



[2015] JMSC Civ 46

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 04464

| | | |
|----------------|------------------------------------|---------------------------------|
| BETWEEN | DOUGLAS CAMPBELL | CLAIMANT |
| AND | THE STRATA APPEALS TRIBUNAL | 1ST DEFENDANT |
| AND | PSP NO 73 (CARIB OCHO RIOS) | 2ND DEFENDANT |

Ms. Carol Davis for the Claimant

Ms. Althea Jarrett instructed by the Director of State Proceedings for the 1st Defendant

Mr. Rodrick Gordon and Ms. Karen Smith instructed by Gordon/McGrath for the 2nd Defendant

Heard: 20 January and 18 March 2015

Administrative Law - Application for Judicial Review of decision of Strata Appeals Tribunal – Registration (Strata Titles) Act - Relevant section of act to be applied on appeal to Strata Appeals Tribunal where issue being appealed is assessment of Strata Corporation and there was no appeal to Commission of Strata Corporations - Time limit on appeal to Strata Appeals Tribunal - Whether appeal to Strata Appeals Tribunal must be made within thirty days

In Chambers

Laing J

The Claim

[1] The Claimant Douglas Campbell by fixed date claim filed on 9 October 2014 as amended on 5 November 2014 seeks the following orders:

- 1) A declaration that the 1st Defendant acted *ultra vires* and/or illegally and/or unlawfully in dismissing the appeal of the Claimant dated 8th May, 2012 as being out of time.
- 2) A declaration that the 1st Defendant acted irrationally and without any reasonable cause in dismissing the appeal of the claimant dated 8th May 2012 as being out of time
- 3) An order of certiorari to quash the decision of the 1st Defendant dated 19th September 2014.
- 4) Further or other relief
- 5) Costs

Background

[2] The Claimant asserts that he is the legal owner of apartment 103, and the beneficial owner of apartments 104 and 218 (the three are referred to hereafter collectively as the “Apartments”). Apartment 104 is registered in the name of Traute Campbell, his deceased wife and apartment 218 registered in the name of Woodruff Hospital of the United States of America. The Apartments are managed by Proprietor Strata Plan 73 (Carib Ocho Rios) the 2nd Defendant (the “Corporation”). The Corporation is a strata corporation established pursuant to the Registration (Strata Titles) Act (the “Act”).

[3] The Claimant fell into arrears in respect of the maintenance fees for the Apartments and by a letter dated 23 March 2011 addressed to the Claimant, a delinquency notice was issued to him pursuant to section 5A of the Act. This notice required that the outstanding sums be settled and warned of the possibility of an application to the Commission of Strata Corporations (the “Commission”) for a power of sale and if received, there would be the sale of the Apartments.

[4] On 13 July 2011 the Commission issued Certificates pursuant to section 5C (4) of the Act in respect of the Apartments, certifying that it was satisfied that the Corporation had exhausted its means of obtaining payments of amounts owing to it and notifying the proprietor of the proposed sale of the Apartments.

[5] In May 2012 the Claimant lodged an appeal to the 1st Defendant, the Strata Appeals Tribunal (the “Tribunal”) under section 15A (2)(b) of the Act, challenging the amount of the contribution levied by the Corporation in respect of the Apartments. The appeal was heard by the 1st Defendant on 19 September 2014 and was dismissed as being out of time.

Basis for Judicial Review

[6] On 2 October 2014, the claimant was granted leave by Sykes J to apply for judicial review with respect to the decision of the 1st Defendant made on 19 September 2014, dismissing the appeal on the basis that it was out of time, with the sole ground to be argued that the decision was *ultra vires* and/or unlawful or irrational.

[7] All parties are generally agreed that the Court on this application for Judicial review can grant relief if it finds that the decision of the 1st Defendant was *ultra vires* and/or unlawful or irrational. The Court was referred to the case of **Council of Civil Service Unions v Ministry of Civil Service** [1985] AC 374 where at page 410 Lord Diplock classified under three well established heads the grounds upon which administrative action is subject to control by judicial review, namely illegality, irrationality and procedural impropriety. Lord Diplock proceeded to explain as follows:

“By “illegality” as a ground of judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “Irrationality” I mean what can now succinctly be referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Court’s exercise of this role, resort I think is today no longer needed to Viscount Radcliffe’s ingenious explanation in Edwards v Bairstow [1956] A.C. 14 of irrationality as a ground for a court’s reversal of a decision by ascribing it

to an inferred though unidentifiable mistake of law by the decision maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have describe the third head as “procedural impropiety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of justice .”

