

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION**

SAINT LUCIA

CLAIM NUMBER: SLUHCv2022/0262

BETWEEN:

MONDESIR ESTATES LIMITED

Applicant/ Claimant

-and-

**[1] THE DEVELOPMENT CONTROL AUTHORITY
[2] THE ATTORNEY GENERAL OF SAINT LUCIA**

Respondents/ Defendants

Before the Honourable Mr. Justice Alvin Pariagsingh

Appearances:

Mr. Peter Foster KC, leading Ms. Reneé St Rose and Ms. Marie- Ange Symmonds instructed by Ms. Tianah Foster of the firm Fosters for the Applicant/ Claimant.

Mr. Anand Ramlogan SC, leading Mr. Jared Jagroo and Ms. Marcellina Jouavel instructed by Ms. Rochelle John-Charles of the Attorney General's Chambers for the Respondents/ Defendants

2024: February 15;
March 25

JUDGMENT

Claimant's application filed on December 11, 2023 seeking an unless order
and in default, a committal order

THE APPLICATION:

[1] **PARIAGSINGH, J:** - Before the Court is the Claimant's application seeking an order that unless the First Defendant withdraws a stop notice and an enforcement notice served on the Claimant on December 05, 2023, the Executive Secretary of the First Defendant be committed to the Bordelais Correctional Facility for failure to comply with the order of the Court dated July 24, 2023.

[2] The Claimant also seeks damages arising out of the issuance of the stop and enforcement notices and costs.

DISPOSITION:

[3] Having considered the evidence before the Court and heard the parties, this Court is of the view and holds that the Claimant's application must be refused. The Court finds that the part of the relief sought seeking an 'unless' order is abusive and the part of the relief sought seeking committal is procedurally flawed and even if it were not, premature and unmaintainable. Accordingly, the application is dismissed.

[4] Consistent with the consensual position expressed at the hearing, the Claimant shall pay the Defendants costs for one lead counsel, one junior counsel and one instructing attorney to be assessed by this Court in default of agreement within 14 days of this judgment on the application of either party.

THE JUDGEMENT AND ORDER OF THE HIGH COURT:

[5] On July 24, 2023, Innocent J delivered judgment on the Claimant's claim filed on June 09, 2022. At pages 84 to 85 paragraph [280], the following orders were made:

1. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant was contrary to the Physical Planning and Development Act, unlawful, and in breach of the claimant's constitutional right not to be deprived of its use and enjoyment of property otherwise than by the observance of the due process of law.
2. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant denied the claimant the right to the protection of the law guaranteed to it under the Constitution.
3. The court declares that the DCA's reliance on the LAC Study as the primary basis for the denial of development approval to the claimant was unlawful to the extent that the LAC Study was devoid of any statutory, legal, or regulatory basis and is therefore the reliance thereon as a basis for the DCA's decision was arbitrary, illegal, unreasonable, and fundamentally unfair.

4. The decision of the DCA in refusing the claimant's application for development approval is quashed and the application is remitted to the DCA for reconsideration in light of the observations and directions given by the court in this judgment.
5. That upon the review of the claimant's application, the DCA should consider the question of the payment of compensation to the claimant as one of the options available should the DCA find that upon review of the claimant's application in conformity with the Act development approval ought not to be granted.
6. Costs are awarded to the claimant to be assessed if not otherwise agreed between the parties within 21 days of the date of this judgment.

THE PENDING APPEAL AND APPLICATIONS IN THE COURT OF APPEAL:

[6] The six (6) orders of the trial judge were appealed by the Defendants in SLUHCVAP2023/0020 filed on August 30, 2023. An application for a stay of the orders made by the trial judge pending the hearing and determination of the appeal was filed on September 11, 2023. This application was refused by Ward JA on November 28, 2023.

[7] The relevance of mentioning the pending appeal of the substantive matter is that during the course of the arguments before this Court, it was argued by the Defendants that the position now taken by the Claimant (set out fully below) was not taken by the Claimant in the stay application before Ward JA. The Defendants rely on this posture by the Claimant and the affidavit filed in the Court of Appeal by the Claimant which was also referred to at the hearing of this application to support its contention that the Claimant's position in this enforcement application was never signaled or taken before the Court of Appeal.

[8] Following the refusal of the stay by the Court of Appeal, in addition to the instant application being filed, the Claimant also filed an application in the Court of Appeal to strike out the appeal. In response, the Defendants, the Appellants in the Court of Appeal filed an application seeking an extension of time to file the record of appeal and submissions. Both outstanding applications were heard by the Court of Appeal on March 11, 2024, and judgment was reserved.

[9] As set out fully below, it is this Court's view that the pending applications do not impact on the application pending before this Court. Additionally, the posture of the Claimant in the Court of Appeal, although admittedly not contained in the evidence filed in the Court of Appeal by the Claimant, is not relevant to the resolution of this application.

