THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0003

BETWEEN:

JEROME JENKINS

Appellant

and

HIS LORDSHIP THE HONOURABLE JUSTICE BRIAN COTTLE (IN HIS CAPACITY AS AN APPELLATE TRIBUNAL CONSTITUTED BY SECTION 16 OF THE ARCHITECTS (REGISTRATION) ACT)

Respondent

Before:

The Hon. Dame Janice Pereira, DBE	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

On Written Submissions:

Dr. David Dorsett for the Appellant
No Written Submissions filed on behalf of the Respondent

2017: June 1.

Interlocutory appeal – Judicial review – Whether learned judge exercised judicial or administrative functions – Interpretation of section 16 of the Architects (Registration) Act – Whether decision of learned judge amenable to judicial review

The appellant made an application to the Architects Registration Board ("the Board") to be registered as an architect. The Board denied his application. He sought judicial review of the Board's decision but this was refused on the ground that he had an alternative remedy by way of appeal under section 16 of the Architects (Registration) Act ("the Act"). The appellant appealed the decision of the Board and this appeal was heard by Cottle J who dismissed the appeal. Cottle J was of the view that the Act gave the Board a discretion in determining eligibility for registration and therefore the Court would only interfere with the exercise of the discretion on the basis of illegality, irrationality or procedural impropriety.

The appellant being dissatisfied with the decision of Cottle J, sought leave to file a claim

for judicial review of Cottle J's decision on the following basis: (i) rule 60.8(1) of the Civil Procedure Rules 2000 ("the CPR") provides that "Unless an enactment otherwise provides, the appeal is by way of rehearing"; (ii) the respondent dismissed the appeal, holding that he would only interfere with the decision for reasons of irregularity, illegality, or procedural impropriety; (iii) the respondent misunderstood his role and reviewed the decision rather than acting as an appellate tribunal. Her Ladyship Justice Henry dismissed the application for leave to seek judicial review. Her reason for so doing being, the decision of a judge sitting in Chambers to determine an appeal pursuant to section 16 of the Act is not subject to judicial review since the judge was exercising a judicial function. Therefore an application for judicial review would have no realistic prospect of success.

The appellant appealed this decision on the ground that there was an arguable case that: (a) the statutory appellate body constituted by section 16 of the Act though comprised of a judge in Chambers, when exercising its powers under section 16 of the Act was not exercising the jurisdiction of a judge but as a matter of fact and law was exercising the jurisdiction of a statutory tribunal established under section 16 of the Act; and (b) the statutory appeal tribunal to which the appellant had appealed had acted ultra vires when it conducted a judicial review exercise rather than an appeal by rehearing as required by the rules of court which the statutory tribunal was bound to observe.

Held: dismissing the appeal and making no order as to costs:

1. It is a well settled rule that a court would not grant leave for judicial review unless the court is satisfied that there is an arguable ground for judicial review with a realistic prospect of success and it is not subject to a discretionary bar such as delay or an alternative remedy.

2. It is a well settled principle of administrative law that decisions of tribunals and inferior courts and administrative bodies are amenable to judicial review. A decision of a judge of a superior court will also be subject to judicial review, if in making the decision the judge is performing a statutory function as distinct from acting in a judicial capacity exercising the powers of the court. Whether a judge is performing a statutory function or is acting in a judicial capacity depends on the provisions of the statute.

   Attorney General v Whyte [2010] JMCA CIV 24 considered; **R v Master of the Rolls exp McKinnell** [1993] 1 WLR 88 considered; **R (Woolas) v Parliamentary Election Court** [2010] EWHC 3169 (Admin) considered; and **R (Cart) v Upper Tribunal** [2011] UKSC 28 considered.

3. It is a well-established principle that in interpreting legislation the court will seek to give effect to the intention of Parliament. In so doing, the court must consider the purpose for which the legislation was enacted and construe it accordingly.