[8] This application at its core concerns the interpretation of the Act and as a consequence it is necessary to review and set out in extenso the relevant portions of the Act.

Sections 3 and the thirty-day limit

[9] Section 3A of the Act establishes the Commission. Section 3B sets out the functions of the Commission which include under 3B (d) considering complaints from proprietors that the amount of the contribution levied under section 5(2)(b) is unreasonable or inequitable. Section 3B (2)(a) empowers the Commission to order by notice, that the contributions be varied where they appear to the Commission to be excessive or inadequate.

[10] Sections 3B (5) and 3B (6) of the Act provide as follows:

“(5) The Corporation, a proprietor or any person aggrieved by a decision of the Commission may appeal against the decision, so, however that, that the decision of the Commission shall, subject to subsection (7), be binding on the corporation, proprietor or any other person aggrieved, as the case may be, until the appeal is determined.

(6) An appeal pursuant to this section shall be made no later than thirty days from the date of the decision of the Commission (emphasis supplied).

It is important to note that section 3B(6) refers specifically to and is expressly declared to refer to an appeal pursuant to section 3B which addresses appeals against a decision of the Commission. This appeal must logically and for practical purposes be interpreted to mean an appeal to the Tribunal which was established by section 15A, since this is

the only other body to which an appeal could reasonably be directed. I will return to the relevance of section 15A later in this judgment.

Section 5A

[11] Section 5A of the Act also addresses appeals, but 5A (5) indicates that it is limited to appeals to the Tribunal against a decision of a strata corporation, it does not purport to address appeals against decisions of the Commission. The material sections provide as follows:

5A.-(1) Where for a period exceeding thirty days, a proprietor fails, neglects or refuses to pay to the corporation, all or any part of the contribution levied pursuant to section 5(2)(b), the corporation shall act in the manner specified in subsection (2).

(2) for the purposes of section (1), the corporation shall notify in writing the proprietor concerned and his agent, if any, and the mortgagee of the strata lot , if any -...

(a)

(b)

(c)

(d)

(e) that the proprietor, if aggrieved by the amount of contribution stated in the notice, may lodge an appeal if he has paid at least fifty percent of the amount owing or such other amount as may be agreed with the corporation.

(4) Where a proprietor appeals against the amount of contribution, the corporation shall not exercise its power under subsection (2) (d) until the appeal is determined.

(5) Where **in any appeal under this section the Tribunal** is satisfied that contributions owing to a corporation are due and have been owing for at least sixty days prior to the appeal being lodged, the Tribunal may make an order for such payment.**(emphasis supplied)**

(6) Where on appeal the Tribunal determines that the amount paid by the proprietor pursuant to subsection (2)(c) ought not to have been paid, the Tribunal may order –

(a) that a corporation refund the amount to the proprietor; or

(b) if there is any other amount outstanding with respect to that proprietor, that the corporation use the amount to offset the amount outstanding;

Claimant's Submissions

[12] It was submitted on behalf of the Claimant that the Tribunal was wrong to have relied on section 3B (6) in dismissing his appeal since its appeal was not filed pursuant to section 3 of the Act. His Counsel submitted that although the Claimant did not specify a particular section to the Tribunal pursuant to which he was appealing, it is clear that his appeal was in respect of the calculation of and the amount of arrears determined as due by the Corporation, and was a consequence, an appeal of a decision of the Corporation. The Claimant asserts that his appeal was therefore pursuant to section 5A and there is no provision in section 5A that places a limitation or specifies a limit on the time during which a proprietor of a strata unit can lodge his appeal to the Tribunal.

[13] Counsel for the Claimant further submitted that Section 5A (e) provides a separate and independent right of appeal (other than section 3B (6)) and having paid the amount required as a precondition to the appeal pursuant to that section, his appeal must be an appeal pursuant to section 5A (e), to which there is no expressed limit of thirty days. Counsel submitted that the Act should not be interpreted in such a way as to negatively affect the rights of a citizen since in the absence of a clearly expressed thirty-day limit he would not be aware on such a limitation on his right of appeal.

Defendants' Submissions

[14] Ms Althea Jarrett who appeared on behalf of the Tribunal made a number of clear and well formulated submissions to the Court. She submitted that the issue of the time limits within the Act have to be viewed in the context of the general schema of the legislation. Counsel referred the Court to the Registration (Strata Titles) (Amendment) Act 2009, and highlighted the fact that prior to the amendments brought about by this Act, neither the Commission nor the Tribunal existed. She submitted that the wide-ranging changes that were effected, were largely aimed at assisting corporations in the face of widespread delinquency of proprietors and section 5A (2) places importance on the Certificate issued by the Commission as a precondition to any sale of the property of a delinquent owner. It was further submitted that once a delinquency notice had been

issued which was not challenged, on the issuing of the Certificate, the delinquent owner lost his right to appeal the decision of the Corporation. Any appeal therefore must be an appeal of the decision of the Commission (to have issued the Certificate), even if, as in this case, the ground of the appeal related to the quantum of the arrears as assessed.

