



# In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2012: No. 211

**IN THE MATTER OF AN APPEAL UNDER SECTION 61 OF THE DEVELOPMENT  
AND PLANNING ACT 1974**

**AND IN THE MATTER OF A DECISION OF THE MINISTER OF THE  
ENVIRONMENT PLANNING AND INFRASTRUCTURE**

**(1) JOE DESILVA**

**(TRADING AS BERMUDA QUARRY SUPPLIES)**

**Appellant**

**-v-**

**THE MINISTER OF ENVIRONMENT, PLANNING AND INFRASTRUCTURE**

**Respondent**

**RULING**

(in Chambers)

Date of Hearing: August 1, 2012

Date of Ruling: August 31, 2012

Mr. Marc Daniels, Charter Chambers, for the Appellant

Ms. Maryellen Goodwin, Attorney-General's Chambers, for the Respondent

## Introductory

1. Section 61(1) of the Development and Planning Act 1974 (“the Act”) provides as follows:

*“Appeals to the Supreme Court*

61 (1) The Director or any party to proceedings before the Board—

(a) *which have been the subject of an appeal under section 57;*

(b) *where the decision of the Board in the matter has been varied by direction of the Minister in accordance with the powers vested in him by section 30, 48 or 60*

*who is aggrieved by the decision or direction of the Minister in the matter may 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.”*

[emphasis added]

2. The Appellant applied by Notice of Originating Motion dated June 6, 2012 to appeal a decision of the Minister dated January 16, 2012, almost six months after the relevant decision and some 5 months after the expiry of the time for appealing. The decision refused permission for the erection of a fence around the quarry site pursuant to an application made on June 2, 2009 and refused by the Development Applications Board on March 25, 2011. Although rule 2(1) of the Development and Planning Rules 1974 requires a notice of appeal to be given within 21 days, the appeal to the Minister was lodged almost three months later on June 22, 2011.
3. The Respondent’s counsel unsurprisingly pointed out at the first hearing of the appeal on June 14, 2012 that an extension of time ought to be sought before the appeal was heard on its merits and I directed that a formal application should be made.

### **The explanation for the delay**

4. The Appellant’s explanation for the delay may be summarised as follows:
  - the Appellant was not verbally told of the Minister’s decision until April or May although his architect received notice of the decision within time to appeal and forwarded a copy of the refusal decision to him before April/May;
  - the Appellant was embroiled with family health problems after he spoke to his architect about the refusal;
  - the Appellant did not realise the significance of the refusal until he learned on May 21, 2012 that his firm’s operating license was not going to be renewed.
5. Ms. Goodwin refuted the last excuse by reference to correspondence which demonstrated that the Appellant knew or ought to have known well before May 21,

2012 that his operating license would not be renewed if his planning application was refused.

### **Applicable legal principles**

6. Section 61(3) of the Act provides in effect that the Rules of the Supreme Court govern the procedure for appeals under section 61. Ms. Goodwin submitted that the Court's power to extend the time for appealing under section 61(1) accordingly had to be exercised in accordance with the Rules. The usual extension of time powers under Order 3 rule 5 accordingly applied. Order 3 rule 5 provides as follows:

*“(1) The Court may on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*

7. Strictly read, however, Order 3 rule 5 governs the power to extend time limits fixed by judgments, order or directions, not by statutes or primary legislation. Section 61(1) creates a freestanding statutory discretion to extend the 21 day time limit to “*such longer period as the Supreme Court may allow*”. This is different to provisions such as section 15 of the Court of Appeal Act 1964, which delegates all procedural matters (including the time for appealing and the power to extend time) to rules of court.
8. After hearing full argument, I granted counsel 10 days in which to submit any further authorities relevant to the question of how the power to extend time under section 61(1) had been exercised in the past and the implications of extensions of time for fair hearing rights under section 6(8) of the Bermuda Constitution (especially the right of access to the Court).
9. Having reviewed the various authorities cited<sup>1</sup>, it appears that:
  - (a) there are no recent published judgments elucidating how the power to extend time under section 61 of the Act has been exercised in the past;
  - (b) there is no obvious reason in principle why the approach to extensions of time under Order 3 rule 5 of this Court's Rules and/or Order 2 rule 4 of the Rules of the Court of Appeal should not apply by analogy to extensions of time in relation to planning appeals; and

