

THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV2012/0067

BETWEEN:

LA BAIA LIMITED

Claimant

And

THE ATTORNEY GENERAL OF ANGUILLA

Defendant

Appearances:

Mr. Saul Froomkin, QC with him Mr. Kenneth Porter and Mr. Michael Bourne for the Claimant.

Mr. Ivor Greene for the Defendant.

2013: October 1;2;4

JUDGMENT

[1] **MATHURIN J.:** The claimant (**LA BAIA**) seeks judicial review of the decision of the defendant (**EXCO**) to not grant it an Alien's Landholding Licence (**ALHL**) on the basis that this was in breach of a legitimate expectation. Parties agreed that the witness statements of Mr. Charles Davis and Mr. Saro Spadaro was accepted evidence and that there would be no cross examination. La Baia also relies on three letters written to it

over the course of several years to establish that it had a legitimate expectation that EXCO would grant it an ALHL.

LEGITIMATE EXPECTATION

[2] I have extrapolated the following principles from the authorities provided by Counsel and am satisfied that they are the ones which guide a court on the issue of legitimate expectation.

[3] Legitimate expectation may arise from a course of conduct or from a stated policy or undertaking whether written or otherwise. It is founded upon a basic principle of fairness that a legitimate expectation ought not to be thwarted. The protection of legitimate expectation is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public.

[4] In **R v Board of Inland Revenue ex parte M.F.K. Underwriting Agencies Ltd and others** [1990] 1 ALL ER 91, 110 Bingham LJ re-stated the basic principles adding the overriding element of fairness:

"In so stating these requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing to which the authority is as much entitled as the citizen."

[5] In the Privy Council decision of **The Attorney General Of Hong Kong V Ng Yuen Shiu** [1983] 2 All ER 346 Lord Fraser of Tullybelton stated that

"The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."

- [6] In **South Bucks District Council V Flanagan And Another** [2002] EWCA Civ 690, Keene LJ reiterated that *"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public authority to the terms of the representation."*
- [7] The issue of whether or not the authors of the letters which purportedly grounded the claim for legitimate expectation had the ostensible authority to do so is not a question that has been raised or relied on in these proceedings.
- [8] At paragraph 44 of the **Ng Yuen Shui** case, Lord Fraser added that *"The question for consideration is how, on a fair reading of the statement, it would have been reasonably understood by those to whom it was made... In the present context the question is whether it would reasonably be understood as an assurance that the qualification would be recognized in the case of this appellant if he obtained it in a reasonable time."*
- [9] Lord Woolf MR In **Regina V North And East Devon Health Authority, Ex Parte Coughlan** [2001] QB 213 stated that what the legitimate expectation of a party is, is to be determined by the court and involves a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion. He added at paragraph 57 that *"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which was substantive, not simply*

procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

[10] In the Privy Council case of **Paponette And Others V Attorney General Of Trinidad And Tobago** [2012] UKPC 32, Lord Dyson JSC examined the question of the circumstances and the manner in which a public authority is entitled to frustrate a substantive legitimate expectation provided of course, that such a legitimate expectation is established. This case establishes that the burden of proof, after the complainant has established his legitimate expectation, shifts to the authority to justify the frustration of the expectation and that the court would then have to weigh the requirements of fairness against that interest. He added that *"If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence, its conduct is so unfair as to amount to an abuse of power."*

[11] Lord Dyson stated that the Board agreed with the observations of Laws LJ in **R (Nadarajah) V Secretary Of State For Home Department** [2005] EWCA Civ 1363 at [68];

"The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

He added that it is for the authority to prove that its failure or refusal to honor its promises was justified in the public interest and that there is no

burden on the applicant to prove that the failure or refusal was not justified.

- [12] Further, Lord Dyson and the Board rejected the proposition that the court can infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. He stated "*So expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding interest.*"

It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favor of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment, is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority."