[15] Counsel for the Tribunal submitted that under the provisions of the Act, if there is no challenge to the accuracy of that amount assessed as being due by the proprietor as in this case, the Commission is not required to review and confirm the amount assessed and submitted to it as a part of the Commission's Certification process. Accordingly, she submitted that the decision of the Tribunal was correct in applying section 3B (6). Counsel also submitted that, in any event, the Act should not be interpreted to be giving the Applicant an indeterminate period within which to appeal and any appeal to the Tribunal must be within thirty days of the decision being complained of, or certainly within a reasonable time. On any formulation, Counsel said, the Claimant is out of time and the Tribunal's decision was not irrational (even if it was wrong on the application of the thirty-day limit) and the Court should not exercise its discretion in the Claimant's favour.

[16] Mr Rodrick Gordon appearing for the Corporation admitted that the drafting of the Act was less than straightforward which created difficulty in its interpretation for all users. His submissions to the Court were in his own style and clearly conveyed but largely mirrored and supported those of Ms Jarrett. For this reason in an effort to avoid unnecessary repetition in this judgment I will not recite those submissions in detail and trust that Counsel will not view this course as a courtesy in the circumstances.

Was there an appeal of the decision of the Corporation or of the Commission and under which section was the appeal brought?

[17] In determining whether the Claimant's appeal was an appeal of a decision of the Corporation's assessment or of the Commission's decision to issue the Certificate, it is helpful to examine Section 5C of the Act which addresses the procedure to be satisfied prior to a sale of a strata lot and sets out the Commission's role in that process:

5C.-(1) Prior to the exercise of the power of sale by the corporation, the corporation shall satisfy the Commission that the corporation has taken all

reasonable measures to recover the amounts owing by giving notice to the proprietor and his agents, if any, and the mortgagee of the strata lot, if any, in accordance with the notice referred to in section 5A(2).

(2) *Where the Commission is satisfied that the corporation has exhausted all means of notifying the proprietor in accordance with section 5A, it may direct the corporation to take any additional action it deems fit in the circumstances, including the publication of a notice of the proposed sales of the strata lot.*

(3) *A notice referred to in subsection (2) shall –*

(a) *be published within thirty days after the Commission has given the direction in relation hereto, in a daily newspaper, printed and circulating in Jamaica; and*

(b) *shall contain –*

(i) *a brief description of the land including the area of the unit;*

(ii) *the number of rooms;*

(iii) *the strata lot and strata plan numbers;*

(iv) *the relevant Volume and Folio numbers of the Register Book of Titles ;*

(v) *the civic address and name of the complex, if any; and*

(vi) *the land use.*

(4) *Where the Commission is satisfied that the corporation has taken all reasonable steps in accordance with section 5A (2) for the purpose of –*

(a) *obtaining payment of amounts owing to the corporation; and*

(b) *notifying the proprietor of the proposed sale; it shall issue a certificate in the prescribed form to that effect.*

(5) *The corporation may only exercise a power of sale where it has received from the Commission a certificate under subsection 4.*

[18] I have difficulty accepting that the Claimant was appealing a decision of the Corporation to the Tribunal simply because his appeal was subsequent to the issuing of the Notices by the Corporation. It is common ground that the Commission, not having had a challenge to the assessment of the arrears before it, did not and was not required by the Act to review and certify the correctness of that assessment. In my opinion one

would be applying an artificial construction to say that the Claimant (who in his appeal expressed it to be an appeal of the quantum of the assessed sum) was appealing the decision of the Commission to issue the Certificate, the Commission not having at all considered or made a decision as to quantum. Furthermore appeal in the absence of any express provision indicating this to be so, I do not find that the Claimant has lost his right to appeal to the Tribunal on the issue of the quantum of the Corporation's assessment simply because he did not lodge an appeal to the Commission and permit the Commission to exercise those powers of review granted to it by section 3B.

[19] I therefore agree with the Claimant's Counsel's submission and find that his appeal to the Tribunal was an appeal against the decision of the Corporation in its assessment of the fees payable. The Court having so found, must also consider the effect of the section pursuant to which the appeal was made.