4. Having regard to the statutory provisions of the Act, it is clear that parliament intended that appeals from decisions of the Board are to be determined by the court in accordance with its procedures with full powers of rehearing. The fact that

Parliament has left the timing within which an appeal may be brought and the conduct of the appeal to be governed by the Rules of Court are strong indicators that a "judge in chambers" hearing an appeal would be acting in a judicial capacity and not merely performing a statutory function. The judge's decision would therefore not be subject to judicial review. The decision of the judge in Chambers would not mean the end of the road of the matter, since a party aggrieved by the judge's decision would have a right of appeal to the Court of Appeal under CPR 62. The learned judge was therefore correct in refusing to grant leave for judicial review of the decision of Cottle J.

Section 16 of the Architects (Registration) Act applied.

JUDGMENT

[1] **THOM JA**: This appeal relates to the construction of section 16 of the **Architects (Registration) Act** ("the Act").[1]

[2] The background facts to this appeal are that the appellant who holds a Bachelor of Science Degree in Architectural Studies from the University of Technology, Kingston, Jamaica made an application to the Architects Registration Board ("the Board") to be registered as an architect. The Board denied his application. He sought judicial review of the Board's decision but this was refused on the ground that he had an alternative remedy by way of appeal under section 16 of the Act.

[3] The appellant appealed the decision of the Board and this appeal was heard by Cottle J who dismissed the appeal. Cottle J was of the view that the Act gave the Board a discretion in determining eligibility for registration and therefore the Court would only interfere with the exercise of the discretion on the basis of illegality, irrationality or procedural impropriety. Cottle J having reviewed the evidence that was before the Board stated at paragraph 13 that:

> "Against this factual background it is clear to this court that the position adopted by the Board in refusing to register the appellant as an architect was not unreasonable. The Board carefully considered the application of the appellant. They were not satisfied as to his training as evidenced by his academic credentials…."

[4] The appellant being dissatisfied with the decision of Cottle J, sought leave to file a

[1] Chapter 34, Laws of Antigua and Barbuda.

claim for judicial review of Justice Cottle's decision on the following basis: (i) rule 60.8(1) of the **Civil Procedure Rules 2000** ("CPR") provides that "[u]nless an enactment otherwise provides, the appeal is by way of rehearing"; (ii) the respondent dismissed the appeal, holding that he would only interfere with the decision for reasons of irregularity, illegality, or procedural impropriety; (iii) the respondent misunderstood his role and reviewed the decision rather than acting as an appellate tribunal.

[5] Her Ladyship Justice Henry dismissed the application for leave to seek judicial review. Her reason for so doing being, the decision of a judge sitting in Chambers to determine an appeal pursuant to section 16 of the Act is not subject to judicial review since the judge was exercising a judicial function. Therefore, an application for judicial review would have no realistic prospect of success.

[6] The appellant appeals this decision on the ground that there was an arguable case that: (a) the statutory appellate body constituted by section 16 of the Act though comprised of a judge in Chambers, when exercising its powers under section 16 of the Act was not exercising the jurisdiction of a judge but as a matter of fact and law was exercising the jurisdiction of a statutory tribunal; and (b) the statutory appeal tribunal to which the appellant had appealed had acted ultra vires when it conducted a judicial review exercise rather than an appeal by rehearing as required by the Rules of Court which the statutory tribunal was bound to observe.

[7] It is a well settled rule that a court would not grant leave for judicial review unless the court is satisfied that there is an arguable ground for judicial review with a realistic prospect of success and it is not subject to a discretionary bar such as delay or an alternative remedy.

