IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV00983

BETWEEN	**TREEBROS HOLDINGS**	**CLAIMANT**
AND	**MINISTER OF ECONOMIC GROWTH AND JOB CREATION**	**1ST DEFENDANT**
AND	**NATIONAL HOUSING TRUST**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Andre Earle Q.C. and Ms. Diandra McPherson instructed by Earle & Wilson for the Claimants

Ms. Lisa White instructed by the Director of State Proceedings for the 1st Defendant

Mr. Michael Hylton Q.C., Mr. Manley Nicholson and Mr. Harrington McDermott instructed by Nicholson Phillips for the 2nd Defendant

Heard: May 16, 17, 18 and July 22, 2022

Judicial Review – Whether the Claimant has established illegality – Whether the signature of the Minister was forged – Whether there was a breach of statute – Whether the actions of the Minister were Wednesbury unreasonable or irrational – Whether there is a discretionary bar of delay

Carr, J

Introduction

[1] In 2016 the Minister of Transport Works and Housing (**MTWH**) made an Order declaring Creighton Hall in the parish of St. Thomas a flood water control area under the Flood Water Control Act (**FWCA**) of 1958. The Claimant was directly affected by the Minister's decision to make such an Order as they had previously been in negotiations with the National Housing Trust (**NHT**) in relation to a section of land owned by them in the said area. The main sticking point in the negotiations was that of the appropriate amount to be paid in compensation. Before those negotiations were completed amicably the Minister made the Order which rendered said negotiations moot.

[2] While the negotiations were ongoing work was being carried out by the NHT on lands adjacent to the property belonging to the Claimant, the Claimant alleged that the work resulted in damage to its property. The negotiations having broken down the Claimant filed suit in the Supreme Court for trespass, nuisance et al, and sought compensation in damages. During the hearing of that claim there was no reference to the Order made by the Minister, until counsel on behalf of the NHT in closing submissions mentioned it, in what Queen's Counsel Mr. Earle described as a passing comment. The court ruled in favour of the Claimant and the NHT appealed. On appeal the Order took centre stage. The Claimant subsequently filed this matter for judicial review which seeks to quash the decision of the Minister to make the Order.

Background

Chronology of events

[3] It is important to set out by way of a timeline the events that led up to the Order of the Minister:

a) By letter dated August 22, 2013 Assistant General Counsel for the NHT (Mrs. Helen Pitterson) sought the intervention of the MTWH to have the

Creighton Hall area in the vicinity of a housing development by them declared as a flood water control area[1].

b) On January 16, 2014 Mrs. Shereika Hemmings-Allison legal officer on behalf of the Permanent Secretary for the MTWH wrote to Mrs. Helen Pitterson outlining by way of advice what was required of the NHT in order for the Minister to be in a position to make such a declaration[2].

c) Mrs. Pitterson acting on that advice sent a letter to the Minister on March 14, 2014 in which she explained the reason for the request, and enclosed a document entitled "Provisional Flood Water Control Scheme" which set out all the relevant documentation for consideration by the Minister[3]**.**

d) On September 5, 2014 a report was sent by way of memorandum to the Permanent Secretary of the MTWH from the National Works Agency (**NWA**) summarizing the issues related to the appointment of the NHT as undertakers of a flood water control scheme[4].

e) On October 15, 2014 a memorandum was sent to the Minister from the Acting Director of Projects attaching a brief for consideration entitled "Request for the declaration of a Flood Water Control Area in Creighton Hall St. Thomas, and for the NHT to be Undertakers of the Flood Water Control Scheme.[5]"

f) By letter dated October 22, 2014 the NHT was advised that the Minister had granted his approval for a Flood-water Control Scheme to be declared in Creighton Hall, St. Thomas[6].

g) The order was gazetted on February 16, 2015 [7].

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[1] Volume 1 Core Bundle pgs. 178 and 179
[2] Volume 1 Core Bundle pg. 204
[3] Volume 1 Core Bundle pgs. 206-207
[4] Volume 1 Core Bundle pgs. 234-237
[5] Volume 1 Core Bundle pgs. 240 -243
[6] Volume 1 Core Bundle pg. 244
[7] Volume 1 Core Bundle pg. 285

h) The NHT as undertakers of the scheme published three notices in the Sunday Gleaner on August 2, 9 and 16 2015.

i) The Flood Water Control Area (Declaration) (Creighton Hall, St. Thomas) (Confirmation) Order, 2016 was gazetted on February 25, 2016.

j) The Corrigendum was gazetted on February 25. 2016.

