THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2016/0484

BETWEEN:

MARY FRANCIS

Claimant

and

DEVELOPMENT CONTROL AUTHORITY

Defendant

APPEARANCES:

Horace Fraser for the Claimant
Adrian Etienne and Khadya Florius for the Defendant

2017: May 5th;
2017: May 17th.

JUDGMENT

[1] **SMITH J**: This is a judicial review claim in which Ms. Mary Francis seeks a declaration and orders of certiorari and mandamus in relation a decision of the Defendant, the Development Control Authority ("the DCA"), made on 14th February 2014 granting permission/approval to Raymond H. Moses for the construction of certain structures on Block 0849E Parcel 407 at San Souci, Castries.

[2] The gravamen of Ms. Francis' case is that, firstly, the DCA gave approval for Mr. Moses to erect structures on his property within the six-foot minimum building setback (from the side of all

buildings to the boundary) in breach of sections 18 and 35 of the **Physical Planning and Development Act** ("the Act") and in breach of its own policy, which amounts to illegality.

[3] Secondly, Ms. Francis says that it is irrational for the DCA, having issued an abatement notice to Mr. Moses in 2011 for erecting structures in breach of the DCA's policy, to have reversed itself and granted approval when the breaches identified in its abatement notice had not been rectified.

[4] Thirdly, Ms. Francis says she had a legitimate expectation that the DCA would have acted in accordance with its policy and practice of requiring landowners, when building, to allow for a six-foot minimum setback. Ms. Francis' complaint is that the erected structures affect the amenity of her land and pose a threat to her property which the DCA's policy was designed to prevent.

[5] The gravamen of the DCA's case is that, firstly, both Ms. Francis and Mr. Moses had built buildings on their respective properties, within the six-foot set back, prior to the introduction of the six-foot minimum setback policy. In oral argument, Mr. Etienne, counsel for the DCA, acknowledged that at the time Mr. Moses began erecting the structures in dispute the policy was in effect, but asserted that the structure Mr. Moses was erecting was within the existing building footprint on his property.

[6] Secondly, the DCA argued that Ms. Francis had filed her application for judicial review on 8th August 2016, two and a half years after the decision sought to be impugned, which amounts to an unreasonable delay. This the DCA says precludes Ms. Francis from the grant of any relief. Indeed, in argument, the DCA trained its heavy artillery on the issue of delay; the substantive points were given perfunctory attention.

[7] Having examined the affidavit of Mr. Hickson Smith filed on behalf of the DCA in opposition to the claim for judicial review, I can find no evidence that the structures erected by Mr. Moses were in fact within the existing building footprint of Mr. Moses' property. Mr. Smith had visited the property and conducted certain examinations and made certain observations which were set out in his affidavit, yet he neglected to say anything about the structures falling within the existing footprint. There was no evidence of this before the Court.

[8] I am therefore obliged to find that the decision of the DCA to have issued an abatement notice for certain construction works, only to thenturn around and approve the said works, in breach of its only policy and practice, was Wednesbury unreasonable. No reasonable decision-maker, in the position of the DCA, and given the facts and circumstances of the case, would have arrived at the decision which it did. In considering the matter of relief, I must consider the issue of delay.

[9] Part 56.5 of the **Civil Procedure Rules** 2000 ("CPR") provides as follows:

> "56.5 Delay
>
> (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.
>
> (2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –
>
> (a) be detrimental to good administration; or
>
> (b) cause substantial hardship to or substantially prejudice the rights of any person

[10] It is clear that section 56.5 requires a judge to consider whether there has been unreasonable delay. Further, the judge must consider whether grant of relief would be detrimental to good administration or cause substantial hardship to the rights of any person.

[11] I understand from counsel for the parties that the matter of delay was raised at the leave stage and the Court took the view that the matter should or could be raised at the judicial review hearing. In any event, leave was granted.

[12] Mr. Fraser, counsel for Ms. Francis, relied on **Virgin Islands Environmental Council v Attorney General**[1] for the proposition that the issue of whether an applicant for judicial review has been guilty of undue or unreasonable delay will depend on the circumstances of the particular case and decisions of the courts serve merely as guidance. I accept this as the applicable starting point in considering the issue of delay.

---

[1] British Virgin Islands, Claim No. BVIHCV2007/0185

[13] What is the explanation given for the more than two years delay and can be considered as reasonable?

[14] Ms. Francis' explanation for the delay is found at paragraph 7 of her affidavit in support of her application for leave. Her affidavit in support of her claim for judicial review contains no explanation for the delay. Her explanation is that the DCA had advised her to apply for an injunction (a private law claim) to prevent the continuation of the nuisance created by Mr. Moses' construction within the six-foot setback. She stated that the DCA advised this course because it had no resources to demolish the structure. She said she acted on this and applied to the court for an injunction.