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<sup>1</sup> The authorities cited included: *Supreme Court Practice 1999*, paragraph 55/4/2; *Re Waxoyl Limited* [1995] Bda LR 5 (CA); *Re Braswell* [2001] Bda LR 80 (CA) and *R-v- London Borough of Hammersmith and Fulham et al* [2002] UKHL 23.

- (c) the right of access to the court which operates in favour of an applicant may only be enjoyed to the extent that it does not extinguish the corresponding right of the opposing party to a fair hearing within a reasonable time.

10. The following observations of Worrell JA on behalf of the Court of Appeal for Bermuda in *Rayclan Limited-v- Trott* [2003] Bda LR 42 illustrate the core requirement that good reasons must be furnished for granting extensions of time:

*“The following remarks in the judgment of Lord Guest in the case of Ratnam v Cumarasamy and Another [1964] 3 ALL ER 933 do provide some useful guidelines in dealing with these matters. At page 935 he states-*

*‘The rules of Court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.’”*

### **Merits of present application**

11. Applying the generally applicable principles governing the extension of time within which to appeal to the present case, no satisfactory reasons for the not inconsiderable delay have been established by the Appellant as Ms. Goodwin for the Respondent submitted.
12. The mere fact that the appeal is arguable and extremely important to the Appellant as it involves an attempt to ensure the continuation of a business in a location where it has operated for a number of years cannot justify the careless way in which the Appellant responded to actual and constructive notice of the Minister’s rejection of his planning appeal. I reject the notion that the importance of the impugned decision only became apparent in May 2012 when the operating license was not renewed.
13. However, there are two exceptional reasons, admittedly not explicitly advanced in argument, why in my judgment the Appellant’s application ought properly to be granted in a case where no or no material prejudice to the Respondent would flow from such disposition of the appeal:
  - (a) it was very arguably unclear before the present application whether or not this Court’s statutory discretionary powers to extend time under section 61(1) of the Act were more flexible than the corresponding powers under

Order 3 rule 5 of this Court's Rules and Order 2 rule 4 of the Rules of the Court of Appeal; and

- (b) the Minister seems to have ignored the 21 day time limit for filing appeals against the decision of the Development Application Board without any formality. Counsel for the Respondent referred to the lateness of the initial appeal, but made no reference to any extension of time application. This might well have led the Appellant and his architect to believe that appeal time limits were somewhat 'relaxed' in the planning law context.

### **Conclusion**

- 14. Planning litigants in future cases should be in no doubt that the general principles applicable to extensions of time under the Rules of this Court and in relation to appeals to the Court of Appeal apply to the exercise of this Court's discretion to extend time for appealing under section 61 (1) of the Development and Planning Act 1974.
- 15. However, having regard to the commercial importance of the case to the Appellant, urged upon the Court by Mr. Daniels, combined with the fact that the way in which the section 61(1) discretion should be exercised was somewhat unclear before the present application was made, the Applicant is granted an extension of time.
- 16. However, unless either party applies within 14 days by letter to the Registrar to be heard as to costs, the costs of the present application are awarded to the Respondent in any event. Although the provisions of Order 62 rule 6(6), upon which Ms. Goodwin relied, do not strictly apply to extensions of time pursuant to a statutory power, I see no reason why this rule ought not to apply in the present context by way of analogy.

Dated this 31<sup>st</sup> day of August, 2012 \_\_\_\_\_  
IAN R.C. KAWALEY CJ