The Claim

[4] An amended fixed date claim form was filed on October 15, 2019. The Claimant seeks the following orders:

1. An order of Certiorari to quash the Defendant's decision to declare Creighton Hall, St. Thomas a Flood Water Control Area in 2016.
2. A declaration that the Defendant erred in the exercise of his discretion in declaring Creighton Hall a Flood Water Control Area;

The Law

[5] Much has been made by Queen's Counsel Mr. Earle about the previous trial for trespass and the process before the appellate court. I am constrained however to view this matter as it is presently pleaded. The claim is one for judicial review. A claim for judicial review is concerned with the legality of the process that led to the decision. The court is therefore not concerned with the merits of the decision. The court's sole purpose is to determine if the decision was made in keeping with the law.

[6] It is trite law that claims for judicial review can only be sustained on limited grounds. In the seminal case of **Council of Civil Service Unions v. Minister for the Civil Service**[8] , Lord Diplock categorized these grounds as follows:

[8] [1984] UKHL 9

a) Illegality – where the decision is made which is ultra vires the law that regulates the decision making power.

b) Irrationality – where the decision made defies logic. It has been known as the test of “Wednesbury unreasonableness".

c) Procedural Impropriety – the failure to follow the rules of natural justice and procedural fairness as well as the failure of the decision maker to follow all the procedural steps required by the legislation which enables him to make the decision.

Preliminary Point

[7] At the commencement of the hearing an application was made to further amend the fixed date claim form as follows:

1. *An order of Certiorari to quash the decision/Order made by the 1st Defendant contained in the Flood-Water Control Area (Declaration) (Creighton Hall, St. Thomas) Order, 2015 declaring Creighton Hall a flood-water control area and the 2nd Defendant as the Undertakers of the scheme as published in Gazette No. 9A dated February 16, 2015.*

2. *An order of Certiorari to quash the decision/Order made by the 1st Defendant contained in the Flood-Water Control Area (Declaration) (Creighton Hall, St. Thomas) Order, 2015 declaring Creighton Hall a flood-water control area and the 2nd Defendant as the Undertakers of the scheme as published in Gazette No. 100 dated August 13, 2015.*

3. An order of Certiorari to quash the *1st* Defendant’s decision/*Order contained in the Flood-Water Control Area (Declaration) (Creighton Hall, St. Thomas) (Confirmation) Order, 2016 declaring Creighton Hall, St. Thomas a flood-water control area* as published in Gazette 17A dated February 25, 2016.

5. *A declaration that the Notice dated August 2, 2015 published in the Sunday Gleaner on August 2, 9 and 16, 2015 is null and void and of no legal effect.*

6. *A declaration that the Notice dated August 2, 2015 published in the Gazette No. 100 dated August 13, 2015 is null and void and of no legal effect.*

[8] Mr. Earle in making his submissions asked the court to find that the amendments were merely cosmetic and that they did not change the substance of the claim. He submitted that the 2016 Order was made pursuant to the 2015 Order and as such there was nothing new to be determined. The sole purpose was to streamline the pleadings. Unsurprisingly, both Ms. White and Mr. Hylton objected to the amendments.

[9] Mr. Hylton argued that the claim is one for judicial review. The Claimant had to first seek leave before filing. The leave that was sought did not contemplate the matters which would form part of the further amended claim. The application for leave was specific to the 2016 order and there was no order granting permission for leave in respect of the 2015 orders. Further he submitted that the proposed amendment to paragraphs 1 and 2 directly affect the NHT and was entirely new.

[10] Ms. White submitted that the trial of the claim was not the place to seek new relief. It was further submitted that a fresh application would have to be brought in order to challenge the 2015 orders. She went further to suggest that the amendments would affect the 1st Defendant who she contended was not the proper party to the claim, given that the decision maker was the MTWH and not the Ministry of Economic Growth & Job Creation (**MEGJC**).