[20] It was submitted by the Defendants that section 5A (e) merely establishes the prescribed fee for the appeals in respect of quantum and does not confer an independent right or route of appeal and so the appeal could not have been pursuant to this section as the Claimant asserted. Whereas I accept that 5A (e) does establish the required fee, (and this fee is cross referenced at section 15A (1)), it is difficult to accept that it does not confer a separate avenue of appeal in the face of sub-section 5A (5) which clearly appears to contemplate that there can be appeals pursuant to section 5A. 5A (e) provides as follows:

(5) *Where in any appeal under this section the Tribunal is satisfied that contributions owing to a corporation are due and have been owing for at least sixty days prior to the appeal being lodged, the Tribunal may make an order for such payment.* (emphasis supplied).

[21] I am therefore quite able to easily infer why the Applicant formed the view that his application was being made pursuant to section 5A (e). In determining whether the Claimant is indeed correct that the applicable gateway appeal section he utilised is 5A (e) (as opposed to 3B) and in order to complete the analysis of the appeal process provided by the Act, it is necessary to also look at section 15A.

Section 15A

[22] Section 15A addresses appeals and provides for the establishment of the Strata Appeals Tribunal. It provides as follows:

15A.-(1) There is hereby established for the purposes of hearing appeals, a body to be known as the Strata Appeals Tribunal, and the provisions of the Fourth Schedule shall have effect with regard to the constitution and operation of the Tribunal and otherwise in relation thereto.

- (2) Any person aggrieved by a decision of-***
 - (a) the corporation, in the case of the aggrieved person being a proprietor of a strata lot; or***
 - (b) the commission, may appeal to the Tribunal in the prescribed manner, upon payment of any prescribed fee.***
- (3) Before determining an appeal, the Tribunal shall give the parties the opportunity to be heard by the Tribunal.***
- (4) The Tribunal may, on an appeal under subsection (2)-***
 - (a) allow the appeal and set aside or vary the decision of the corporation or the Commission , as the case may be; or***
 - (b) dismiss the appeal and confirm the decision of the corporation or the Commission, as the case may be.***
- (6) Where an order of the Tribunal is made pursuant to subsection (6) of section 5A, the Tribunal shall forthwith cause the order to be lodged with the Clerk of the Courts for the parish in which the land comprising the strata lot to which the order relates is situated.***

Section 15A is therefore a comprehensive appeals section which provides for appeals from decisions of a strata corporation as well as the Commission and is noticeably devoid of any time limit or deadline for appeals to be brought.

Conclusion

[23] The sections of the Act which address the right of appeal and which may properly be considered to be appeal gateway sections are sections 3B, 5A and 15A. It is clear that the Act does not establish a rigid, tiered system of appeals and whether intentionally or not, there is an overlap in these gateway sections to the extent that section 15A provides a right of appeal already conferred by section 3B and 5A. The

Claimant, although he was permitted to do so, was not required to first appeal the issue of quantum of the assessment to the Commission and by not so doing he did not lose his right of appeal to the Tribunal on this issue.

[24] It is my considered opinion and finding that it is a decision pursuant to section 3B to which the thirty-day limit imposed by 3B (6) specifically applies and that it applies exclusively to appeals pursuant to that section. Had the draftsman intended the thirty-day deadline to apply to all appeals this could have been easily stated in section 15A. The Court is not prepared to construe the Act in such a manner as to impose the application of such a provision to all appeals made to the Tribunal.

[25] Where an appeal is to the Tribunal and there is no reference to the particular section of the Act pursuant to which the Appeal is brought, this may create a difficulty as it has in this case. For purposes of this application I find that it matters not whether the Applicant's appeal was pursuant to section 5A or 15A. This is because the Court has found that it was not an appeal of a decision of the Commission and consequently it was not pursuant to section 3B.

[26] In the absence of any expressed time limits imposed on appeals under sections 5A and 15A the Claimant was entitled to bring its application within a reasonable time. I find that the Claimant did bring his appeal within a reasonable time given the Court's acceptance of his explanation for the delay as contained in his affidavit, which was that he did not become aware of the Corporation's assessment and delinquency notices dated 23 March 2011 until sometime in January 2012.

[27] I find that the Tribunal erred in the construction it applied to the Act and in applying the 3 month time limit to the Claimant's appeal, no such deadline being applicable (for the reasons outlined in this judgment). The Claimant's appeal having been brought within a reasonable time (considering his explanation for the delay) was entitled to and deserved to have his appeal considered on its merits

[28] In light of the foregoing reasons, the Court orders that the decision of the Tribunal dated 19th September 2014 dismissing the Claimant's Appeal is quashed and

the Claimant's appeal is to be returned to the Tribunal for consideration and determination on its merits.