

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2017/0555

BETWEEN:

JOHN JAMES DUFFY

AND

FREDERICK SOUTHWELL

In his capacity as Head of DCA

Appearances:

Mr. John Duffy, The Applicant in person

Mrs. K. Knight Edwards for the Respondent

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2018: May 24
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DECISION

- [1] **HENRY, J.:** In about February 2016 Mr. Duffy entered into discussions with Mr. and Mrs Gutteridge leading to an agreement whereby Mr. Duffy agreed to sell and Mr. and Mrs. Gutteridge agreed to purchase a plot of land known as Registration Section: South East, Block 56 2282A; Parcel 408. Parcel 408 is located adjacent to Mr. Duffy's residence. Thereafter sketches were prepared allegedly indicating the style and size of the house to be constructed on parcel 408. It is alleged that Mr Gutteridge wrote to Mr. Duffy saying that he would buy the land and build the house to the design that was indicated in the drawings. Thereafter a contract was entered into by the parties agreeing to the sale of Parcel 408 subject to planning permission and the obtaining of a non-citizen landholder licence. The sale was completed. Thereafter plans were submitted to the Development Control Authority (DCA) which were approved.

- [2] Mr. Duffy asserts that the house as constructed is not in compliance with the plans as approved by DCA. DCA, he complains, has failed to comply with its statutory duty to enforce the terms of the planning permission. According to Mr. Duffy, the house, as constructed, is significantly increased in height and volume. His privacy is substantially affected by the overlooking of his property by the veranda and windows of the constructed property and by the swimming pool, which instead of being ground level as shown on the plans, is now 17 feet above ground. Mr. Duffy alleges further that on three of its four boundaries, the development is in breach of Regulation 16. He states that he has brought the breaches to the attention of DCA starting in June 2017, but to no avail. The house is now completed with fencing in place.
- [3] Mr. Duffy now makes application for leave to commence a claim for judicial review seeking an order of Mandamus requiring the respondent to enforce the terms of the planning permission granted to Mr. and Mrs. Gutteridge and that the construction be made to conform with the Physical Planning Act 2003 (the Act). In effect he seeks an order of Mandamus requiring the respondent to cause the house to be pulled down and rebuilt in accordance with the approved plans. The ground of the application is that the respondent together with his officers and staff have failed to comply with their statutory duty to enforce the terms of the planning permission granted in respect of the said parcel and thereby have allowed breaches of the Act together with an infringement upon Mr. Duffy's property and a gross intrusion into his privacy.
- [4] The Respondent opposes the application.
- [5] In addition to affidavits by Mr. Southwell, the Town and Country Planner, affidavits on behalf of the respondent were filed by Tory Cornelius, a building Inspector and Kiyode Straker, a Senior Building Inspector both employed at DCA. Mr. Southwell denies that he and his officers have failed in their duty. Mr. Southwell acknowledges that complaints were received from Mr. Duffy. In response, checks were carried out at the site and it was found that the property was being constructed in accordance with the approved plans. By letter dated 21st June 2017, Mr. Southwell wrote to Mr. Duffy in the following terms:

"The Development Control Authority (DCA) recently received your correspondence dated 19th June 2017, and is writing a response to it.

Recently, Senior Building Inspector Mr. Kiyode Straker and Building Inspector Mr. Tory Cornelius visited the above captioned site of Gutteridge residence at Horseford Hill, that you complained about, and these were their findings:

- The floor of the first storey is almost at level with the access road
- The developer was approved for two storeys, which he has complied with
- There is no restrictive covenant on the land which will preclude him building two storeys. All the building setbacks are adequate and fall within legal parameters.

Consequently, the DCA has no issues with the Gutteridge residence at Horseford Hill that is being built.”

[6] Mr. Southwell states that the building is substantially in compliance with the plans. He admits that there are two (2) areas of variance with the plans:

- 1) The roof is constructed lower than on the plans to accommodate complaints by Mr. Duffy; and
- 2) On one boundary, the set back is 7 feet instead of the required 10 feet.

Respondent’s position is that the law allows for a variance of 3 ft.

[7] The affidavits of Mr. Cornelius and Mr. Straker confirm that they, visited the Gutteridge residence in response to Mr. Duffy’s complaints and their inspection revealed that the construction was in keeping with the plan and design approved by DCA. According to their affidavits, Mr. Duffy’s main complaint was that the Gutteridge’s house was blocking his view. They noted that the first storey was actually the same level of the road due to the nature of the slope of the land. There was a second storey, approval having been given for a 2 storey house. According to Mr. Cornelius Mr. Gutteridge also submitted a plan for the construction of a swimming pool and a pump room. The pool was approved. Mr. Gutteridge thereafter changed the direction of the pool to facilitate the slope of the land and he submitted drawings to DCA to demonstrate the change in the direction of the pool.

[8] Mr. Southwell in his supplemental affidavit filed on 16th March 2018, states that as recent as 9th March he went to the premises in question accompanied by other employees of DCA. They carried out an inspection of the premises. Based on the measurements taken the setback at the front of the property is required to be 20 ft. The setback necessary for the rest of the property is 10 ft. The western portion of the building to the western boundary is 23 ft and 19.6 ft from the steps. The eastern setback is 11ft, 9ft and 8 ft at various section of the building. The southern portion of the property to the back boundary line is 41 ft. His finding after review of the house and the plans is that the property is in major compliance with the approved plans.

[9] In Reply, Mr. Duffy submitted survey reports which indicate that the setback on the southwest corner is 6ft instead of the 10ft required; on another boundary the setback is 9ft and on a third boundary the setback is 10 feet. On the last boundary the house is built too far North and crosses unto the Road Reservation.