[8] The issue is whether a judge in exercising the powers of section 16 of the Act exercises the powers of a judge of the High Court or the powers of a statutory appellate tribunal. Learned Counsel Dr. Dorsett submitted that the decision of the

appellate tribunal established by section 16 of the Act is amenable to judicial review since a statutory tribunal can only exercise the powers under the statute and it had no other jurisdiction. Therefore, when a judge exercises the power of the appellate tribunal his decision is amenable to judicial review. Dr. Dorsett relied on several cases including **Mohit v Director of Public Prosecutions of Mauritius**,[2] **Attorney General v Whyte**;[3] **R v Master of the Rolls exp McKinnell;**[4] **R (Woolas) v Parliamentary Election Court**;[5] and **R (Cart) v Upper Tribunal.**[6]

[9] In **Attorney General v Whyte**, the issue was whether the power to review contained in section 5A of the **Parole Act** was entrusted to a judge of the Court of Appeal or the Court of Appeal. Section 5A reads as follows:

> "Where, pursuant to section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was commuted shall be examined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined."

[10] The Jamaica Court of Appeal followed the reasoning of the Privy Council in **Devon Simpson v R**[7] where the Privy Council had to determine the nature of the jurisdiction given to a single judge or judges of the Court of Appeal pursuant to section 7 of the **Parole Act** which deals with the classification of murder into capital and non-capital murder. The Privy Council found that the power in the section was only a limited statutory power in the parole scheme set up by Parliament and the power of review was vested in judges of the Court of Appeal and not the Court of Appeal. In delivering the judgment Lord Goff stated:

> "Now it is plain that, in the two cases under consideration, the Court of Appeal was purporting to act in its capacity as the Court of Appeal of

[2] [2006] UKPC 20.
[3] [2010] JMCA CIV 24.
[4] [1993] 1WLR 88.
[5] [2010] EWHC 3169 (Admin).
[6] [2011] UKSC 28.
[7] 1996 (48) WIR 270.

> Jamaica in determining whether or not to classify the murders as capital or non-capital. This appears in particular from the orders made by the Court of Appeal in each case. Their lordships are clearly of the opinion that the Court of Appeal acting as such, had no jurisdiction to carry out any such classification exercise; … First of all it is plain that the statutory power of review is vested not in the Court of Appeal as such but in judges of the Court of Appeal, the three judges of the court who perform the second stage of the review procedure being nominated for that specific purpose by the President of the court. Second, it is also plain that there is no other provision, in the Amendment Act from which the Court of Appeal as such derives jurisdiction to perform the classification procedure in these cases. It follows that, in the present cases, the Court of Appeal purported to make orders which it had no jurisdiction to make. Moreover this led, in particular, to the consequence that each appellant was deprived of the benefit of the first stage of review by a single judge of the Court of Appeal, and so deprived of the possibility that the single judge might have classified his case as one of non-capital murder."

[11] In **Whyte**, the Court of Appeal found section 5A to be an analogous provision and therefore held that the judge was not acting in a judicial capacity exercising the powers of the Court of Appeal.

[12] In **Ex Parte McKinnell**, on an application for judicial review, certiorari was sought to quash the decision of the Master of the Rolls on appeal from the decision of the Disciplinary Tribunal on the ground that it was wrong in law. The issue was whether the Master of the Rolls was correct in finding that when the Tribunal makes an order for restoration to the roll, an appeal from the Tribunal lies at the instance of the Law Society pursuant to section 49(a) of the UK **Solicitors Act**. Whether the decision of the Master of the Rolls on appeal from the disciplinary Tribunal of the Law Society was subject to judicial review was not in issue. It was not contended by either side that the Master of the Rolls when hearing appeals under the **Solicitors Act** was acting in a judicial capacity. The application for judicial review was dismissed on the basis that the Master of the Rolls was correct in finding that the appeal could be brought by the Law Society. The **Solicitors Act** makes clear provision for appeals in certain circumstances to the High Court and in others to the Master of the Rolls. In relation to appeals to the Master of the Rolls, the Act empowers the Master of the Rolls to make regulations to regulate

such appeals. They are not governed by the Rules of Court. The Master of the Roll in hearing such appeals does not act in a judicial capacity.