THE GROUNDS OF THE APPLICATION:

[10] The Claimant contends that the order of the High Court remitted its application No. 773/21 for reconsideration by the First Defendant. It is further contended that a representative of the DCA was present on the date of the delivery of the judgment. Additionally, it is contended that Rule 45.6 CPR mandates that when a judgment or order requires a person to do an act within a specified or a specified date, it may be enforced by an under Part 53 CPR for (i) committal; or (ii) sequestration of assets.

[11] The Claimant contends that section 24 (1) of the Physical Planning and Development Act Cap 5.12 ("the Act") provides that a decision shall be given by the Head of the Planning and Development Division within ninety 90 days of receipt of the application. The Claimant contends that sub-section 24(2) (a) of the Act contains a deeming provision that in the case of a single-family dwelling house, permission shall be deemed to have been granted unconditionally if there is no decision given within the ninety (90) day period.

[12] Following on from the deeming provision, the Claimant contends that the period specified for the decision to be made on an application for permission, that is ninety (90) days, applies to the reconsideration ordered by the trial judge on July 24, 2023, as the order did not specify a date by which the reconsideration ought to take place.

[13] By letter dated July 25, 2023, the Claimant wrote to the First Defendant requesting a meeting to discuss the judgment of the trial judge and its effect on the pending application. There was no response to this letter and after the 90-day period passed, by another letter dated November 30, 2023, the Claimant again wrote to the First

Defendant. In its second letter, the Claimant gave notice that it intended to commence works on or about December 01, 2023, on the basis that permission was deemed to have been granted unconditionally pursuant to Section 24 (2)(a) of the Act.

[14] There was a meeting between the Claimant and the First Defendant which is referenced in a third letter dated December 03, 2023. In this letter, the Claimant restated its position that an unconditional approval was granted pursuant to Section 24 (2)(a) of the Act and that works commenced on December 01, 2023, would continue.

[15] On December 05, 2023, the Claimant was served with the two notices complained of. The first requiring the Claimant to cease activity before the expiry of the period allowed for compliance with the requirements of the enforcement notice ("the stop notice") and the second, an enforcement notice informing the Claimant that it was in breach of the Act as property was being developed without the grant of permission ("the enforcement notice"). The Claimant was also called upon to either restore the land to its original condition or submit an application to the First Defendant within twenty-eight (28) days.

[16] The Claimant contends that the issuance of the stop and enforcement notices is an abuse of power, abuse of process, and in breach of the order dated July 24, 2023.

EVIDENCE IN SUPPORT OF THE APPLICATION:

[17] Mr. Ian Harrison, in his affidavit supporting the application, deposes that he is the duly appointed attorney of the Claimant. His evidence is that he was present in court when the order of the trial judge was pronounced, and so too were the representatives of both of the Defendants. These representatives are not identified in his affidavit or anywhere in this application or on the record. In the trial judge's order drawn after the judgment, there is no mention of any representative being present.

[18] Mr. Harrison's evidence is that application No. 773/21, dated January 26, 2021, which was the subject of the judgment delivered on July 24, 2023, was remitted for reconsideration of the First Defendant. In addition to the facts mentioned in the grounds of the application set out above, his evidence is that there was no response to the first letter written on the day of the judgment to the First Defendant.

[19] His evidence is further that on November 30, 2023, he met with a representative of the First Defendant, and he was informed that its position was that the Claimant's application did not relate to a single-family dwelling house and, therefore, the ninety-day period was not applicable. His evidence is further that he was informed by the representative that the 90-day period was suspended by reason of the pending appeal.

[20] His evidence is that he was informed that Mr. Housen, a Physical Planning Officer of the First Defendant, telephoned his Legal Practitioner and requested that the Claimant abide by convention and not build until the appeal was decided. This, he says, was met with a response by his Legal Practitioner that the Claimant had waited 4 years already. Noteworthy is that no evidence was adduced by Mr. Housen or the Claimant's Legal Practitioner regarding this alleged phone call.

[21] He refers to the third letter written on December 03, 2023, to which his evidence is that there was no response. Following this third letter, the Claimant was served with the stop and enforcement notices.

[22] Mr. Harrison's evidence is further that as a result of the notices, the Claimant's project has been stopped indefinitely, which results in continuing losses of approximately EC\$20,000.00 per day.

EVIDENCE IN OPPOSITION TO THE APPLICATION:

[23] Ms. Karen Augustin filed an affidavit in response on December 27, 2023. She is the Executive Secretary of the First Defendant. Her evidence is that the Claimant's claim related to two applications for permission. These are No. 750/19 and 773/21. Her

evidence is that 750/19 relates to permission to construct a multi-family residential structure. No. 773/21 she contends is a one-page letter which states:

'RE: Application for Full Approval of Single-Family Dwelling House.

Please see attached drawings and associated documentation for a single-family dwelling house on block and parcel 0025B 4, situate in the quarter of Soufriere.'

[24] Her evidence is that the judgment of the trial judge stipulated no time within which the reconsideration ordered was to take place. Additionally, her evidence is that the judgment is unclear as it does not indicate whether the order was intended to capture both applications as there was no specific reference to either and/or both of the two applications.