[10] In his submissions, Mr. Duffy reiterated that the house as constructed has departed substantially from the plan. Further, the building is a 3 storey rather than a 2 storey for which permission was granted. He acknowledges that there was a subsequent amendment to the drawings submitted and approved by DCA. However, he maintains that there are additions not shown on the plans, such as a 10 ft staircase on the side of the building. He accepts that his main complaint is that his privacy is being impinged by the increased height of the building and pool. He submits that Mr.

and Mrs. Gutteridge knowingly departed from the approved plans, therefore they ought to be required by DCA to pull down and rebuild in accordance with the permission granted.

- [11] With regard to the delay in bringing proceedings, Mr. Duffy states that he first attempted to negotiate with the Gutteridges and it was only after negotiations broke down that he consulted DCA. He then consulted certain Government Officials. He asserts that if DCA had reacted promptly, there would have been minimum delay.
- [12] Following the hearing of the matter, Mr. Duffy caused to be filed additional submissions. No leave was sought and none was granted for further submissions. Furthermore, the submissions were not served on the respondent. Accordingly, the court will not take those submissions into consideration in determining this application.

The Law

- [13] The court will refuse leave to file a claim for 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 remedy¹.
- [14] Under the Physical Planning Act, 2003, DCA is the Authority charged with the oversight of the orderly development of land; the grant of permission to develop land and with the regulation of construction of buildings in Antigua and Barbuda².
- [15] Section 17 of the Act provides that no person shall carry out any development of land except in accordance with a development permit granted under the Act.
- [16] Part V of the Act deals with enforcement. Section 34 defines breach of planning control. The Part gives the Town & Country Planner wide discretion. It sets out various actions open to the Town and Country Planner where there has been a breach.
- [17] Furthermore, Part VII deals with Building Regulations. Section 59 provides that it shall be a function of DCA to enforce building regulations and DCA shall appoint such persons as it shall deem appropriate, as building inspectors to assist the Town and Country Planner in the performance of such function. Again discretion is given to DCA and if it is advised by the Town and Country Planner, it may relax or dispense with a requirement.
- [18] Section 61 provides:
 - 61.** (1) If any work to which building regulations apply, contravenes any provision of this Part or of the regulations, the Authority, without prejudice to any prosecution under this Part, may by notice require the owner either to pull down or remove the work or, if the

¹ Sharma v Brown-Antoine and others [2006] UKPC 57

² Section 5 of the Act

owner so elects, to effect such alteration therein as may be necessary to make it comply with building regulations or this Part.

(2) If a person to whom a notice has been given under the foregoing provisions of this section fails to comply with the notice before the expiration of the period specified in the notice, or such longer period as the Authority may allow, the Authority or any department or officer of the Government or any contractor or officer of the Government or any contractor engaged by any of them may pull down the work, or effect such alterations therein and the Authority may recover from that person the expenses reasonably incurred in so doing as a civil debt.

(3) Nothing in this section shall affect the right of the Authority or of the Attorney General or any other person to apply for an injunction for the removal or alteration of any work on the grounds that it contravenes the building regulations or any provision of this Part.

Discussion and Conclusion

- [19] The court is of the view that the applicant has failed to present an arguable ground for Judicial Review having a realistic prospect of success.
- [20] Firstly: There has been substantial delay in bringing the action. The applicant spent a considerable amount of time in dialogue with various government officials. He also allegedly encountered difficulties with his legal representative. The result is that the building has been completed no doubt at a cost to the Gutteridges. The court considers that to grant the relief would cause substantial hardship to Mr. and Mrs Gutteridge, especially under these circumstances where throughout the construction, DCA has consequently found that the development was in substantial compliance with the planning permission granted.
- [21] Secondly, the applicant's main concern is that the building, as constructed, allows the occupants clear sight into his property. He complains that in reality the building is a 3 storey and not a 2 storey – one storey being partially below ground level at the slope of the land. Particularly it violates the agreement he had with Mr. and Mrs. Gutteridge at the time they purchased the land. However, DCA was not a party to that agreement. If the applicant wanted to control the size and height of the property to be built, he could have accomplished same with the use of restrictive covenants. But there are none in respect of the use of the land.
- [22] Thirdly, it has been succinctly stated that the court will rarely if ever issue a mandatory order requiring a public body to exercise a discretion in a particular manner. To do so would usurp the public body's role and overstep the limits of judicial power. The only circumstance where a court will issue such a mandatory order is if the court concludes that only one decision is lawfully open to the public body³. This matter does not fall within the latter category.

³ R v Ealing LBC, ex p Parkinson (1995) 8 Admin LR 28 QBD,287 per Laws

- [23] Furthermore, while section 61 gives DCA the authority to require an owner to pull down and remove work, if it finds the work contravenes the regulation, DCA is required to serve a Notice on the owner. Upon receipt of the Notice, the owner has the right to appeal to the High Court under section 62 of the Act. Upon hearing of the appeal, the court may either confirm the Notice or direct that it be withdrawn. Pending the determination of the appeal, the Notice is of no effect. Mr. and Mrs. Gutteridge are not parties to this action. Without any notice to them affording them an opportunity to be heard, the court could not grant an order of mandamus directing the respondent to cause the house to be pulled down and rebuilt as requested by Mr. Duffy.
- [24] Accordingly, the application for leave to file a claim for judicial review to assert a claim for mandamus is refused. No order for cost.

Clare Henry
High Court Judge

By the Court

Registrar