

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/004

BETWEEN:

QUORUM ISLAND (BVI) LIMITED

Appellant/Interested Party

THE ATTORNEY GENERAL

Appellant/Defendant

and

VIRGIN ISLANDS ENVIRONMENTAL COUNCIL

Respondent/Claimant

Before:

The Hon. Mr. Denys Barrow, SC
The Hon. Ms. Ola Mae Edwards
The Hon. Mr. Michael Gordon, QC

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances :

Mr. Gerard Farara QC and Ms. Tana'ania Small Davis for Quorum Island (BVI) Ltd.
Ms. Vereen Vanterpool for the Attorney General
Mr. Stephen Hockman QC and Ms. Megan Thomas for the Virgin Islands Environmental Council

2008: September 25;
October 27.

Civil appeal – Judicial Review – limitation period – whether an application to the court constitutes a “proceeding” – Public Authorities Protection Act Cap. 62. – Interpretation Act Cap. 136 – Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 – Part 56 of the Civil Procedure Rules 2000

The respondent (the Council) applied to the High Court for leave to apply for judicial review of a decision of the Government. This application was filed on the last day of the six-month period limited by the **Public Authorities Protection Act** (the Act) for the bringing of proceedings. The judge granted leave and the Council thereafter filed its Fixed Date Claim Form. The appellants

objected contending that the judicial review claim had been brought after the expiration of the limitation period. They argued that the judicial review claim was commenced only upon the filing of the claim and not upon the making of the application for leave, which was not an “action”, “claim” or “proceeding” within the meaning of the Act. The judge rejected this contention, against which decision the appellants have appealed.

Held: dismissing the appeal, awarding prescribed costs of the appeal to the respondent and affirming the costs order in the court below:

- (1) “Proceeding” is a word of the greatest possible scope in that it includes, but is not limited to, action, cause or matter. An application to the court is a proceeding and is commenced when the application is filed.
- (2) An application for leave to apply for judicial review is therefore a proceeding within the meaning of section 2(a) of the Act.
- (3) Section 2(a) of the Act does not require that an “action” be commenced, but simply requires that whatever is the manner prescribed by rules of court for a person to commence proceedings to obtain the court order that he seeks, the proceeding must be commenced within the specified time. The application for leave to apply for judicial review, having been filed within the six-month limitation period, was commenced in time, as required by that section.

JUDGMENT

- [1] **BARROW, J.A.:** This appeal is by the Interested Party (Quorum) and the Attorney General against the decision of Joseph-Olivetti J in which she rejected their contention that the respondent (the Council) had brought proceedings for judicial review after the expiration of the relevant limitation period.
- [2] There is no dispute as to the facts. The Council applied to the High Court for leave to apply for judicial review of a decision of the Government granting planning approval to Quorum for the establishment of a resort on 432 acres on Beef Island that would include an 18-hole golf course and marina. The Council filed its application on the last day of the six-month period limited by the **Public Authorities Protection Act**¹ (the Act) for bringing proceedings to challenge a decision by the Government. The judge granted leave and the

¹ Laws of the Virgin Islands, Revised Edition 1991, Chapter 62

Council filed its Fixed Date Claim form a little more than a month after it had filed its application for leave and, therefore, after the six-month period had passed.

- [3] The Attorney General and then Quorum objected that the Council's claim for judicial review fell foul of section 2(a) of the Act, which states:

"Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or of any public duty or authority or of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect ----

- (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of ..."

- [4] The core of the appellants' argument was that under rule 56.3(1) of the **Civil Procedure Rules 2000 (CPR 2000)** a claim for judicial review can only be made after an applicant first applies for and obtains leave to make the claim. It is only after leave is obtained from the court that a person can commence a claim for judicial review. Before the claim form is filed there is no claim, Quorum argued. Counsel further argued that by virtue of section 42 of the **Interpretation Act**² (as amended³) a claim is an action because "action" is defined as meaning:

"a civil proceeding commenced in such manner as may be prescribed by rules of court and includes a claim under the Eastern Caribbean Civil Procedure Rules, 2000, ..."

The appellants argued that no claim and hence no action was brought before the expiration of the limitation period under the Act, therefore the Council is barred from making a claim for judicial review.

- [5] In a written decision the judge concluded,⁴ after a full examination of the rival arguments, "that an application for leave is to be regarded as the commencement of the action for the purposes of section 2(a) of the Act."

² Laws of the Virgin Islands, Revised Edition 1991, Chapter 136

³ Interpretation (Amendment) Act, 2000 (No 16 of 2000)

⁴ Paragraph [49], judgment delivered 7th March 2008, in BVIHCV2007/0185

[6] Mr. Farara QC, leading counsel for Quorum, contended on appeal that the judge reached her conclusion on flawed reasoning. The fundamental flaw, in counsel's submission, was that the judge equated the procedure for judicial review in this jurisdiction with the procedure in England, which the judge wrongly understood as treating leave to commence judicial review proceedings not as a condition precedent for filing a claim but as the first stage of a two stage process. That is not so in this jurisdiction, counsel argued, because the clear effect of our rules is that leave is a condition precedent. Counsel presented a number of arguments to establish the validity of this submission. The burden of Mr. Farara's submission, as well as that of counsel for the Attorney General, remained that a claim is commenced when a claim form is filed in the court,⁵ a claim for judicial review is made by filing a Fixed Date Claim Form,⁶ the claim form in this case was filed more than six months after the act complained of, and therefore the claim was not commenced until after the limitation period had expired.