[25] Ms. Augustin contends that upon receipt of the email on August 04, 2023, she responded the same day informing the Claimant that she would reply under separate correspondence on the confirmation of a date. She admits that the meeting never took place as it was overtaken by the decision of the trial judge being appealed and a stay of the order was sought in the Court of Appeal.

[26] Her evidence is that the Claimant did not disclose to the Court of Appeal in the stay application that its position was that it considered permission to be granted after ninety (90) days of the judgment pursuant to section 24 (2) (a) of the Act. Reference is made to paragraph 13 of the Claimant's affidavit filed in the Court of Appeal on October 27, 2023 (after the 90-day period had expired) contending that the First Defendant should comply reconsider the applications without considering the LAC Study.

[27] Further, her evidence is that section 24 has been complied with. A decision was made on application Number 773/21 on August 11, 2021, refusing permission. Her evidence is that section 24 does not apply to the reconsideration ordered without a timeframe set in the order. She contends that the First Defendant is in the process

of reviewing and reconsidering the application and will do so within a reasonable time.

[28] Ms. Augustin admits the meeting on November 30, 2023, with Mr. Harrison. She contends that Mr. Harrison made an unscheduled appearance at the First Defendant's office and requested an audience with the legal officer and herself which was accommodated. She contends that during that meeting, in response to the letter of December 01, 2023, which was provided to her, she indicated to Mr. Harrison that she was surprised by the Claimant's position as the application for the stay had only recently been refused and it was the first time that she was hearing that there was any contention that section 24 of the Act applied to the reconsideration ordered by the trial judge.

[29] Her evidence is further that she informed Mr. Harrison that Application Number 773/21 although described as and referring to a single-family dwelling house was not in fact so as a single-family residential unit had already been approved and built on the parcel and an additional unit will result in multiple dwelling units. Further, her evidence is that several other supporting amenity structures were also approved and built on the parcel including maids/butlers' quarters, parking area, laundry facilities and security hut all of which are inconsistent with a single-family dwelling unit and suggest a commercial development.

[30] In relation to the conversation Mr. Harrison contends in his affidavit that his legal practitioner allegedly had with Mr. Housen, Ms. Augustin's evidence is that Mr. Housen was questioned on any such conversation and he denied same.

[31] Ms. Augustin denies the Claimant's assertion that his letters of November 30 and December 03, 2023. She contends that she responded to these letters and advised that it would be imprudent for the First Defendant to consider Application Number 773/ 21 while the application for stay was still pending.

[32] Her evidence is further that during his visit on November 30, 2023, Mr. Harrison submitted three (3) copies of an amended site plan. This plan she contends upon

examination revealed that there was a change in the location of the proposed structure as shown on the amended site plan. Further, she contends that the amended site plan did not indicate the dimensions of all of the relevant setbacks. She contends that the amended site plan required consideration afresh as it amounted to a new application. This amended site plan she contends was not before the trial judge or the Court of Appeal and as such it could not have been captured by the order of remission which pertained to the earlier application.

[33] Her evidence is also a team of Building Officer visited the property on December 01, 2023, and conducted investigations noting that excavation works had commenced before a decision was made on the amended site plan. The stop and enforcement notices were then issued on December 05, 2023.

[34] Ms. Augustin's evidence is that on December 18, 2023, the enforcement notice was revoked and reserved to correct an error. The enforcement notice now requires the Claimant to inter alia restore the land to its original condition before the breach took place.

EVIDENCE IN REPLY:

[35] In his affidavit in reply, Mr. Harrison contends that Application No. 773/21 was a complete application. He contends that applications 497/20 and 773/21 superseded 750/10. His evidence is that in the judgment the trial judge only considered application no. 773/21. He contends that the change of location of the building was done based on a suggestion made by the First Defendant during its technical review in October 2022. He denies that the minor variation amounts to a new application.

SUPPLEMENTAL AFFIDAVIT OF THE CLAIMANT:

[36] On February 9, 2024, the Claimant filed a supplemental affidavit and an additional affidavit of Duane Heholt, a Planning Consultant and former Deputy Chief Planning

Officer and Acting Executive Secretary of the Development Control Authority during the period April 2002 to December 2006.

[37] Mr. Heholt provides his views and opinions based on his experience of over 30 years and exhibits a letter dated February 2, 2024, from the First Defendant.

[38] On the same day, the Claimant's attorney, Mr. Harrison, filed a supplemental affidavit. The scope of the permission sought and granted by this Court at the directions hearing of this application was to put before the Court the letter received on February 6, 2024.

[39] Though the supplemental and additional affidavits went far beyond the scope of permission granted at the directions hearing, no objection was taken by the Defendants which instead chose to file an affidavit in response. Accordingly, the Court considered the supplemental affidavit, the additional affidavit and the affidavit in response.

[40] In this affidavit, Mr. Harrison stated that he received an email dated February 6, 2024, from the Secretary of the DCA Board attaching a Letter from the Executive Secretary of the DCA dated February 2, 2024. The email suggested that he should disregard the email sent to him on Monday, February 5, 2024, which he claims he did not receive. From the letter of February 2, 2024, he made the following observations:

1. The Applicant's Development was referred to as a 'Residential (single-family) Development';
2. That the DCA Board purported to have considered the Applicant's application (Application Registration Number: 773/21) at its meeting dated January 31, 2024;
3. That the Board of the DCA deferred the Applicant's application pending the resolution of four (4) issues; and
4. That it was suggested that upon the resolution of the four issues, the Applicant's application would again be considered.