- [13] I note at this point, that both Counsel are in agreement with the propositions of law as stated above. EXCO has not defended the claim beyond stating that the letters in question between the parties could not have formed a legitimate expectation on which La Baia can rely.

BACKGROUND

[14] La Baia is a company that was incorporated in Anguilla on the 13th June 1983 to own and develop land in Anguilla. The land that was intended to be developed was until recently the subject matter of litigation which was heard in the High Court in June 2006, the Court of Appeal in January 2010 and finally determined before the Judicial Committee of the Privy Council on 28th March 2011. The Judicial Committee ruled in favor of La Baia having a valid agreement binding the defendants in that litigation to sell their equitable interests in the West End Bay land, or alternatively their expectancies in that land, to La Baia.

[15] After the Privy Council confirmed ownership of the disputed land in favor of La Baia on the 28th March 2011, an application for an ALHL was renewed shortly afterwards on the 4th April 2011. La Baia states that repeated requests were made to the Government after the application was made, seeking an interview which was believed to be the normal custom. No interview was held but on the 27th June 2012 Counsel for La Baia received a letter from the Permanent Secretary of Lands and Physical Planning in these terms;

"I advise that having given deliberate consideration to the application for an Aliens Land Holding Licence for La Baia Limited, Executive Council has determined not to grant an Aliens Land Holding Licence to La Baia Limited."

[16] La Baia then requested the reason or basis for the decision to refuse to issue the ALHL to them, but in a letter by the Permanent Secretary on 19th July 2012, was told that the reasons and basis for such decisions are not generally released.

[17] EXCO has since agreed to a certiorari to quash the decision of Council not to give reasons on the basis that it was in breach of rules of natural justice not to give La Baia any reason for such refusal and so the only

question for determination in this judgment is whether the conduct of EXCO in relation to La Baia's application and the communication between them over the period of several years, was sufficient to ground a claim for legitimate expectation.

EXCO'S SUBMISSION

[18] EXCO is of the view that the letters and conduct of EXCO does not and cannot create a legitimate expectation. They are of the view that the letters upon which La Baia states that they had a legitimate expectation to get the ALHL do not positively state that La Baia would receive an ALHL and that the letters could not form the basis of a reasonable expectation.

[19] Counsel refers to the definition of legitimate expectation by Lord Fraser in **Council Of Civil Service Unions V Minister for The Civil Service** [1984] 3 WLR 1174 at 1187 E;

"Legitimate or reasonable expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue..."

Counsel adds that a legitimate expectation has to be premised on a clear, unambiguous promise without qualification.

[20] Counsel for EXCO states that none of the letters, that is those dated 4th July 1985, 31st July 2001 and that of 20th March 2005 can be read as construing or conveying any promise on the part of EXCO. He states that EXCO was only prepared to give due consideration to the application. Counsel says that the language in the letters is conditional and it is apparent that at the material times all documents and required information had not yet been considered by EXCO so that they could not have promised to issue the ALHL.

LETTER No. 1

[21] The first letter in issue is that of the 4th July 1985. It was addressed to Mr. I D Mitchell, Attorney at the time for Mr Rosario Spado, father of the now beneficial owner of La Baia.

"I refer to your letters of 25th March 1985, to the Attorney General and the Permanent Secretary Finance on the above matters and advise that :-

(a) Government cannot agree to your request for an amendment to the Aliens Land Holding Licence issued on 10th June 1983, in respect of the Savannah Bay Project. You were advised of this decision in my letter of 11th February 1985.

(b) No further Aliens Land Holding Licences will be issued to your client (Mr. Rosario Spadaro) until he has fulfilled his obligations in respect of the Savannah Bay Project."

[22] EXCO states that this letter cannot amount to a clear unambiguous promise without qualification as it does not say in effect that EXCO will give La Baia a licence. It merely asserts that no additional ALHL will be granted to La Baia unless obligations in respect of another project are completed.

[23] La Baia states that this letter means that Mr. Spadaro had a licence and that he would not be granted another until the project was completed. Counsel asks the court to read into this that the granting of the licence would be imminent on the completion of the project.

