EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: NEVHCV2018/0054

Between Zephaniah Liburd

Applicant

and

Nevis Housing and Land Development Corporation
The Minister of Agriculture and Lands

Respondents

Before: His Lordship Justice Ermin Moise (A.g)

Appearances:

Mr. E. Robelto Hector with Ms. Saundra Hector of counsel for the applicant
Ms. Farida Hobson of counsel for the Respondents

2019: January, 31st
2019: March, 5th

JUDGEMENT

[1] Moise, J (A.g.).: This is an application for leave to apply for judicial review. The applicant has outlined a number of declarations which he will ultimately seek if granted leave to make this claim. However, it would seem that the applicant's main grievance is the decision of the 1st respondent, under the chairmanship of the 2nd respondent, to grant a lease of that property registered in Block 5 Folio 43 (The Property) to a third party investor, despite the applicant's claim to a legitimate expectation that a lease which he held over that property would be renewed or that the property would be sold to him. He is also aggrieved at the actions of the respondents in allegedly damaging buildings and other investments which he claimed to have made during the subsistence of his own lease. After careful consideration of the application and the affidavits and legal submissions presented by both sides, I have decided to grant leave to the applicant to make a claim for judicial review on certain terms which are outlined in my final order. These are my reasons for doing so.

The Facts

[2] In 1982 the applicant was granted a 35 year lease of the property. This lease was executed between the applicant and then Governor General Sir Clement Arrindel. Although executed in 1982, the lease acknowledges that the 35 year period would run from the date of the applicant's occupation which commenced in 1981. As per the lease agreement, the property was to be used for the purpose of operating a boat yard. The lease also dictates that no permanent structures were to be constructed without permission from the government.

[3] The applicant asserts that he was subsequently granted permission to construct a beach bar, restaurant, boat shop, bathroom facilities and 3 villas on the property. He obtained loans from the Development Bank of St. Kitts and Nevis as well as the Nevis Cooperative Credit Union in order to develop the property. He claims to have also used funds from his own savings in order to do so.

[4] On 1st June, 1995, the applicant received a letter from the 1st respondent, signed by its then general manager Mr. Livingston Herbert, informing him that the board of directors had agreed to the applicant's request that the property be sold to him. It is unclear as to what efforts were made to facilitate this sale immediately after receipt of the letter. I do note that the applicant states that he was recovering from a stroke which he had suffered in 1994. However, by letter dated 21st May, 1998, the applicant wrote to the 1st respondent requesting that the property be sold to him at a rate of $2.00 per square foot. There is no response to this letter presented in evidence.

[5] The applicant next wrote to the Premier of the Nevis Island Administration on 24th September, 2015, less than one year prior to the expiration of the lease. He highlights in that letter the investments which he has made in the property during the subsistence of the lease. He also claimed to have attached a business proposal for the future use of the property and requests an audience for discussion on the "nature of a new lease." He states that even prior to this letter he was given assurances, after a change in the government in 2006, that his investments in the property would not be in vain and that a first refusal right would be given to him as a longstanding occupier of the property. He claims to have retained a legitimate expectation that the offer made to him in 1995 remained in effect. He goes further to state that in 2013 and 2017 himself and his son

had discussions with the then premier in which assurances were given that the terms of the sale of the premises to him would be finalized.

[6] The applicant goes on to state that he was contacted by the legal advisor of the Nevis Island Administration, who was also legal counsel to the 1st respondent, regarding his instructions to add his son as a party to the lease and to finalize the sale agreement. He was later given verbal assurances that the sale of the property would be finalized. He claims to have continued servicing his lease during that period. I note however, that the lease executed in 1982 would have expired in 2016, given its retroactive commencement date of 1981.

[7] The applicant asserts that in March, 2018 he instructed his son to "effect some cleaning of the property." When these instructions were being carried out, the 2nd respondent approached the equipment operators and "threatened to lock them up if they didn't leave the property". The operators duly obliged. The applicant states that the following day the 2nd respondent and/or his agents demolished and removed his boat shop, bar, restaurant and toilet facilities. He was subsequently informed that his lease was determined and that a decision was taken not to have the lease renewed due to his delinquency. He states that he received no notice of this decision, neither was he informed beforehand that the buildings he had constructed on the property would be demolished. He later became aware that the property would be leased to another investor.

[8] By letter dated 10th April, 2018, solicitors for the 1st respondent wrote to the applicant accusing him of trespass of the premises and insisting that he remains in arrears of rent. The applicant states in his affidavit that he is not in arrears and that he was given a receipt proving that his balance was zero. He also claims that he continued paying the lease even after the expiration date in 2016. It is apparent that he instructed his solicitors to write a letter in response to these allegations of the 1st respondent. By letter dated 10th May, 2018, solicitors acting on behalf of the 1st respondent insisted that there had been no activities of boat building or repairs, or any other enterprise on the premises for 15 years. It was asserted that the applicant was informed on a number of occasions that the lease would not be renewed. It was further asserted that despite a receipt showing a zero balance on his annual rental payments, the applicant remained in arrears and non-compliance with a number the terms of lease agreement. This letter of 10th May, 2018 also indicates that a decision

had been taken to lease the property to another entity. It is unclear as to when this decision was taken and to whom the property was now being leased.