[11] I ruled that the Notice of Application to further amend the fixed date claim form which was filed on May 13, 2022 is granted in terms of paragraph 3 and refused in terms of paragraphs 1, 2, 5 and 6.

[12] I did not accept Mr. Earle's submissions that the amendments were nothing new. The application for leave to apply for judicial review was granted in respect of the decision of the Minister which was dated in 2016. The proposed amendments were in respect of 2015 and included the decision to appoint the NHT as undertakers of the scheme. Since judicial review is concerned with the decision making process each decision is open to individual challenge. The proposed amendments therefore would take into consideration decisions for which no leave had been granted. As the proposed amendment at paragraph 3 merely involved a further particularization of the 2016 order that amendment was permitted. The declarations sought at 5 and 6 I considered to be new relief being sought on the day of the hearing. There must be an end to pleadings and the continued last minute amendments are not fair to litigants who have done all that they ought to prepare their cases.

Discussion

[13] Mr. Earle argued three main points in his submissions, Illegality, Irrationality and Delay. Delay can be a bar to the grant of relief and would usually be addressed first as it is somewhat of a preliminary objection to the court embarking upon any determination as to the substantive claim, nevertheless I will address each of Counsel's submissions in the order he has indicated.

Illegality

[14] On the ground of illegality, Mr. Earle focused on two points. Firstly, that the signature of the Minister was a forgery and secondly that the Minister acted illegally as the notice contained in the Jamaica Gazette was in breach of sections 6(a) and 6(c) of the FWCA.

[15] He pointed the court to Section 3(2) of the Forgery Act which states that:

> **"A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by, or on behalf**

> **or on account of a person who did not make it nor authorize its making; or if, though made by, or on behalf or on account of, the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false-**
>
> > **(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein,**

[16] Counsel referred to the cases of **Paul Griffiths v Claude Griffith**[9], and **Brott v The Queen.**[10] **Brott** spoke to the fact that having a false date or time on a document could amount to forgery where the date or time was material. In the present case the Ministerial approval for the Order was said to be given on August 2nd, 2015, however, the documentary evidence states quite clearly that approval was not given until August 8, 2015. It is further submitted, in the alternative, that having not received the Notice for signature until August 4, 2015, the NHT acted prematurely in publishing same on August 2, 2015, thus rendering them nullities.

[17] The case of **MacFoy v United Africa Co. Ltd**[11] was highlighted to make the point that in such a case where the document is deemed a forgery the court need not do anything as the circumstances prove that the document is automatically null and void and has no legal effect. In summary it was submitted that the purported signature of the Minister was a forgery and anything that comes from that must collapse.

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[9] [2017] JMSC Civ. 136
[10] [1992] 173 CLRR 426; [1992] HCA 5 at 430-432
[11] [1961] WIR 1405

[18] With respect to the breach of Section 6 (a) and (c) of the FWCA, Mr. Earle submitted that Section 6 of the FWCA states expressly that the undertakers of the scheme shall cause to be published in the Gazette a notice specifying that they have prepared a provisional flood-water scheme and specifying where it is located. The Notices it was argued are in breach of subsections 6(a) and 6(c) as they did not state that the undertakers, NHT, had prepared the Provisional Flood-Water Control Scheme nor did they state a period of inspection.

[19] Ms. White in her submissions asked the court to disregard the claim of forgery. It was her contention that notwithstanding the standard of proof being a balance of probabilities, the evidence required must be cogent and of a strong and convincing nature. She argued that the Claimant engaged in speculation and conjecture and failed to lead evidence that the Order or Gazette is a false document.

[20] Mr. Hylton submitted that there was no requirement under Section 6 of the FWCA for the Minister to sign the Notice, so that any question as to whether the Minister's signature was forged is an academic exercise. In the alternative it was further submitted that the Claimant failed to prove that there was a forgery. Mr. Hylton relied on **Halsbury's Laws of England**[12] which set out the consideration of the court as to the burden of proof:

> **"… it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged the more serious the allegation, the more cogent is the evidence**

[12] 5th ed. (2009) para. 1108

required to overcome the unlikelihood of what is alleged and thus to prove it"

[21] Counsel also relied on the case of **Paul Griffith v Claude Griffith**[13] to demonstrate the principle. The case made reference to another case, that of **Fuller v Strom**[14] where the Court stated that:

"While I recognize that the standard of proof is the civil standard on the balance of probabilities, it is well recognized that where a serious allegation (like forgery) is made, the inherent improbability of the event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event has occurred."

