins JA was of the

view that the overall procedure under the statute was administrative, but the question had to be approached on broad lines, and it was a question of fact and degree in administrative procedures whether the rules of natural justice had been broken. Huggins JA carried on to say:

> "I apprehend that a party may invite the Minister to have a view at which he could point out to her specific features the importance of which might be in controversy. If she were to accede to such a request it would certainly be incumbent on her to give notice to any opposing party. In the present case I see no reason why she should have given notice, as the purpose of her visit was not to receive representations from any party."

Huggins JA concluded that the appellants did not know all the facts and had assumed the worst, and that on the evidence as it stood their suspicions were unfounded. In his dissenting judgment, Henry JA said:

> "The intention of these rules (a reference to the Development and Planning (Appeals to the Minister) Rules 1974) must, in accordance with the principles of natural justice, be to afford parties to an appeal the opportunity of giving evidence or, as the case may be, making submissions in relation to submissions made and documents presented by other parties to the appeal. It must be remembered that the Director of Planning always is, and was in this case, a party to the appeal to the Minister. Accordingly whether it was he or the Second Respondent who was responsible for bringing matters to the Minister's attention as indicated in paragraph 9 of his affidavit, the Appellants ought to have been at least made aware of those matters and afforded an opportunity of responding to them."

25. Henry JA concluded that in making the site inspection in the absence of one of the parties to the appeal and in further failing to make the appellants aware of the matters brought to her attention during the course of that inspection, the Minister was acting contrary to the principles reflected in the rules and to the principles of natural justice.

26. It does seem to me that that case was concerned with precisely the sort of issues which arise in this case, and I am bound to say that in my view, in the context of the particular facts of this case, the statutory appeal procedure afforded by section 61 of the Act is manifestly suitable for the resolution of the matters complained of in this case.

Delay

27. One of the matters which concerned me in the case of *Hollis* was the fact that by the time the application to set aside the grant of leave on the basis of alternative remedy came to be decided, the applicant was very considerably out of time in relation to the statutory appellate process. I noted in *Hollis* that when the applicant had become aware of the pertinent facts, the time within which to pursue an appeal had only just passed, so that an application for leave to enlarge time could have been made at that time, and might reasonably have been expected to succeed. I took the view that there were no exceptional circumstances which would justify a departure from the normal principles applicable on the issue of alternative remedy.

28. In this case, Ms Stoneham received notice of the Minister's decision when she received a copy of the letter sent on 27 April 2007 by the Permanent Secretary to the Ministry of the Environment to the Church's agent. She then had twenty-one days within which to appeal. There was then a delay in reviewing the file at the Planning Department, and Ms Stoneham appears to have viewed the Planning Department file on more than one occasion, while the time limit for objection passed. She then said that it had taken "a number of weeks" to organise the funding and to liaise with the other objectors. The objectors had then been further delayed when they had sought to obtain advice from the Ombudsman's office. What is clear is that by the time these proceedings were filed, Ms Stoneham was aware both of the provisions of section 61 of the Act, and the applicable time limit within which an appeal needed to be made. Strangely, Ms Stoneham referred to making application to the Court for an extension of time, when she was within the time limit requirements of Order 53, and outside the time limit

requirements of section 61 of the Act, but had not chosen to pursue an appeal under section 61. Mr Clarke could not explain the reason for these statements in Ms Stoneham's affidavit, but instead said that he wished to make an application in the alternative (by which I understand him to mean as an alternative to the judicial review proceedings), for an extension of time within which to appeal under section 61 of the Act. There being no such application before me, and this being inconsistent with the course which the Applicants had chosen to pursue, I declined to hear such an application and suggested that in the event that such an application did become necessary, it was better to make the application in the appropriate proceedings, supported by an affidavit dealing properly with the issue of delay.

Summary

29. The conclusion which I have reached in relation to the issue of discovery is that there is no advantage to the Applicants in terms of the availability of discovery, by reason of pursuing judicial review proceedings as opposed to following the appellate procedure available under section 61 of the Act. It follows that I do not regard the availability of discovery in judicial review proceedings as constituting exceptional circumstances such as to justify a departure from the normal rule that a remedy by way of judicial review is not to be made available where an alternative remedy exists, and particularly where that alternative remedy is a statutory appellate procedure.

30. Further, in relation to the particular appellate procedure afforded by section 61 of the Act, I do not regard that as in any way inadequate in terms of its ability to deal with the complaints which the Applicants make. On the contrary, past cases demonstrate that such procedure has dealt effectively with precisely the type of matters of which the Applicants make complaint.

31. I therefore find that there were no exceptional circumstances in this case to justify the Applicants seeking relief by way of judicial review, as opposed to following the prescribed appellate procedure. That procedure should have been

followed in this case, and the fact that the Applicants are now out of time to a very much greater extent than was the position in July 2007 does not seem to me to convert into "exceptional circumstances" circumstances which would not be exceptional but for the choice made by the Applicants in pursuing judicial review proceedings instead of the appropriate appeal procedure.

32. I therefore make an order in terms of the Respondents' summons and set aside the grant of leave made to the Applicants on 10 August 2007, entitling them to bring proceedings for judicial review. The grant of a stay made at the same time is also set aside.

Costs

33. In my view there is no reason why costs should not follow the event. I therefore order that the Applicants pay the costs of the Respondents in these proceedings, to be taxed in default of agreement.

Dated the 26th of March 2008.

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Hon. Geoffrey R. Bell
Puisne Judge