

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
Civil Division

COMMONWEALTH OF DOMINICA

Claim No. DOMHCV2021/1008

BETWEEN:

DAVID EDWARDS

Applicant

-and-

THE PHYSICAL PLANNING AND DEVELOPMENT AUTHORITY

Respondent

Before The Honourable Madame Justice Jacqueline Josiah-Graham

Appearances: Mrs. Dawn Yearwood-Stewart for the Applicant; and
Mrs. Tameka Hyacinth-Burton for the Respondent.

2023: July 13
July 18

ORAL RULING with Reasons
Application for leave to apply for judicial review

- [1] **JOSIAH-GRAHAM, J:** - The Applicant seeks leave to apply for judicial review for an Order of Certiorari to quash the decision of the Respondent granting approval to the Applicant to subdivide a portion of land containing 4 acres on condition that the Applicant merges lots 1A and 1B as a single lot.
- [2] The decision sought to be challenged is contained in a letter dated February 08, 2021. In granting the approval, the condition of merging Lots 1A and 1B is stated. The Applicant's case is that Lot 1B was sold to one Mr. Dave Emmanuel as evident on the subdivision plan.
- [3] The Applicant being dissatisfied with the decision of the Respondent had lodged an appeal on March 22, 2021 to the Appeals Committee of the Planning Authority pursuant to Section 75 of the Physical Planning Act, Chapter 63:05 (Act). This appeal was denied on June 08, 2021.

THE APPLICANT'S EVIDENCE AND SUBMISSIONS:

- [4] The Applicant's ground for judicial review is Wednesbury unreasonableness. In his affidavit in support, the Applicant deposed that after obtaining his Certificate of Title he sold 3 acres of the 4 acres owned by him. He also deposed that when he attempted to sell the remaining 1-acre portion of Land, he approached the Respondent who advised him of the requirement to seek planning approval before so selling.
- [5] The Applicant deposed further that when he submitted an application in 2013 requesting planning approval to subdivide his land the application was denied on the basis that the lot sizes were inadequate and that the recommended lot size for a single-family residential area under the Pond Casse Land Use Plan was 1.5 acres. Being dissatisfied, he sent a second application to the Respondent for approval dated October 21, 2020 to subdivide the said land. This second application was approved subject to *inter-alia* Lots 1A and 1B to be merged as a single Lot.
- [6] Dissatisfied with this conditional approval, he filed an appeal to the Physical Planning and Development Authority Appeals Committee pursuant to section 75 of the Physical Planning Act #5/2002 challenging the approval and setting reasons why this condition was not feasible. The Appeal was denied.
- [7] In submission, Learned Counsel for the Applicant contends that the Respondent acted Wednesbury unreasonable in granting conditional approval for subdivision. The condition complained of is merger of lots 1A and 1B.
- [8] Counsel argues further, that taking all the circumstances into account, including the fact that there is another ½ acre of land approved and sold to another Natasha Winston the decision of the Respondent to impose the condition of amalgamation of lots 1A and 1B is Wednesbury unreasonable.
- [9] The Applicant relies heavily on a Land Use Plan which states that, "Land with titles dated prior to 2009 may be exempt from required sizes set by the Pond Casse Land Use Plan, however if the lot is smaller than 1/3 of the recommended size this may not be considered favorable."
- [10] His contention is that his application was submitted since 2008 but there was a delay in processing his title which resulted in him losing the benefit, in particular, being exempted from the required sizes. The Certificate of Title issued, Register Book B18 Folio 8, is dated 22nd June, 2009.

THE RESPONDENT'S EVIDENCE AND SUBMISSIONS:

- [11] The Respondent opposing leave, submits that it did not act unreasonably since it sought to minimize population density in a watershed area so as to safeguard the water resources for all in Dominica pursuant to its statutory duty to "assist in the orderly, efficient and equitable planning, allocation and development of the resources of Dominica taking account of all relevant social, economic and environmental factors so as

to ensure that the most efficient, equitable and environmentally sustainable use is made of land in the interests of all people of Dominica.”¹