[22] It is submitted by Counsel for the 2nd Defendant that the evidence before the court failed to establish a case of forgery and the Claimant has placed mere allegations before the court without specific proof.

[23] In any event it was also submitted that the case of **Williams Group Australia Pty Ltd v Crocker**[15] accepted the proposition that an act done without authority could later be ratified by the subsequent acts of the principal. It is submitted that in the present case the Minister knowing that his signature was placed on a document cured any issue which the Claimant has by making a confirmation order.

Analysis

[24] Section 3 (1) of the Forgery Act makes it clear that for a document to be declared a forgery the whole or any material part must be made by or on behalf or on

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[13] [2017] JMSC Civ. 136
[14] [2000] All ER. (D) 2392
[15] [2016] NSWCA 265

account of a person who did not make it nor authorize its making. It presupposes that there will be evidence from the person who is alleging that their signature is forged. There is no such evidence before this court. In the absence of such evidence the Claimant would have to provide a statement from a handwriting expert disputing the signature. Once again there is no such evidence before this court. There is also no evidence to support a finding that there was an electronic signature on the Notice. Even if there was, it would still be for the Minister to say that it was used without his authorization. I am therefore not satisfied on a balance of probabilities that the signature of the Minister was forged.

[25] In the alternative, Mr. Earle argued that the date on the Notice was incorrectly inserted by Mrs. Pitterson. In cross-examination Mrs. Pitterson was asked if she had inserted the date on the Notice which was to be published in the Gleaner newspaper. It was her evidence that *"it wasn't dated as in a handwritten date...it was just the typed in dated August 2nd "*. She was then asked if she was the one who typed it in and she indicated that *"it was possible that it may have been sent with the draft that was sent before*".

[26] The date of Ministerial approval of the Notice, based on email documentation, was a date subsequent to the date of the publication of the Notice. It is to be noted that the Claim is in respect of the 2016 Order. However, Mr. Earle argues that if the 2015 Order was void then the 2016 Order would also be void.

[27] The case of **Brott** specifically indicates that an insertion or acknowledgement of a false date in an instrument **with intent to defraud** is forgery, if the date is **material**. The Claimant would therefore have to satisfy the court that the date was material, and further that there was an intention to defraud.

[28] There is nothing in the FWCA which requires the Minister to sign the Notice that is placed in the newspaper. Section 3 outlines the role of the Minister as follows:

> **"(1) The Minister may by order declare any area defined in such order to be a flood-water control area for the purposes of this Act. (2) When**

declaring an area to be a flood-water control area under subsection (I) the Minister shall, by the same order, appoint to be undertakers of a scheme in respect of such area –

(a) any Government department;
(b) any Government agency; or
(c) any statutory body or authority,

and such appointment may be made notwithstanding that such department, agency, statutory body or authority has not the power under any other law to undertake and carry out works of improvement to land".

[29] Section 8 provides as follows:

(1) So soon as may be after the expiration of the period during which notice of objection to any provisional flood-water control scheme may be given under section 7 the undertakers of the scheme shall transmit such scheme and any objection made to such scheme under section 7 and the comments of the undertakers of the scheme upon such objection (if any) to the Minister.

(2) Where the Minister is satisfied that the implementation of any provisional flood-water control scheme is likely to be in the public interest, the Minister may by order published in the Gazette confirm it with or without modification and thereupon such scheme with or without modification shall come into operation as a confirmed flood-water scheme."

(3) Every order under subsection (2) shall also be published in a local daily newspaper at least once in each of two successive weeks.

