In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2012: No. 126

(1)TELECOMMUNICATIONS (WEST INDIES) LIMITED

(trading as Digicel Bermuda)

(2) MICHAEL MARKHAM

Appellants

-AND-

THE MINISTER OF ENVIRONMENT, PLANNING AND INFRASTRUCTURE

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: August 14, 2012

Mr. Nathaniel A. Turner, Attride-Stirling & Woloniecki, for the Appellants

Mr. Saul Froomkin QC, Isis Law, for the Respondent

Introductory

1. In this matter the Appellants appeal by Notice of Motion dated April 5, 2012 against the decision of the Minister dated March 15, 2012 to refuse their appeal against an

earlier Development and Applications Board decision. This was in fact the second appeal against the Minister's decision in this matter.

2. The first appeal was disposed of by this Court's judgment of April 29, 2011 in Supreme Court Appellate Jurisdiction 2010 No. 336[1] and by the Order of that same date ("the First Appeal"). Paragraph 2 of the Order in the First Appeal provided as follows:

> "*That the Appellants' planning application is hereby remitted to the Respondent Minister to be reheard in accordance with law.*"

The present appeal

3. The Appellants appealed on two broad grounds. The first ground was essentially an attempt to disturb the substantive findings made by the Minister in the March 15, 2012 decision. The second and alternative ground complained that the Minister erred in law in failing to afford the Appellants an opportunity to make fresh submissions before arriving at his second decision.

4. In my judgment, notwithstanding the vigorous arguments of Mr. Froomkin to the contrary, it is clear that the Minister erred in failing to afford the Appellants an opportunity to make fresh submissions. This arises primarily from the conclusions of this Court in paragraph 54 of the decision in the First Appeal where I said this:

> "*Because the appeal record indicates that application was never fully assessed on its merits under the Plan at all, this Court cannot properly either (a) quash the decision and order the Minister to grant the application (as the Appellants sought), nor (b) confirm the decision on the grounds that the application was fully considered under the 2008 Draft Plan and rightly refused (as the Respondent sought). The alternative basis of the impugned decision was clearly tainted by the primary finding that the application was in breach of the mandatory prohibition contained in the Zoning Order…*"

5. Mr. Froomkin sought to argue that the findings made by the Minister in his second decision are unimpeachable. But the question of whether or not the minimum standards of fairness have been met is not concerned with the merits of the decision at all. It is, rather, concerned with the appearance of justice.

6. In this case Mr. Turner astutely pointed out that if one looks at the second decision itself, there is not even a bare assertion that the Minister has reviewed and taken into account the original submissions made by the Appellants in support of their First Appeal. This in my judgment adds greater force to the complaint that the decision was not reached by a fair procedure and that the Appellants ought to have been afforded an opportunity for the first time to make submissions addressed solely to the merits of

[1] [2011] Bda LR 27.

the planning application undistracted by attention to the legal issue which was ultimately resolved in the Appellants' favour.

7. The importance of parties being afforded an opportunity to be heard was perhaps best expressed in its widest canvass by Wade J (as she then was) in *Somers Villa Limited-v-Minister of the Environment*, Civil Jurisdiction 1992: No. 442, Judgment dated October 7, 1993[2]. In that case she observed (at pages 31-32):

> "*However, sight should not be lost* [of the fact] *that the pivotal point of the appellant's complaint to the Minister expressed in the Minister's own words was that '…the Board erred in determining that there was an existing stock of housing in Bermuda, sufficient to meet Bermuda's current and short term need without first giving the appellant's representatives an opportunity to consider such representations and make representations with regard thereto…' (emphasis added)*…"

8. She concluded (at pages 32-33):

> "*In the circumstances of this case, I am left with the feeling that the applicant was not given a 'fair crack* [of] *the whip'. The issue of need came very much by a 'side-wind' and it was proper that the Minister should have given the appellant an opportunity to comment on the issue of need before the Minister made her decision.*
>
> *Mr. Holder stressed that at all times the Minister was acting in an administrative capacity. I find that the Minister in determining this appeal was acting in a quasi-judicial capacity. However, in my judgment, whether the Minister's function is administrative or quasi-judicial, is of no import if the question to be decided is one which touches the property and rights of individuals, they are entitled to have the matter determined in a judicial temper in accordance with the principles of fairness.*
>
> *I bear in mind the authorities emphasising that it is not for every error in the course of a hearing that an appeal will be granted.*
>
> *I have come to the conclusion that this decision must be quashed. It would not be right for me to exercise my discretion to allow the decision to stand, despite the errors to which I have referred.*"

[2] [1993] Bda LR 52.

Conclusion

9. For these reasons I allow the appeal and remit the matter to the Minister to be reheard according to law. For the avoidance of doubt I signify that a rehearing in all the circumstances of this case requires the Minister to afford the Appellants an opportunity to make fresh submissions as to the Minister in support of the appeal as recast by the Judgment of this Court in the First Appeal.

10. Costs to the Appellants to be taxed if not agreed.

Dated this 14th day of August, 2012 _____

IAN R.C. KAWALEY CJ