[41] His evidence is that this letter is a further breach of the Court's order of July 24, 2023, and a further act of contempt. According to Mr. Harrison, the DCA failed to outline the basis upon which it was empowered to defer an application in light of s24(2) of the Act and inviting stakeholder agencies for comments and inputs on the elements of interest at the proposed site within the World Heritage Site is akin to taking into account the LAC study which the trial judge specifically rejected and ordered not to be part of the DCA's reconsideration.

[42] His evidence is that previous applications were approved with a 10-foot wide vehicular right of way, which was approved by a Master Site Plan, and this change cannot be enforced, as this was an issue raised in the February 2, 2024, letter.

SUPPLEMENTAL AFFIDAVIT IN RESPONSE:

[43] The Defendant filed a further affidavit deposed by Ms. Karen Augustin, in response to the Claimant's supplemental affidavits. Her evidence can be summarized as follows:

1. Single-family dwelling applications are ordinarily reviewed at weekly building review committee meetings.
2. ARN 773/21 goes beyond the scope of a Single-Family Dwelling Unit.
3. The DCA is not restricted by the Act in its method of administrative processes.
4. S21 of the Act provides for the DCA to attain further information before determining ARN 773/21 application because of the nature and complexity of the application and its location within the Word Heritage Site.
5. Information is required from stakeholders such as Soufriere Regional Foundation, Archaeological & Historical Society, and St. Lucia National Trust, Department of Forestry, Department of Fisheries, Survey and Mapping Section, Crown Lands Section.

6. The DCA has been reconsidering the application in accordance with trial judge's judgment. A Board meeting was held on January 31, 2024, considered the application, and deferred it pending the resolution of 4 issues. Those issues are [1] comments from and input from the relevant stakeholders [2] presentation to the Board by the developer at a date to be communicated [3] dating of the Engineering certification and [4] public vehicular access to the King's Chain to be minimum 27 feet wide. These issues were raised in the February 2, 2024, letter.
7. The LAC was not taken into consideration. However, the World Heritage Status of the site must be considered.
8. The 10-foot wide access roads approved in the Claimant's master plan was an error. 10 feet is approved for footpaths.
9. S24 of the Act is not applicable in this instance, as s24 applies to Single Family Dwelling Units, which is not the case in ARN 773/21.

APPLICATIONS TO CROSS EXAMINE:

[44] By application filed on February 5, 2024, the Claimant sought permission to cross-examine Ms. Augustin. It was contended that cross-examination is appropriate to assist in determining the application. The Defendants also filed an application on February 13, 2024, to cross-examine Mr. Ian Harrison and Mr. Duane Heholt.

[45] At the hearing, the Claimant indicated that it was no longer pursuing its application. The Defendants' position was that its application was only being pursued if the Claimant was given permission to cross-examine.

[46] The Defendants submitted that the Court was bound to accept the evidence of the Defendants where there is any dispute as the application of the Claimant, who bears the burden of proof in this application, was abandoned. I accept this as the general position of law consistent with the authority of **R v Board of Visitors of Hull Prison, Ex Parte St Germaine and others No. 2 [1979] 1 WLR 1401** where it is stated:

‘where the matter has to be decided on affidavit evidence without the benefit of cross-examination the Court is obliged to take the facts, in issue, as they are deposed to on behalf of the Defendant’

[47] In the resolution all disputed facts on this application therefore, where facts are disputed by the Defendants, the Court accepts and resolves these facts in favour of the Defendants and not the Claimant’s version.

[48] For completeness, both applications for leave to cross examine filed on February 05, 2024 and February 13, 2024 are dismissed with no order as to costs.

THE CLAIMANT’S SUBMISSIONS:

[49] Below is a summary of the Claimant’s submissions:

1. By virtue of judgment of the trial judge the DCA had to reconsider the application, and the order not containing any timeframe for compliance, s24(1) and (2)(a) of the Act takes effect. S24 states:

‘(1) Where an application for permission to develop land is duly made to the Head of Physical Planning and Development Division, the Head of Physical Planning and Development Division **shall give a decision within a period of 90 days from the date of receipt of the application or such extended period as may be agreed upon in writing between the applicant and the Head of the Physical Planning and Development Division.**

(2) Unless the Physical Planning and Development Division gives a decision within the period prescribed by subsection (1)

(a) in the case of an application for the erection of or any other building operations to be carried out on or in relation to a single-family dwelling house, **permission shall be deemed for all purposes to have been granted unconditionally** by the Head of the Physical Planning and Development Division at the expiration of such period or the last of such extended periods; and

(b) in all cases other than those mentioned in paragraph (a), the provisions of section 26 shall apply in relation to the application

as if it had been refused by the Head of the Physical Planning and Development Division.'