[15] Ms. Francis deposed that it was at first hearing of the private law claim on 4th March 2014 that she first became aware that the DCA had in fact granted building permission to Mr. Moses. This decision she stated in her affidavit "*created a conflict between the Applicant's private law remedy and the public law remedy*". What did she do about the "conflict"?

[16] She goes on to say in her affidavit:

> "*the Applicant being taken by surprise with a public law issue now arising after filing for a private law injunction which is the result of the Respondent's decision to grant building permission, the Judge ordered that the Respondent be added as a Defendant in that original Claim filed by the Applicant for the Injunction. In compliance with the Judge's Order – the Respondent was added because of the public law issue which had arisen on 4th March 2014. Even at that stage the Applicant was confident that the decision of the Judge would allow the public law issue to proceed upon the claim filed. However, the judge later corrected the Order and struck off the Respondent and ordered that the Respondent remain as a Witness to assist the Court on the Claim before the Court and the parties were also instructed to work at a resolution*."

[17] What the Court gleans from the above paragraph is that Ms. Francis did nothing about the private law/public law conflict because the judge had ordered the DCA to be added as a defendant in the

private law claim and this made Ms. Francis "confident" that the public law aspect could be addressed in the private claim.

[18] Even if Ms. Francis' averments are taken at face value, it does not explain why, after the judge "corrected the Order and struck off the Respondent", she did not initiate judicial review proceedings. The judge's order was made on 3rd June 2014. In it she ordered that: "*The Development Control Authority and all pleadings associated with the authority are struck off but the Authority is to remain associated with the suit as an expert to assist the Court*."

[19] Ms. Francis, or her counsel, must have realized, at least from the date of the order of 3rd June 2014, that relief against the DCA could not be maintained in a private law claim. Notwithstanding this realization, the application seeking leave to make a judicial review claim against the DCA was not filed until 8th August 2016, more than two years after the making of that order.

[20] The Claimant then summarizes the explanation for her delay in her affidavit as follows:

> "*In the circumstances the Applicant has filed this application for leave for Judicial Review so as to correct all the mistakes including the delay in part, caused by the inconsistent decisions of the Respondent. The Applicant through no fault was caught between the claim filed before the Court for an Injunction and the new course of events arising, that of adding the Respondent and then the Court having struck out the Respondent on a count [sic] of the Public Law issue which had arisen*."

[21] I find those explanations untenable. Even if the DCA had misled Ms. Francis into filing the private law claim for injunction, and even if she was lulled into a false sense of confidence by the adding of the DCA in the private law claim, the latest she could have been made aware of the necessity to file a judicial review application was 3rd June 2014 when the judge removed the DCA from the claim. No reasonable explanation has been given for this delay of two years and two months.

[22] Mr. Fraser referred the court to the case of **Romaneta Francis v Public Utilities Authority**[2] in which the Court granted leave to bring a claim for judicial review notwithstanding a delay of two years. That case is distinguishable from this one. Firstly, in that case, the Claimant sought mandamus to compel the Public Utilities Authority to install electricity to her premises which it refused to do. The omission complained of was therefore a continuing one – the continuing refusal to install notwithstanding the continuing requests of the Claimant. Secondly, granting leave would not have been detrimental to good administration or substantially prejudice the rights of any person. As is discussed below, good administration and the rights of other persons are factors in this case.

[23] Quite apart from the unreasonableness of the Claimant's delay, the issue of good administration is relevant in this case. While what would constitute detriment to good administration surely varies from case to case, Lord Diplock's statement in **O'Reilly v Mackman**[3] offers clear guidance:

> "*The public interest in good administration must require that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision*."

[24] The DCA granted building approval to Mr. Moses on 14th February 2014. Under the section 28 (1) of the Act, if the development is not commenced within a period of twelve months from the date on which it is granted, it lapses. Under section 28 (5) of the Act, if the development is not completed within thirty months after the date of commencement, the permission lapses.

[25] Given this, Mr. Moses could not sit idly by. He could not very well wait around to see if Ms. Francis would seek to quash the approval. Ms. Francis was obliged to act with urgency, giving the person to be affected, Mr. Moses, the earliest warning of an intention to challenge the decision of the DCA. That is the spirit and intent behind the notion of good administration.

---

[2] Antigua and Barbuda, Claim No. ANUHCV2006/0452.
[3] [1983] 2 AC 237 at pp. 280-281.

[26] Ms. Francis' delay of over two years in filing her judicial review application was unreasonable. To grant her relief under these circumstances, notwithstanding the merit of her claim, would be detrimental to good administration and substantially prejudice the rights of Mr. Moses.

[27] I therefore make the following orders

(1) The relief sought by the Claimant in its Fixed Date Claim filed 11th November 2016 is refused.

(2) Each party shall bear its own costs.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR