

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2015/0375

BETWEEN:

MACKENZIE FRANK

Applicant

and

**THE ATTORNEY GENERAL
THE BARBUDA COUNCIL**

Respondents

Appearances:

Mr. Ralph Francis for the Applicant

Mr. A. Aslaphan SC and Ms. T. Khan instructed by Ms. A. Aska for the Respondents

2015: March 26th 27th
March 30

Judgment

[1] **Cottle, J.:** The applicant seeks leave to bring proceedings for judicial review. In the application for leave the applicant seeks the following relief:-

- (1) "An Order of Certiorari to remove and quash the outcome of a purported ballot held at a village meeting on Monday 2nd March 2015. The purported outcome of which was the approval of a major development project to be located on lands known as the "K Club" consisting of an area of 251 acres together with additional lands of 195 acres.
- (2) An Order prohibiting the Defendants from holding a village meeting to consider whether or not approval should not be given for a proposal of a major development project to be located on property formerly known as the "K Club" and other

requested areas until such time as the proposal is considered and approved in detail by the Barbuda Council and the Cabinet of Antigua and Barbuda in a manner consistent with the Laws of Antigua and Barbuda, the Barbuda Land Act 2007, and the Land Act Regulations 2010.

- (3) An Order prohibiting the grant of any lease of land for a major development project by the Barbuda Council for a period in excess of fifty years with an extension for forty nine years upon satisfying conditions laid out in Section 5 of the Barbuda Land Regulation No.17 of 2010.”

Background

- [2] In November 2014 a major development project for the island of Barbuda was announced. Under the relevant legislation, the Barbuda Land Act No.17 of 2010, a four stage process is set out to be followed for such a proposal to be adopted.
- [3] At stage one the Barbuda Council should obtain the consent of the people of Barbuda for the project in principle. The second stage requires that the Barbuda Council consider the proposal in detail. If the council approves the project then the proposal proceeds to stage 3. At stage 3 the council approved project, with the details, is sent to the Cabinet for consideration. If the Cabinet approves, the proposal goes to stage 4. At stage 4 the project is submitted to the people for consent of the detailed proposal.
- [4] The project proposed was approved by the people of Barbuda in principle. The Council approved the proposal as did the cabinet of Antigua and Barbuda. The proposal was then approved by the people of Barbuda by the votes of a majority of those attending a scheduled meeting of which adequate notice was given.

[5] The applicant now complains that the process of approval of the project is tainted by illegality in that the statutorily prescribed process to secure approval has not been adhered to. The applicant lists seven matters which he considers to have constituted illegality. I reproduce them below:-

“A) Project approved by the Cabinet without the benefit of a detailed project proposal contrary to Section 17(a)(c) of the Barbuda Land Act No.23 of 2007.

B) Project approved by the Barbuda Council without the benefit of a detailed project proposal contrary of Section 17(2)(b) of the Barbuda Land Act No.23 of 2007.

C) Consent of the people of Barbuda sought without the benefit of a detailed project proposal Contrary to Section 17(2)c of the Barbuda Land Act No.23 of 2007.

D) The grant of a lease of land for a period of one hundred and ninety eight years has been approved Contrary to Section 6 of the Barbuda Land Act No. 23 of 2007 and Section 5 of the Barbuda Land Regulations 2010.

E) A meeting of the village was held at which a vote was taken not by show of hands or secret ballot Contrary to Section 1(11) of the Barbuda Land Regulations 2010.

F) The Respondents failed to disclose to the people of Barbuda the details of the proposed resort development – Barbuda dated 3rd November 2014 submitted by the developers Paradise Found LLC. Further, the Respondents failed to disclose to the people of Barbuda the contents of a letter dated 28th November 2014 in which is set out the approval and concessions granted to the project by the Cabinet on behalf of the Government of Antigua and Barbuda. In addition, the document circulated entitled “Paradise Found – major development proposal” is deficient in providing pertinent information.

G) The respondents have agreed to the grant of an option for a lease of an additional two hundred and fifty acres of land for an Eco Lodge Project the details of which have not been declared by the developers. The Eco Lodge Project appears a kin to a footnote under the project proposal.”

[6] The applicant filed an affidavit in support.

- [7] He deposed that he is Barbudan by birth and has served on the Barbuda Council between 1991 and 2002. From 2004 to 2014 he was a senator representing the people of Barbuda. From 2005 to 2014 he was vice president of the Senate. From 2009 to 2013 he sat as ex-officio member of the Barbuda Council. He is a seasoned politician with many years of experience at the Barbuda Council.
- [8] The applicant makes no complaint about the first public meeting which secured the consent of the people of Barbuda in principle to the proposed development. He makes no complaint about the process which led to the decision of the Cabinet to approve the proposal. He does not say that the decision of the Cabinet is in any way to be challenged.
- [9] The concerns of the applicant are set out at paragraph 13 of his affidavit to paragraph 19. As I understand it the applicant says that no details were available by the council before the people were called upon for their approval. I do not understand the applicant to be contesting the procedure adopted by the Council. He does not say that the Council erred in any way when they agreed to the proposed development and sent it to the Cabinet.
- [10] It is only the final stage, the consent of the people of Barbuda that is being challenged. The concerns of the applicant are that the people were not provided with details of the proposal “to include drawings, company profile, financial instruments, expert studies, location, due diligence info (sic) etc.”. Without these details, he suggests, there could be no informed consent by the people. The applicant complains of the voting procedure. The legislation speaks of voting by show of hands. At the public meeting, the process adopted was that each person who wished to vote was allowed to proceed to the head table, write their names on a sheet of paper, and indicate whether they voted yes or no to the proposed development. The applicant also said that there were persons who voted who were not Barbudan as defined by the legislation and as such not qualified to vote. He gave no particulars in support of this allegation. At this stage it is worth pointing out that he is a born Barbudan with over two decades of experience in the politics of the Barbuda Council. On a small island where the people generally know each other it seems strange that any

unqualified persons would be allowed to vote in full public view without a challenge. The applicant took part in the vote. He made no complaints then. He did not object to the voting procedure.