[emphasis mine]

2. According to the Claimant, 90 days elapsed since the decision of the trial judge, which the DCA was fully aware of and hence, by s24(2)(a), approval was granted unconditionally. The DCA failed to reconsider the application within 90 days of judge's judgment.
3. The appeal by the DCA does not act as a stay, and in fact, the DCA's application for a stay at the appellate level was refused.
4. The Stop and Enforcement Notices that came after the 90-day period are the DCA's attempt to create a stay, intended to frustrate the judgment of the trial judge, and delay the Claimant while the appeal is ongoing.
5. The Claimant further submits that the February 2, 2024, letter in deferring the consideration of the application is a delay tactic, abuse of process and a clear act of contempt.
6. The Claimant contends that its failure to perfect the order after judgment uploaded to the e-litigation portal by the Court Office staff by filing it or serving a copy of the order with the penal notice on the Defendants are not detrimental to this application.
7. The Claimant states that the failure to include a penal clause in the order of July 24, 2023, does not bar the committal application before the Court. The DCA was present on the date of judgment and hence aware of when time started to run.

8. The Claimant submits that the Act's appeal tribunal is not an appropriate forum for challenging the stop notices, which appeared not to be constituted before the action before the trial judge was filed.

THE DEFENDANT'S SUBMISSIONS:

[50] Below is a summary of the First Defendant's submissions:

1. The application for a stay at the appellate level was dismissed on the premise that the Claimant's evidence in opposition was that the judgment appealed was simply a reconsideration issue, with no firm decision having been made, and if the appeal was allowed, any works done could be easily removed. Therefore, at that hearing, by the Claimant not indicating that s24 of the Act was ongoing deprived the material evidence. The Defendants say the Claimant has now filed the instant application 'shifting the goal post'.
2. On November 30, 2023, the Claimant submitted amended site plans, which were not before the trial judge. It still remains unclear which of the Claimant's application the amended site plans relate to, as the Claimant had more than one application before the DCA.
3. The Claimant then indicated that one day later, December 1, 2023, that it would be commencing development, placing reliance on s24(1) of the Act.
4. There was no timeframe stipulated for reconsideration of the application, which is crucial if committal was intended to be part of enforcement. Without a date for compliance, an order for committal cannot be made.
5. CPR Rule 53.4 specifically requires service for a committal order to be personal and to be endorsed with the relevant penal notice. None of this was done.

6. The Court has the discretion to dispense with the failure to incorporate a penal notice in a prohibitory order, but not a mandatory order. The failure to include a penal clause in this case is fatal as there is no application to dispense with service of the order with the penal notice.
7. Ms. Augustine was not present on the date of judgment, nor was she personally served with the order. The affidavits of the Claimant are lacking in that it does not identify who were the representatives the Claimant were alleged to have been present. Accordingly, the Court is in no position to know whether the proper persons had notice of the terms of the judgment assuming that representatives were in Court.
8. The application has been and is still being under consideration, which is what trial judge ordered. There has been no breach of the order as the order had no date for compliance. It was open to the Claimant to apply to the Court to fix a date for compliance but it chose not to do so.
9. The Claimant never informed the DCA of its reliance on s24(1) of the Act before its 90-day expiry. It is, therefore, a mere afterthought.
10. The failure to include the penal notice is fatal. This is so as CPR Rule 53.7 speaks 'service of the **order** endorsed with the appropriate notice..'
11. The Claimant has not proven that Ms. Augustin knew the consequences of disobedience of the Court order. In fact, Ms. Augustin was acting in good faith and in due execution of her duties.
12. Committal for contempt in civil proceedings operates on the beyond reasonable doubt standard of proof. It is equally important to exercise extreme scrutiny of due process and procedure before committing someone

and seizing their liberty. All procedural requirements and procedures must be strictly complied with. The Claimant having not done so, ought not to be granted the relief sought.

THE CLAIMANT'S SUBMISSIONS IN REPLY

[51] Below is a summary of the Claimant's submission in reply:

1. ARN 773/21 was the only outstanding application for the DCA's consideration and there was no need for the judgment of the trial judge to specify which application the judgment applied to.
2. The amended site plan does not amount to a new application as no new application number has been issued. The amended site plan also came after the 90-day limitation under s24 of the Act and hence, the deemed approval precedes any new or amended application.
3. The Claimant accepts that Ms. Augustine was not personally served with the Order, but she was aware of the Order at all material times based on the DCA's conduct in subsequent litigation. In any event, her legal practitioner was present in Court on the date judgment was given.
4. The Order of July 24, 2023, was for the DCA to reconsider the application. No time having been specified in the order; a reasonable time would be the time as specified in s24 of the Act. There was no need for the Claimant to remind or inform the DCA about s24 or its function.
5. The Claimant's application is not for committal outright, but rather an unless order, with committal being the penalty.

6. The lack of a penal clause ought not to be fatal, as if this application is successful, a penal clause will thereafter be attached to the order from this application and served on the relevant persons.
7. The Claimant expressly stated in its written submissions to the Court of Appeal filed on November 15, 2023, that it had obtained the deemed unconditional approval pursuant to s24 of the Act.
8. Despite the Claimant having filed an appeal with the appeals tribunal of the DCA's two notices complained of, this application is not an abuse of process, as it is the DCA who has created this scenario based on their abuse of process and contempt of Court.