- [12] In her affidavit in opposition, Ms. Naomi Onika Dorival, Chief Physical Planner sets out the scheme set up in the Act². Ms. Dorival’s evidence is that the Applicant is mandated by the Act to seek development permission to subdivide all lands. Her further evidence is that the Applicant first applied for permission in 2013 some 4 years after he begun selling off portions of the 4-acre parcel of land without the requisite permissions to subdivide.
- [13] The Solicitor General appearing for the Applicant submits that the approval was granted on condition that, “The applicant to maintain the proposal as submitted where lots 1A & 1B are merged as a single lot” is in fact a proposal made by the Applicant himself. She submits further that although the Pond Casse Land Use Plan has not been Gazetted, the Respondent is mandated by the Act to give consideration and be guided by it when considering an application for development permission in that area.
- [14] The Applicant’s first application was refused and in October 2020 after which he submitted a second application. On this application the Applicant’s revised proposal, Lots 1A and 1B, were merged into a single lot. This was done pursuant to amendment 3 issued to the Applicant on December 12, 2020. The Applicant having submitted a revised proposal merging Lots 1A and 1B, the impugned approval was granted by letter dated February 08, 2021.
- [15] Learned Counsel contends also that the Applicant, having appealed the decision of the Respondent to the Physical Planning and Development Authority Appeals Committee pursuant to section 75 of the Physical Planning Act #5/ 2002, has an alternative remedy by the said Act. That remedy is an appeal to the High Court provided for in Section 80 of the Planning Authority Act.

ANALYSIS:

- [16] It is well established in the Privy Council decision in the case of **Sharma v. Browne Antoine**³ that the test to be satisfied in an application for leave to file Judicial Review proceedings against the Physical Planning Authority by the Applicant is –

“The ordinary rule now is that the Court would refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or alternative remedy.”

¹ Chap. 63:05 Section 3(4) and 3(1)(d),

² Chap. 63:05 (the Act)

³ (2007) 1WLR 780 at 787

[17] It is also established that the threshold for the grant of leave is very low. The Applicant's case must not be merely arguable but it must be strong and likely to succeed: **George v Senior Magistrate**⁴. The material facts in my view to be considered are that:

1. The Applicant was mandated by the Act to apply for permission to subdivide the property before he could sell it in portions. He did not comply with this requirement.
2. The minimum lot sizes and the policy for the land development, including subdivision in the area where the land is located was the basis for the refusal of his first application in 2013.
3. Being affixed with notice of the policy for the development in the area, the Applicant submitted a second application some 7 years after his first application.
4. The Applicant then submitted a revised plan showing a merging of Lot 1A and Lot 1B. The Applicant sold Lot 1B before the application was made and knew or ought to have known he had or could exercise no dominion over the portion as he had already sold it.
5. After submitting a revised plan merging Lot 1A and Lot 1B for approval and the Planning Authority agreeing to the proposal as a condition of its approval, the Applicant sought to challenge the decision, having so proposed and participated in the process of amending his plan to show a merger of Lots 1A and 1B.

[18] In my view, the Applicant cannot seek to approbate and reprobate at the same time and then appeal the approval. Having not obtained the approval without the condition, he now seeks to challenge the decision by Judicial Review on the basis that it was Wednesbury unreasonable.

[19] The thrust of the Applicant's Wednesbury argument is that but for bureaucracy in obtaining his title at or around the same time he made his application in 2008 he would have obtained the benefit of the earlier version (a different) land use policy. I find that argument difficult to follow for the following reasons:

1. The Respondent is entitled to fix the policy for land development, which includes changing the same from time to time. There is no challenge to this.
2. The exemption the Applicant alleges for titles prior to 2008 is not an unqualified exemption. The policy document uses the word 'may'. At its lowest this means any application of the policy was discretionary.
3. There was no challenge to the delay in obtaining the title. The Applicant seeks to now launch a collateral attack on this delay in this claim based on the Registrar's letter dated some 12 years later on October 15, 2020 as a basis for approval under the then plan.

⁴SKBHCV2018/0188

4. By section 16, the Act is clear that any plan in use, including one not approved has the legal status as though approved.⁵

[20] The Court finds it difficult to perceive it being so unreasonable to grant permission on the conditions imposed when the Applicant did not challenge the conditions but submitted revised plans proposing the merger in conformity with the query and then seek to challenge the approval after.

[21] I am mindful in applications for Judicial Review that the Court exercises only a supervisory role. Judicial review is not an appeal procedure. The Court cannot compel the public authority to exercise its power in a particular way nor can it compel it to make a decision which it believes to be the correct one. The Court is not concerned with whether a decision is right or wrong on its merits: **re Evans as quoted at paragraph [20] in Jared Adams v The Commissioner of Police**⁶.

[22] The test for Wednesbury unreasonableness by Lord Greene MR, the famous case of **Associated Provincial Picture Houses Limited v Wednesbury Corporation**⁷ focus is on two limbs of the process for review –

- The first limb of the test: decision-making process of the public body and the emphasis is whether that body has taken into account the right issues when it reaches its decision. Here

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.”

- The second limb of the test: outcomes - even though the right things have been taken into account.

“...although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it.” (per Lord Diplock⁸.)