[13] In **Woolas**, it was held that decisions of the election court established under section 123 of the **Representation of the People's Act 1983** and which was presided over by judges of the High Court were subject to judicial review. In so holding the court was of the view that the statutory scheme contained in the legislation was such that the judges were performing a limited statutory function and it was the intention of Parliament that the election court was to be the final arbiter of fact but not of law.

[14] Similarly in **R (Cart) v Upper Tribunal**, the UK Supreme Court having reviewed the statutory scheme of the 2007 **Tribunals, Courts and Enforcement Act**, held that the unappealable decisions of the Upper tribunal were subject to judicial review.

[15] It is a well settled principle of administrative law that decisions of tribunals and inferior courts and administrative bodies are amenable to judicial review. The above mentioned cases are authorities for the proposition that the decision of a judge of a superior court will also be subject to judicial review, if in making the decision the judge is performing a statutory function as distinct from acting in a judicial capacity exercising the powers of the court. Whether a judge is performing a statutory function or is acting in a judicial capacity depends on the provisions of the statute.

[16] The determination of the issue on this appeal depends on the construction of section 16 of the Act. Section 16 reads as follows:

> "An appeal against any decision made by the Board shall lie to a judge in Chambers, and every such appeal shall be made within such time and in such form and shall be heard in such manner as may be prescribed by rules of court."

[17] It is a well-established principle that in interpreting legislation the court will seek to give effect to the intention of Parliament. In so doing the court must consider the purpose for which the legislation was enacted and construe it accordingly.

[18] The purpose of the Act is to provide a mechanism to regulate the practice of architecture in Antigua and Barbuda. When the Act is read as a whole it is clear that Parliament established one mechanism for the determination of eligibility and registration of architects and another for the discipline of architects.

[19] An Architect Registration Board was established to determine among other things those persons who had met the requirements for registration and were therefore eligible to be registered as architects. The Registrar of the High Court is required to keep a register of architects and to make alterations to the register from time to time in relation to registrations and removals of persons from the register. However, Parliament in its wisdom decided that the Board would not be the final arbiter in determining eligibility for registration of architects. Provision was made in section 16 for decisions of the Board to be appealed to a judge in Chambers. Section 16 also provides that the time for appealing decisions of the Board and the manner for determining such appeals are to be in accordance with the Rules of Court. It is not disputed that Part 60 of the CPR governs appeals from decisions of tribunals such as the Board. Pursuant to Part 60.8 such appeals are by way of rehearing unless the statute provides otherwise. It is noted that section 16 does not limit the powers on appeal. Therefore appeals from the Board are by way of rehearing.

[20] In contrast the provisions to regulate the professional conduct of architects which are contained in section 17 of the Act provide for the Minister to make regulations after consultation with the Board for, among other things, a code of conduct for architects, the establishment of a disciplinary body to investigate allegations of professional misconduct and the procedure to be followed in respect of disciplinary

[21] proceedings. There are no similar provisions for appeal as contained in section 16.

[22] Having regard to the statutory provisions of the Act, it is clear that Parliament intended that appeals from decisions of the Board are to be determined by the court in accordance with its procedures with full powers of rehearing. The fact that Parliament has left the timing within which an appeal may be brought and the conduct of the appeal to be governed by the Rules of Court are strong indicators that a "judge in Chambers" hearing an appeal would be acting in a judicial capacity and not merely performing a statutory function. The judge's decision would therefore not be subject to judicial review. The decision of the judge in Chambers would not mean the end of the road of the matter, since a party aggrieved by the judge's decision would have a right of appeal to the Court of Appeal under CPR 62. The learned judge was therefore correct in refusing to grant leave for judicial review of the decision of Cottle J. Consequently, the appeal is dismissed. The respondent not having participated in the appeal, there shall be no order as to costs.

I concur.
Dame Janice M. Pereira DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag]

By the Court

Chief Registrar