ANALYSIS:

[52] The reasoning of the Court is broken down into the heading of abuse of process issues with the 'unless' order part of the relief sought and issues with the second part of the relief sought for a committal order.

ABUSE OF PROCESS – Issues with the 'unless' order application:

[53] This Court is of the view that moving the Court for an 'unless' order mandating the DCA to withdraw its stop and enforcement notices whilst simultaneously pursuing an appeal in the Appeals Tribunal set up under the Act is inherently abusive.

[54] S26 (5) and (6) of the Act states:

'(5) The decision of the Appeals Tribunal on any appeal **shall be final**.

(6) **An appeal shall lie to the High Court** from a decision of the Appeals Tribunal on a point of law, but not on any matter of fact or on the merits of any decision made by the Head of the Physical Planning and Development Division, Cabinet or the Appeals Tribunal.'

[Emphasis mine]

[55] There is nothing before this Court with regards to what is before the Appeal Tribunal.

There was the acceptance by the Claimant that the both notices complained of were appealed as per the appeal process set out in under the Act. This Court is of the view that the disputes of fact and law raised by the challenge to the notices are properly to be determined by the Appeals Tribunal in the first instance. The function of this Court under the Act is to hear any appeals of the Tribunal's decision on points of law only. To determine any issues regarding the issuance of the notices will be the usurp the function of the Appeal Tribunal which is abusive in this Court's view.

[56] The interpretation of s24 on a remittance or what defines a family unit are issues which deal with fact and law, these issues are properly to be determine by the Appeals Tribunal. While an inferior tribunal, the Appeal Tribunal under the Act is a specialized tribunal which has the remit to deal with the issues arising out of the challenge of the notices.

[57] To have both this Court and the Appeal tribunal dealing with these issues, especially where this Court has appellate authority over the Appeal tribunal on points of law, would make a mockery of due process.

[58] It is abusive in my view for the Claimant to approach this Court for an 'unless' order with a penalty of committal for contempt of Court when it has the alternative remedy of a statutory right of appeal before the Appeal Tribunal, which is had already engaged.

[59] The Court adopts an even more cautious approach in circumstances where the appeal of the Tribunal's decision will be to the High Court.

[60] For these reasons, the Court is not minded to consider or grant the first part of the relief sought, the 'unless' order.

COMMITTAL APPLICATION – FAILURE TO PERFECT THE ORDER:

[61] At the hearing of this application, the Court raised the fact that the Order has not been filed on the e-litigation portal. The Court posed the question to both Counsel; 'What is the effect of the order after judgment not being perfected?

[62] Junior Counsel for the Claimant, Ms. St. Rose submitted that there was no requirement under the Civil Procedure Rules to 'file' an order. It was submitted that Rule 42.4 (2) CPR set out the requirements and none of these requirements required the order to be filed. This rule provides:

“(2) Every judgment or order must –
 (a) be sealed by the court;
 (b) bear the date on which it is given or made; and
 (c) be signed by the registrar”

[63] Counsel submitted that the judgment of the Judge being uploaded on the e-litigation portal was in itself sufficient. Similarly, the fact that the final order after the judgment was delivered by the judge, being drawn by the Court, signed by the Registrar and uploaded to the e-litigation portal was sufficient.

[64] Counsel for the Defendants submitted that this oversight by the Claimant alone makes any application for a committal order fatally flawed. It was submitted that there is a distinction between a judgment and an order. A judgment being a document which sets out the reasons why an order is made which may or may not include the terms of the final order made. In this case, it is undisputed that the judge set out the terms of his order at paragraph [280] of his judgment.

[65] The Defendants contended that what is enforced by seeking an order for committal is the order of the Court. The Claimant having up to the hearing of the application filed the final order and served it with a penal notice endorsed has brought a fatally flawed application.

[66] In my view, the general rule requires the order to be served with the penal notice endorsed before committal can be granted. This is set out in CPR Rule 53.3. There is an exception to the general rule where the Court can grant committal if the judgment or order is not served, that is CPR 53.5. When a person is in contempt of an order which is set out in a judgment pronounced in Court, notice of the order in my view carries a high evidentiary threshold. Evidence of who was present when the judgment was delivered and further that they were the appropriate persons to have notice of the order is required. That evidence has not been adduced. The Claimant has not met this threshold in its evidence.