[24] In my view it would be a bit of a stretch to conclude that a licence would automatically be granted upon completion of the project from this letter. It seems to me to be an assertion that an application for an ALHL will not be given consideration until and unless the project was completed simpliciter. I do not agree that this is sufficient to ground a claim of a legitimate expectation to receive an ALHL.

LETTER No.2

- [25] The second letter was entitled "TO WHOM IT MAY CONCERN" dated the 31st July 2001. It is evident from its content that it is relevant to these proceedings.

"This is to certify that the representatives of La Baia Ltd have had recent discussions with the Government of Anguilla concerning the grant of an Aliens Land Holding Licence for the property registered as Registration Section West End Block 17709B Parcel 23.

Government indicated at the aforementioned meeting that subject to the submission of all required documents necessary for the grant of an Alien Land Holding Licence for the property, it would be prepared to give due consideration to the application.

Based on the facts as presented to Government there seems to be no reason at this time why it should not look favourably upon an application for an Alien Landholding Licence for the property on behalf of La Baia Ltd."

- [26] EXCO asserts that this letter merely refers to a meeting of the parties having discussions and again does not state that they would issue a licence. Counsel states that it merely promises to give due consideration to an application subject to the submission of documents. Counsel for La Baia claims that this letter is a continuation of the discussions from the time of the earlier letter of 4th July 1985.

- [27] In my view, the letter clearly suggests that at that time in July 2001, subject to the provision of the required documents, not only was EXCO satisfied with the facts presented at that meeting but would grant the application subject to the normal required documents. I find that this letter can ground a legitimate expectation for a ALHL subject only to the

provision of the normal required supplemental documents in the form of duties and due diligence.

LETTER No.3

[28] The third letter referred to is dated the 20th March 2005 and addressed to the Attorneys for La Baia.

"Please be advised that Government has considered the matter regarding La Baia Ltd holding land in Anguilla. Government confirms that there has been no predetermination by Executive Council to suggest that La Baia will not be granted an Alien Landholding Licence to hold the property described as Registration Section West End Block 17709B Parcel 23.

Executive Council further confirms that there is now no reason to our knowledge why an Alien Landholding Licence would not be granted to La Baia or its beneficial owners if the application is made or if the Court rules that it is the owner of the property concerned. However such Licence would be subject to such usual conditions as is deemed necessary and appropriate by Executive Council."

[29] Counsel for EXCO states that this letter is merely a statement that EXCO has made no pre-determination and that there is no reason not to grant the licence. Counsel for La Baia states that no reasonable person could read this letter other than as an express promise to grant the ALHL to La Baia.

[30] I agree with Counsel for La Baia in this regard. The conditions attached to the granting of the licence in this letter are stated clearly to be either the making of an application or pursuant to a ruling of the court that La Baia owned the property concerned. Conditions as deemed appropriate would be attached to the licence granted. This was the conclusion after the matter was considered by EXCO after its assurance that there had been no determination before that. It is difficult to see what else could have

reasonably been understood by these representations. I therefore find that this letter is capable of grounding a legitimate expectation to receive an ALHL.

[31] A legitimate expectation having been found by this court, the issue of whether EXCO was entitled to frustrate that expectation is one that has been accepted by Counsel for EXCO as moot. La Baia submits that large sums of money have been spent to its detriment by way of pursuing litigation for ownership, architects, project plans, all expenses attached to an expectation of being granted the ALHL to develop land. This has not been challenged by EXCO who limited arguments to the sole point as to whether there was indeed a legitimate expectation.

[32] In conclusion, the Order of the court is as follows,

- (a) That the decision by EXCO to refuse to issue an Aliens Land Holding Licence is quashed on the grounds that there was a legitimate expectation created by EXCO that La Baia would be issued with such licence.
- (b) That the matter be remitted to EXCO to be reconsidered in accordance with the findings of this court.
- (c) Costs to La Baia to be assessed if not agreed.

Cheryl Mathurin

High Court Judge