[7] The skeleton arguments of the appellants mentioned but did not dwell on the word "proceeding" in section 2(a) of the Act. This apparently was because the judge had fully considered in her judgment the meaning of this word and concluded that the meanings she found in dictionaries and one reported case tied in with the meaning of action and seemed to add very little to section 2(a). Just before the commencement of the hearing the court drew the attention of counsel to the meaning given to "proceeding" in the **Supreme Court Act**.⁷ In the interpretation section of that Act appear the following definitions:

"action" means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Crown;"

"cause" includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Crown;"

"matter" includes every proceeding in court not in a cause;"

"proceeding" includes action, cause or matter;"

⁵ Rule 8.1 CPR 2000

⁶ Rule 56.7 (1)

⁷ Eastern Caribbean Supreme Court (Virgin Islands) Act, Chapter 80

- [8] It seems clear that “proceeding” is a word of the greatest possible scope because by including action, cause and matter it extends to more than those. The word “action” in the **Supreme Court Act** bears essentially the same meaning as in the **Public Authorities Protection Act** although the meaning in the latter Act is more modern as it does not refer to a writ. The essence of the definition in the latter Act, which is confirmed by looking at the older definition, is that action includes a civil proceeding commenced as a claim under **CPR 2000** but, more broadly, it means a civil proceeding commenced in such manner as may be prescribed by rules of court. Action, therefore, does not mean only a claim. It means any civil proceeding, whether or not a ‘claim’, commenced in a manner that is prescribed by rules of court. Returning to the word “proceeding”, it hardly matters that the definition quoted above is found in the **Supreme Court Act** and not the **Public Authorities Protection Act**, as Mr. Farara took pains to point out, because the meaning given to it in the former Act is perfectly consistent with its usage in the latter Act and provides valuable assistance by way of an example of its usage in a similar context, including its relationship with the word action.
- [9] The significance of the word proceeding in section 2(a) of the Act is that if the appellants are correct in their argument that an action for judicial review is not commenced until the claim form is filed and filing an application for leave does not commence an action, which I do not accept but do not need to explore, the amplitude of that word easily encompasses an application for leave to apply for judicial review. An application to the court is certainly a proceeding. That proceeding is commenced when the application is filed. It cannot matter that the proceeding commences as an application and continues as, or morphs into, a claim. Neither can it matter if the making of the application is not a first stage of, but is rather a condition precedent to, commencing a claim. The proceeding initiated by an applicant for judicial review commences by filing an application for leave. That is a proceeding.
- [10] Section 2(a) of the Act does not require that an action be commenced. The section simply requires that where any action or other proceeding is commenced it must be commenced within a specified time. Whether the manner prescribed by rules of court for commencing

a civil proceeding is by filing a claim form or a notice of application (or a petition or originating motion or otherwise) is immaterial for purposes of section 2(a). That is an issue of practice and procedure. So far as section 2(a) is concerned whatever is the manner prescribed by rules of court for a person to commence proceedings to obtain the court order that he seeks, the proceeding must commence within the specified time. In this case the proceeding was commenced in time. To my mind, that is the end of the matter.

- [11] I would dismiss the appeal and award prescribed costs of the appeal, in accordance with rule 65.13 of **CPR 2000**, to the Council to be paid equally by the two appellants, as the judge ordered in the court below. Quorum appealed the award of costs in the court below, contending that the judge failed to either award the costs of two issues in the appeal against the Council or reduce the award because the Council failed on these issues.
- [12] One of the issues to which Quorum referred was that the Council had also sought to challenge the entry by the Government into a development agreement with Quorum before the Government granted Quorum planning permission but the Council conceded, at the outset of the hearing in the court below, that its application for leave to apply for judicial review had been brought after the limitation period to challenge that decision had expired. In my view this matter did not attract such attention in the preparation by Quorum for the hearing on the limitation issue as to require a particular order in the award of costs, under rule 64.6.
- [13] The other matter that Quorum said the judge should have regarded in the award of costs was that for the first time at the hearing the Council conceded that section 2(a) of the Act applied to the proceeding it brought, having previously maintained both in its affidavit evidence and submissions that the Act did not apply. I am not sure this is accurate because in Quorum's written submissions filed in the court below in advance of the hearing Mr. Farara stated that the Council has made that concession.⁸ In any event, I am again of the view that even if the Council had maintained the contrary up to the point of the commencement of the hearing, no time was wasted on the point at the hearing or in the

⁸ Record of Appeal, Tab 10, paragraph 9 at p 91

preparation for the hearing. I do not see that this matter called for any departure from the general rule that costs are awarded to the successful party. I would therefore affirm the judge's costs order in the court below.

Denys Barrow, SC
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]