[9] The court is in receipt of evidence that letters were in fact written to the applicant in 2011 and 2013 about the state of his account. The respondents also assert that in discussions with Mr. Alexis Jeffers, the applicant was informed that the renewal of his lease would not be recommended due to the fact that the property was not kept in a good condition. It is denied that the applicant has made the investments which he claims to have made or that the premises were in a decent state of upkeep at the time of the demolition. In the letter of 10th May, 2018 it is alleged that the buildings which were demolished were unoccupied for over five years.

The applicable test

[10] In accordance with Rule 56.4 of the CPR the court is empowered to grant leave to the applicant without notice. However, sub rule (3) mandates that the matter be listed for hearing in open court if ***"it appears that a hearing is desirable in the interests of justice; the application includes a claim for immediate interim relief; or the judge is minded to refuse the application."*** Given that the application contained a request for an interim injunction, the court was not empowered to grant leave without a hearing. On 5th November, 2018 the resident judge dismissed an application by the respondents to strike out the matter, granted an order maintaining the status quo and ordered that the matter be listed for hearing. It is now before me for a determination as whether leave should be granted as prayed for.

[11] There are a number of factors which the court must take into account when considering an application for leave to make a claim for judicial review. Rule 56.2(1) of the CPR states that ***"a****n application for judicial review may be made by any person, group or body which has* ***sufficient interest in the subject matter of the application."*** There is no dispute as to the applicant's interest in the matter at hand. The applicant has also generally complied with the provisions of rule 56(3) of the CPR. I do note however, that there was an initial dispute as to whether an alternative remedy was available to the applicant under the laws relating to breach of

contract; given his initial assertion that a contract of sale existed between the parties. He has since abandoned this limb of his argument and I will return to this issue later in this judgment.

[12] In the case of *Sharma v. Browne-Antoine*[1], the Privy Council highlights the general approach which ought to be taken in applications such as the present. At paragraph 14 the following was noted:

> *The ordinary rule now is that the court will refuse leave to claim 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 an alternative remedy ... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application.*

Is There an Arguable Ground for Judicial Review?

[13] The first issue for determination is whether there is an arguable ground for bringing a claim for judicial review. As the Privy Council itself noted, *it is not enough that a case is potentially arguable.* What is important is that the claimant must be able to prove that the case is more than merely speculative. Their Lordships went on to note that a judge must, ***"when giving reasons for*** *an interlocutory ruling of this kind, make plain that she is not finding any facts and that the* ***evidence relied on may turn out to be incorrect, incomplete or misleading."*** This is therefore not a hearing to determine or reconcile the truth of the statements made. What is essential is to determine whether, if proven, the facts relied on by the applicant presents an real basis for judicial review.

[14] As stated earlier, the applicant initially argued that there exists an agreement for sale of the premises between himself and the first respondent. Indeed, he seeks a declaration to that effect. For what I consider to be good reasons, the applicant has abandoned this argument. There is no evidence that a contract existed. What the evidence proves is that the parties had initially engaged in negotiations for the sale of the premises. The 1st respondent's letter in 1995 indicated that the sale was approved by the board of directors, but stipulated none of the terms on which this sale

[1] [2006] UKPC 57

was to take place. Three years later the applicant wrote indicating the price he was willing to pay for the property. This in no way constitutes a contract for sale. Indeed, if the applicant was successful in arguing that there was a valid contract then he would have no basis for seeing leave to apply for judicial review, as an alternative remedy would have been available to him in private law.

[15] In my view however, the evidence suggests that there was some discussion between the parties for the sale of this property; at least as far back as 1995. The applicant alleges that these negotiations continued at intervals and that he was given the assurances that his investment in the property would not be in vain. I note that some of these assurances were allegedly given by the then Premier and I am unsure as to the direct role or influence that he would have had on the decisions of the respondents. I also note that the respondents have attempted to present a different version of events. However, as I indicated earlier, it is not for me to reconcile the evidence at this stage. In light of that I make the following observations:

(a) That the applicant claims to have made substantial investments in the property over the subsistence of his lease, which came to an end in 2016;

(b) He states that, quite apart from the letter received in 1995, he was given verbal assurances that his investments would have been protected and that he would have been given the first right of refusal if the property was to be sold;

(c) That it is claimed that a lease of the premises has been offered to another investor without giving the applicant the option to exercise the right of first refusal and, in any event, without any notice. I note that the letter dated 10th May, 2018 confirms the respondent's decision to offer the lease to a third party;

(d) That the applicant alleges that there were a number of structures on the property which were demolished by the respondents with no notice given to him.