[23] The distinction essentially stipulates that in reviewing exercises of administrative discretion courts must confine themselves to ensuring that the decision maker has acted in accordance with the terms of his or her power and in compliance with other overriding principles of legality such as relevancy, propriety of purpose and reasonableness. Here the Court’s role is not to review the appropriateness of a decision nor must it in any way become involved with the policy considerations underlying it in the sense of simply criticising the substance of the policy. This constitutes the merits of the decision and it is the body in whom Parliament has vested the discretion that is alone to be the final arbiter on the merits of a decision.

⁵ Section 16(3)

⁶ CLAIM NO. AXAHCv2009/0089

⁷ [1948] 1 KB 223, [1947] 2 All ER 680

⁸ Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, [1984] 3 All ER 935

[24] In the case of **Virgin Islands Environmental Council v the Attorney General and Quorum Island BVI Limited**⁹ Hariprashad-Charles J, after discussing various dicta on the test for Wednesbury unreasonableness concluded:

“Simply put, the issue to be determined is whether the decision made by the Minister was so outrageous that it defies logic or accepted moral standards and that no reasonable authority could have arrived at that Decision.”¹⁰

[25] See also the case of **Council of Civil Service Unions v Minister for the Civil Service**¹¹ where Lord Diplock held the meaning of unreasonableness as being applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[26] The Applicant has not pointed to a flaw in the process or the consideration or non-consideration of any matter that makes the process employed fundamentally flawed.

DISCRETIONARY BARS:

[27] Learned Counsel for the Respondent has raised the issue of alternative remedy, the second limb in the **Sharma v Browne-Antoine** test, and relies on the statutory regime set out in Section 80 of the Act in support. Section 80 provides :-

- “80. (1) Save as provided in this Act no appeal shall lie against a decision of the Authority in a matter to which section 75 relates otherwise than as provided for by sections 75 to 79 inclusive nor shall any such decision or order be reviewable in any manner by any court.
- (2) Save as otherwise provided in this section the decision of the Appeals Committee shall be final.
- (3) An appeal shall lie to the High Court from a decision of the Appeals Committee on a point of law but not on any matter of fact and not in any manner upon the merits of the policies applied by the Authority or the Appeals Committee in reaching the relevant decision.
- (4) An appeal to which subsection (3) relates shall be filed in the High Court within 28 days of the notification of the decision of the Appeals Committee”.

[28] It is undisputed that there was an appeal of the Respondent’s decision that was refused by letter dated March 22, 2021. The Act provides for a right of appeal to the High Court if the Applicant is aggrieved with the decision of the Appeals Committee. The Applicant has not appealed the decision in question but instead seeks to apply for judicial review without exhausting the alternative remedy.

⁹ Claim No. BVIHCV2007/0185 delivered on September 21, 2009

¹⁰ At paragraph [163]

¹¹ [1985] AC 374, [1984] 3 All ER 935

- [29] Noteworthy is that section 80 is telling in the scope of involvement of the High Court in the process of approvals. The gravamen of section 80 is in sub-section (2) which speaks to the finality of the Appeals Committee's decision. In addition, the appeals process has in place off-limits to lifting the veil of the Committee on any matter of fact and not in any manner upon the merits of the policy as applied by the Respondent or the Appeals Committee in reaching the relevant decision. The right of appeal contemplated in Section 80 is a right of appeal to the High Court: section 80(3).
- [30] The Applicant, not permitted to challenge any matter of fact or the merits of the policies applied by the Respondent or the Appeals Committee, is in my view, one that it is clearly contemplated that the merit of the policies, including the reasonableness or unreasonableness is not a matter which the High Court can grant leave for judicial review.
- [31] The Court therefore holds the view, that although the threshold is low at the leave stage, the Applicant has not satisfied the limbs required in the tests set out for an application for leave to apply for Judicial review. Having examined the statutory regime in relation to this matter, the Applicant having appealed the decision to the Appeals Committee established by the Act and not being thereby successful in his appeal pursuant to s. 80 (2)(3)(4) of the Act there exist an adequate alternative remedy being and an appeal to the High Court.
- [32] To permit the Applicant leave to apply for judicial review on the matters set out in the application, in my view, notwithstanding the position that the application does not cross the hurdles of the tests on which leave should be granted, would permit a collateral attack on the policy of the Respondent which is clearly sought to be prevented within the scheme of the Act.
- [33] In these circumstances, the application is refused with no orders to costs.

ORDER:

- [34] It is hereby ordered that -

1. The Applicant's application for leave to apply for judicial review filed on August 28, 2021 is refused;
2. There shall be with no order as to costs.

**Jacqueline Josiah-Graham
High Court Judge**

By the Court,

Registrar