[11] Arthur Nibbs swore an affidavit in response to the application for leave. He denied that there were any unqualified persons permitted to vote. He agrees that the vote was not taken by show of hands. He explains that the procedure adopted had been suggested by a Mr. Trevor Walker. Mr. Walker was a government minister in the previous government which had governed Antigua and Barbuda up to 2014. The applicant is an executive member of the Barbuda People's Movement, a political party which had been affiliated with the previous government under whom the applicant had served as senator. Mr. Nibbs swore that there were over 300 persons wishing to vote, that the room was L shaped and there were persons outside the building on two sides. He says it would not have been possible to see and count all raised hands at a vote. He therefore agreed with the suggestion made by Mr. Walker. The applicant who was present throughout raised no objection. He participated in the vote. The applicant does not say that the vote represents other than the freely expressed will of the voters present and voting.

[12] Mr. Nibbs also swore that details of the proposals were circulated with notice of the meeting. He exhibits a copy of the document circulated. It is sub headed "Detailed proposal for the second meeting of the people of Barbuda". The heading is "Paradise Found: Major Development proposal".

The Arguments

[13] At the hearing of the application for leave, counsel for the Respondents pointed out that the applicant attended at the meeting. His only expressed concern was the total value of the proposed lease. He considered the proposal and voted against it.

- [14] Having participated fully and failed at the ballot the applicant ought not to be permitted to challenge the result at this stage. Counsel also submitted that no decisions of the Barbuda Council or the Cabinet have been challenged.
- [15] Counsel points out that in any event persons aggrieved by any decision of the Barbuda Council have a right of appeal under Regulation 8 of which the applicant has not availed himself. Regulation 8 reads:-
“A person who is aggrieved by a decision of the Council may appeal to the tribunal established under regulation 9.”
- [16] Under Regulation 10 (17) and 10 (18) a certificate of the results of the vote is conclusive evidence:-
“(17) A Certificate signed by the Chairman or the Deputy Chairman and Secretary of the Council certifying the result of the votes at a meeting of the people of Barbuda, shall be conclusive evidence of the decision of the people of Barbuda on the proposal before it.
(18) Consent of the people under the Act shall be deemed satisfied by presentation of the Certificate of Consent of the People signed by the Chairman, or in his absence the Deputy Chairman, and the Secretary of the Council.”
- [17] Counsel for the applicant concedes that the applicant attended at the meeting and participated fully without complaints but argues that acquiescence by the applicant cannot cure a breach of the law. Regulation 10 (11) is cast in mandatory terms:-
“Voting at a meeting of the people of Barbuda shall be done by a show of hands unless by a show of hands the majority of the persons present determine that any vote at the meeting shall be held by a secret ballot.”
The failure to vote by show of hands or secret ballot taints the vote by illegality and the applicant should be given leave to review the vote.

Discussion

- [18] The complaint at ground A by the applicant for leave that the project was approved by cabinet without the benefit of a detailed proposal is not supported by any evidence in the applicant's affidavit. I decline to grant leave on this ground.
- [19] The complaint that the project was approved by the Barbuda Council without the benefit of detailed proposals is not supported by any evidence. I decline to grant leave on ground B.
- [20] The complaint at ground C is rejected. There has been no complaint by anyone other than the applicant that the details of the proposal supplied have not been sufficient. The fact that the applicant attended the meeting and voted suggests that the details provided were sufficient for him to arrive at a decision. No leave to apply for judicial review on this ground is given.
- [21] The evidence is that no lease has been granted for 198 years or any other period. This offers no basis to grant leave on ground D.
- [22] Ground F is subsumed under ground C. Ground G is not supported by any evidence in the applicant's affidavit and offers no basis for the grant of leave.
- [23] Under ground E it is agreed that the vote was not conducted by way of show of hands or secret ballot. The question which arises is whether in the circumstances this court should exercise its discretion to grant leave on this basis. It is not the applicant's position that there was any element of fraud in the decision to opt for this mode of voting. The evidence is that the proposal for this method of voting came from the political ally of the applicant who is opposed to the ruling government. It is also the evidence that the numbers of electors and the configuration of the room

at which the voting took place made it impossible to confidently record the result of a vote by show of hands.

[24] Should the court vitiate the clearly expressed will of the electorate when there is no suggestion that the results represent anything but the decision of the majority? I do remain concerned that on the face of it the regulation is couched in mandatory terms.

[25] In the particular circumstances of this application for leave where the only extant ground is the failure to follow the statutorily prescribed method of voting where the failure has led to no disenfranchisement of any voters and there is no doubt that the result as certified represents the will of the majority of voters, I consider that the ends of justice require that I refuse the applicant leave to challenge the results of the vote on this basis only.

[26] The application for leave is accordingly denied.

Brian Cottle
High Court Judge