[16] The applicant argues therefore, that the decisions of the respondents were unreasonable and irrational and more importantly, were in defiance of a legitimate expectation that his interest would be protected in that the lease would be renewed or the property sold to him. As noted by Lord

Fraser in *Council of Civil Service Unions and others v Minister for the Civil Service*[2] a ***"[l]egitimate** 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."*** To my mind, this expectation becomes even more relevant if the applicant has acted to his detriment in reliance on the promise which has been made by the public authority. In these proceedings, the applicant claims to have invested in these premises. As far back as 1995 he was offered the sale of the property, despite the fact that the lease was valid until 2016. He also states that he received numerous verbal assurances that he would have the first option to purchase the property or that his lease would be renewed. He states further that the manner in which the decisions were made were procedurally unfair and were made with bias.

[17] I am of the view that the applicant has presented an arguable case in that, if indeed he proves that such promises or assurances were given to him, then his expectations would have been legitimate. Further, as the occupier of the premises his buildings were allegedly demolished and a lease offered to a third party with no notice provided to him. I do not find these facts to be proven at this stage, but merely state that if proven at trial there is a real prospect in the successful review of the decisions and actions of the respondents.

Delay

[18] There is nothing to be argued here regarding the issue of delay. Counsel for the applicant argues that he was informed of the decisions to deny a renewal of the lease by letter dated 10th May, 2018. That letter also contained notice that a lease was offered to a third party. The application for leave to apply for judicial review was filed on 7th June, 2018. There is therefore no issue of delay.

Alternative Remedy

[19] I have, to some extent, addressed the issue of whether an alternative remedy is available to the applicant. Counsel for the respondent had initially argued that the claim is one which ought to have been brought for breach of contract. I am satisfied that there is no contract between the parties which can be enforced. I also refer to the judgment of Blenman J (as she then was) in the case of

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[2] [1984] UKHL 9

Gary Nelson v. The Attorney General et al[3] where she states ***"... that** the matter of the grant to proceed with judicial review is a matter for the discretion of the Court... The presence of alternative remedies does not, without more, determine whether judicial review is available to a claimant."* I considered whether the applicant's grievance regarding the damage to his property may be subject to an alternative remedy of damage to property. However, what is important to note, is that he nature of the claim, the grounds on which it is brought and the relief sought, generally fall within the realm of public law. In the circumstances, I am not of the view that the application should be denied on this basis.

[20] One further issue raised by the respondents is that they are not the proper parties to the claim. It is argued that the respondents do not have the authority to alienate land. This, it is argued, is within the powers of the Governor General. As such, given the nature of the applicant's grievance, the respondents have no authority to do that which he seeks. I do not agree with that submission for two reasons:

(a) The decisions and actions which the applicant seeks to review are those made by the respondents. The court is not being asked to alienate lands but rather to review the decision not the renew the applicant's lease, to offer the premises to a third party, and to demolish his buildings without giving notice to him;

(b) Section 7 of the Nevis Land Development Ordinance outlines the general powers of the 1st respondent, under the chairmanship of the 2nd respondent as it relates to the development of property vested in it for the purpose of development. It seems to me that the correspondence between the parties certainly point to the fact that the respondents were attempting to exercise those powers in relation to the property in question. In any event, when one considers that in 1995 the 1st respondent offered the property for sale to the applicant, there is, at least on balance, ample reason to determine that the respondents are the proper parties to these proceedings.

[21] In the circumstances I would grant leave to the applicant to make a claim for judicial review, except to say that I do have some concerns about some of the relief which he intends to seek. As indicated

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earlier, the applicant has abandoned his claim to there being a valid sale agreement. As such, the relief seeking declarations in that regard are not allowed. Secondly, it would seem that a number of the declarations sought are merely findings of fact which the court may or may not make and are therefore not declaratory relief per say. In these circumstances I make the following orders:

(a) leave is not granted to seek the relief sought in numbers (1), (2) (4), (5), (6) and (8) of the application.
(b) As it relates to number (3) under the relief sought, the applicant is granted leave to seek an order of certiorari quashing the decision of the first respondent to grant a new lease to a third party developer.
(c) The applicant is also granted leave to seek the relief outlined in numbers (7) and (9) to (15) of his application;
(d) As per previous orders of this court, the status quo is to be maintained until the final determination of the matter;
(e) The applicant is to file his claim for judicial review within 14 days from the date of this order;
(f) The first hearing of the claim is fixed for 14th May, 2019;
(g) There is no order as to costs.

Ermin Moise
High Court Judge

By the Court

Registrar