[30] The Minister has the responsibility to declare the area a flood-water control area, as per the legislation. He is also required to appoint in that Order undertakers of

the scheme. This was done and Gazetted on the 13th of August 2015. The next step for the Minister is to approve the scheme per Section 8. It is under Section 8 (3) that the confirmed Order is to be published in the local daily newspaper. The section does not specify that it is the Minister who is to do this. In those circumstances it is difficult to see how the date of the Notice can be considered material.

[31] Mr. Earle contends that the Notice in the newspaper gave the impression that the approval of the Minister was on the 2nd of August 2015. The approval to which he refers is the approval of the Notice which was to be published. What is not in dispute is that the Minister had given his approval for the Creighton Hall area to be declared a flood-water control area (by the same emails and correspondence that the Claimant relies on) from as far back as October 22, 2014. The fact that the Notice bears the date the 2nd of August 2015 is therefore immaterial having regard to the role of the Minister as per Section 3 of the FWCA.

[32] Further, there is no evidence that there was any intention to defraud. Mrs. Pitterson's evidence that she possibly typed in the date is insufficient to show that there was any intention on the part of the NHT to defraud the people of Jamaica. The Notice merely reflected what was contained in an Order which had been previously approved by the Minister. The said Order in accordance with Section 8 of the FWCA was confirmed by the Order of the Minister which was gazetted on the 25th of February 2016. Given these reasons I find that the Claimant has failed to prove on a balance of probabilities that there was any forgery which would vitiate the Order of the Minister.

[33] Turning to Section 6 of the FWCA which states,

> **"So soon as may be after the preparation of a provisional flood-water control scheme, the undertakers of the scheme shall cause to be published in the Gazette and at intervals of not less than seven nor**

more than ten days in three issues of a local daily newspaper, a notice–

(a) specifying that the undertakers of the scheme have prepared a provisional flood-water control scheme;

(b) specifying the locality to which the scheme relates;

(c) specifying some place within such locality or as near thereto as may be convenient where the scheme may be inspected without fee during such period (not less than fourteen days after the last publication of the notice in a local daily newspaper) as may be specified in such notice upon such days and at such times as may be so specified;

(d) specifying the name and address of some person from whom copies of the scheme may be obtained on payment of a reasonable fee specified in such notice; and stating that provision is made in section 7 for the making of objections to the provisional flood-water control scheme."

[34] Mr. Earle urged the court to find that the Notice did not comply with Section 6 of the FWCA. It is accepted that the NHT did not indicate in the Notice that they had prepared the provisional flood-water control scheme. The question which the court must determine is what is the effect of that failure. The Notice clearly states that the NHT are the undertakers of the scheme and that the provisional flood-water scheme may be inspected. It also gives the location for inspection and stated that any interested person may object to the scheme.

[35] It is my considered view that the main purpose of the Notice has been fulfilled. It advises the public of the Order of the Minister, it confirms the undertakers of the scheme, it permits for inspection and it provides the means for persons to object. The failure to specifically state that the NHT prepared the scheme is not fatal and therefore does not make the Notice a nullity.

[36] The argument was also made that the period of inspection did not follow the letter of the law. “Not being less than fourteen days after the publication of the last Notice” has been interpreted by Mr. Earle as meaning that the period of inspection should have commenced on the 30th of August 2015. The period of inspection in the Notice commenced instead on the 24th. The time given for inspection was in fact greater than the minimum fourteen days provided for in the statute and gave interested persons’ ample time to make any objections. I do not find that the actions of the NHT were in breach of the FWCA since those matters raised by Counsel speak to the form of the Notice and not its purpose.

[37] Further, I find that in any event the actions of the NHT are not the actions of the Minister. Even if there was a breach of the Act in relation to the Notice this would not affect the decision making process of the Minister. The Minister, under the FWCA, was only required to find that the implementation of the scheme was in the public interest before making a confirmation Order.

Irrationality

[38] As it pertains to irrationality, Counsel for the Claimant relies on section 3 and 8 of the FWCA which gives the Minister the power to implement provisional flood-water schemes. Counsel submits that in applying the **Wednesbury** principles as set out in **Associated Provincial Picture House Ltd v Wednesbury Corporation[16] ,** the Minister’s decision-making concerning Creighton Hall was unreasonable from the inception to the end, because he did not take into account matters which should have been contemplated, or the fact that the procedure was improper and irregular.