[67] **Zukerman 3rd Edition at page 1063** (margin notes 23.5 and 23.20) provides the following learning:

'The difference between judgments and order

Final dispositive decisions commonly have two parts: first, the reasons given by the court for its decision on the issues, commonly referred to as the "judgment"; and, second, the operative part of the court's disposition which directs one or more of the parties to do something or refrain from doing something, and which is the "order". An order must stand on its own and does not require reasons, nor should reasons be included in it. Since the order directs conduct, such as the payment of money or the performance of some other act, attaching reasons to it is likely to confuse and give rise to unnecessary disputes'

'Perfecting and entering judgments

While a judgment is valid from the time that it is pronounced by the judge, **it still needs to be entered and perfected into a formal document. This is done by drawing up and sealing the judgment or order (CPR 40.2, CPR 40.3).** The process, which is variously described as "entering judgment", "perfecting judgment", or "signing judgment" marks the conclusion of the judicial function in so far as the dispute in question is concerned. Once the order has been perfected, the trial judge is functus officio, and has no further capacity (or, at most, a power exercisable only in exceptional cases) to reconsider or vary his decision, except for correcting an accidental slip or omission in a judgment or order, as shall be presently explained. A judgment that has not been perfected is not a nullity. Where all the parties had proceeded on the basis that the order was valid, it would be an abuse of process for a party, many years later, to take the point that the order was in fact invalid.'

[68] In this jurisdiction, when an order is drawn by the Court it is signed by the Registrar and uploaded on the e-litigation portal with a description of the document. In this case, the Court takes judicial notice of the entry on the e-litigation portal at 12:36 pm on December 14, 2023, it reads “Signed order after Judgment for filing by attorney”. In this Court’s view there can be no doubt, that the Claimant was under an obligation to perfect the order by filing it. That perfected order had to be served with the penal notice endorsed and only then would the Claimant have a viable application for committal. Alternatively, cogent evidence of who was present when the order was made, that they were the appropriate persons to be affixed with notice and that they had notice of the order had to be provided. Neither was done in this case.

[69] The obligation of Counsel to endorse the order with a penal notice and serve it was settled by the Court of Appeal in **Alexander & Ors v Nayack & Anor, GDAHCVAP2021/0033** (unreported) per Blenman JA (as she then was) delivered on April 07, 2022. The Court made it pellucidly clear that the inclusion of a penal notice on an order is not a judicial function. A penal notice is not part of an order. It is an administrative act that is done after the judicial officer makes an order. Following from this, the insertion of the penal notice by an Attorney can only be done on an order which is perfected. In this application, there was up to the hearing of this application, no perfected order after the judgment of the trial judge.

[70] It is this Court’s view the general rule requiring service of the order with the penal notice not having been complied with, barring any application to dispense with this requirement pursuant to **Rule 53.5 (3) CPR** or evidence satisfying the Court of the matters set out in Rule 53.3 CPR, the Claimant’s application for an order for committal is flawed

NON-COMPLIANCE WITH THE PROCEDURAL RULES FOR CONTEMPT:

[71] The Claimant submits that its application before the Court is for an unless order with committal to take place ex post facto. But upon reading the relief sought, it clearly states:

"Unless the First Defendant do forthwith withdraw the Stop Notice and Enforcement Notice served on the Claimant on 5th December 2023, the Executive Secretary of First Defendant, Development Control Authority be committed to the Bordelais Correctional Facility for failure to comply with the Order of the Court dated 24th July 2023." [emphasis mine]

[72] The logical reading of the relief sought is that there be an order for committal if the Stop and Enforcement notices are not withdrawn. This is akin to a suspended committal order, for committal to take place if something is not done. The Claimant's application clearly aims its target at Ms. Augustin to be committed if something is not done, i.e., withdrawal of the Notices. To argue now that the application is really for an unless order and not an application for committal is superficial.

[73] If the Court is requested to infringe on Ms. Augustin's liberty in a civil matter, the burden of proving contempt to justify committal must be beyond reasonable doubt and must strictly adhere to the procedural rules (**Quantum Tuning Limited v Sam White [2019] EWHC 1376 QB** paragraph 39).

[74] The Court is not satisfied that there has been procedural compliance. There was no personal service on the person who is subject to committal, and there has been no penal clause to indicate the failure of compliance.

[75] The DCA is bound by the Order of July 24, 2023, having persons present at the delivery of the judgment and being represented by a legal practitioner (CPR 42.2(b)), does not negate the requirement to ensure that the person subject to the committal has been served personally with notice of the order and any penal clause, raising the obvious issue that a failure to comply can result in committal is improper.

[76] With respect to beyond reasonable doubt for breaching the Court's Order, the evidence shows that the DCA has in fact engaged in the reconsideration exercise, albeit not in the manner the Claimant wished it would.

[77] The DCA has engaged with the Claimant by letter dated February 2, 2024, raising concerns regarding its reconsideration. Although the Claimant may not agree with the concerns, it is nevertheless a reconsideration.

[78] Insofar as compliance with trial judge's, the DCA simply had to reconsider the application having regard to the Court's findings. The issue of whether or not the letter of February 2, 2024, had addressed the LAC report, or similar factors that would have been contained in the LAC report, is not a matter before this Court on this application.

THE APPLICABILITY OF SECTION 24 OF THE ACT:

[79] The Claimant relies heavily on a deemed approval within 90 days of the order, and hence the Notices are akin to contempt of Court.

[80] For the Notices to be contemptuous, the Claimant must prove that s24 applies in the way it did. It is accepted by all parties that the trial judge did not specify a time for compliance with the order. Similarly there was no evidence that s24 was raised before the trial judge or that it was operative in his mind that reconsideration implied within 90 days, otherwise approval would be automatic.

[81] In the case of **Bombay Metropolitan Region Development Authority v Gokak Patel Volk. Art Limited Civil Appeal No 9152 of 1994** of the Indian Supreme Court, at page 643 (h), the issue of orders not containing a date for compliance was addressed:

"The deeming clause under Section 13(3) comes into operation only when the Metropolitan Authority fails to pass an order within a period of 60 days from the receipt of the application. But if an order is passed and that order is quashed by the appellate authority or by the High Court, the deeming

clause does not become operative straight away. The appellate order will now hold the field and fresh order will have to be passed in terms of the order of the appellate authority or the Court. The High Court could have fixed a time-limit for passing a fresh order. If such a time-limit had been fixed, the Metropolitan Authority had to pass an order within that period. But in this case no time-limit was fixed by the High Court. Therefore, the Metropolitan Authority had to pass a fresh order within a reasonable time.”

[82] The Defendants submits that in the absence of a time stipulated for reconsideration of the Claimant’s application, then it must be done within a reasonable time. In the absence of any authority from the Claimant to show how s24 (2)(a) of the Act is applicable to the order for reconsideration, the Court accepts that reconsideration should be within a reasonable time.

[83] In the absence of a time for compliance with a court order, a party must comply immediately (CPR 42.9). In this instance, reconsideration had to take place immediately by the DCA and certainly within a reasonable time. The evidence before the Court is that steps were taken with regards to reconsideration.

[84] There exists a lacuna in the Claimant’s s24 argument, in that, the provision applies to single family dwelling units. The Act clearly contemplated s24 to allow deemed approval for only that type of dwelling. The Act define it as follows:

“single-family dwelling house” means a building used or intended to be used solely as a separate dwelling unit without any essential facility shared with another dwelling unit;”

[85] Section 24(2)(a) of the Act applies to single family dwelling houses and positively allows unconditional approval. But section 24(2)(b) applies to other instances, and provides for a negative, ie, the application is deemed to be refused, and the Claimant can seek relief by way of s26 (Appeal).

[86] The Claimant has not provided sufficient evidence that the application before the DCA, before or after the amendments, was for a single-family dwelling unit. The Defendants were not cross examined on this issue and as such I accept the

Defendants evidence given the disparity of the evidence on the nature of the application.

[87] This, no doubt, would have been crucial in determining how s24 applies. The DCA says the application is clearly beyond a single-family dwelling unit, and there is little to dislodge that position from the Court's mind. The DCA is better prepared to determine what is and what is not a single-family dwelling unit (as well as the Appeal Tribunal).

[88] Without this issue being determined, it is difficult to accept that s24(2)(a) applies. It is quite a steep provision of the Act, and without further evidence to prove that the application was in fact for a single family dwelling unit (in compliance with the Act and not a mischievous approach to interpreting what comprises a single family dwelling unit) the Claimant would be stealing a march and deeming approval to something the Act clearly did not intend to be approved.

[89] In default of cross examination on the s24 applicability, the Court must accept the DCA's position, who is best equipped to make such a determination.

CPR 53.2(2): TIME FOR COMPLIANCE WAS AN APPROPRIATE AVENUE

[90] CPR 53.2(2) states, "If a judgment or order does not specify the time or date by which an act must be done, the court may by order specify a time or date by which it must be done."

[91] This rule comes foremost under Part 53, clearly contemplating a situation like the case at bar and unequivocally catering for such an instance. This would have been the more appropriate avenue for the Claimant to have taken, rather than unilaterally applying s24(2) of the Act.

[92] Insofar as the application before this Court is concerned, there is nothing to demonstrate that the Stop and Enforcement notices are akin to contemptuous acts in defiance of Innocent J's order, and if the Claimant has an issue with these notices,

this is not the avenue to address them. There has been reconsideration and it appears to be ongoing.

[93] There is no basis to make an 'unless' order or impose the penalty of committal if the challenged notices are not withdrawn. The appropriate forum to challenge the notices is the Appeal Tribunal under the Act. In respect of committal, due to the non-compliance with the procedural requirements and the lack of evidence of notice of the order, to grant a committal order, even a penalty is dangerous and undesirable in my view.

[94] Accordingly, the application fails in its entirety.

COSTS:

[95] At the hearing lead Counsel for both parties agreed that the appropriate costs order would be for the successful party to recover its costs to be assessed in default of agreement.

[96] Accordingly, the Claimant must pay the Defendants costs of this application.

ORDER:

[97] It is hereby ordered that:

1. The Claimant's application for leave to cross examine filed on February 05, 2024 having been abandoned at the hearing, is dismissed with no order as to costs;
2. The Defendants' application for leave to cross examine filed on February 13, 2024 is dismissed with no order as to costs;
3. The Claimant's application filed on December 11, 2023 is dismissed; and

4. The Claimant shall pay the Defendants costs of this application for one lead counsel, one junior counsel and one instructing attorney to be assessed by this Court in default of agreement within 14 days of today on the application of either party.

**Alvin Pariagsingh
Judge**

By the Court,

Registrar