[39] Counsel argues that the Minister was aware that there were objections and made his decision without considering same. The owner of Lot 8, as Mrs. Pitterson explains, didn’t refuse to grant consent for the building of the concrete drainage,

[16] [1947] 2 ALL ER 680

they were negotiating a counter proposal. It is posited by Counsel that the Minister ought to have enquired as to the bases of the objections in exercising his discretion.

[40] It is further argued that the Minister did not consider the contentious claim which was sub judice and filed under Claim No. 2013 HCV 02399 **Treebros Holdings Limited v the NHT**. Counsel argues that the Minister did not consider special condition 4 of the title registered at Volume 1400 Folio 506 which states:

> *"surface drainage/ storm water run-offs shall be effectively intercepted and disposed of before reaching the parochial and reserved roads to the satisfaction of relevant authorities"*

[41] It was also submitted that the Minister failed to consider the absence of any environmental impact assessment or other environmental study to justify the declaration including the Claimant's land as a flood-water control area or other ways for the 2nd Defendant to drain its development.

[42] Having failed to consider all the factors mentioned, it is submitted by Counsel that the Minister erred extensively when exercising his discretion in declaring Creighton Hall a Flood Water Control Area, and having erred, came to an unreasonable decision.

[43] The 1st Defendant contends that the Claimant has not furnished the Court with sufficient evidence to ground these assertions. It is their position that the Minister did not act unreasonably as alleged, or at all, in that, the decision was not tainted by irrationality and in the circumstances not **Wednesbury** unreasonable.

[44] The 1st Defendant states that the Claimant would have to show (i) all that was available to the Minister to peruse (ii) what he considered; and (iii) what the Minister rejected. It is submitted that there was no evidence that assists the Claimant on the assertion of unreasonableness or irrationality.

[45] Counsel for the 1st Defendant relied on the case of **Council of Civil Service Unions v. Minister for the Civil Service**. Counsel argued that the proper party in judicial review proceedings is the decision maker. She relied on Rule 56.6 of the CPR and the case of **Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Limited et al**[17] where it was said:

> *"…the minister… was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers…"*

[46] It is her contention that the Claimant has identified the 1st Defendant as a party when the decision under review did not emanate from that office, despite the fact that the duties have been assumed by another Ministry. Therefore, it was submitted that any orders made by this court would not be enforceable against the 1st Defendant whose office was not the decision maker at the material time.

[47] Counsel for the 2nd Defendant submitted that the Minister received relevant technical advice and would have been aware of the Claimant's rights and the interests of the community at large, therefore, his decision cannot be impugned on the basis of irrationality.

Analysis

[48] Before I commence the discussion on this point I wish to address the submissions of Ms. White in respect to the 1st Defendant's status in this matter. Counsel referred to the authority of **Minister of Foreign Affairs and Trade.** She quoted one line from that decision which was never placed in context. It is noted that the decision was determinative of an issue as to whether a stay of execution could be granted in respect of a Minister in the exercise of an administrative function as against a quasi-judicial function. In the instant case the court is not asked to make an order compelling the Minister to do any act. The claim is to quash an order of the Minister

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[17] [1991] 1 WLR 550, 555

which would effectively render that order to be void and of no effect. The Ministry with oversight of Housing is now subsumed by the 1st Defendant. I am therefore of the view that the 1st Defendant is the proper party to this claim as the MTWH is no longer in existence.

[49] The evidence of what the Minister considered or failed to consider came from the Claimant's documents which, the Claimant's representative says, indicates that the Minister failed to consider certain relevant information. Under cross-examination by Ms. White he was asked. "*so all of these allegations that you have about what the Minister did not take into consideration or took into consideration you really cannot prove any of that?*" His answer was "*no, I guess not that's why we are here"*. He insisted that the Minister did not have all the facts however he admitted that he didn't know if that was in fact so. His main point of contention was that if the Minister was aware of the ongoing litigation between the Company and the NHT then he would not have made the decision that he did.

[50] I do not find that the status of the litigation between the Claimant and the NHT was a necessary factor for the consideration of the Minister. The institution of legal proceedings on the part of the Claimant suggested that there was no quick resolution to the problem faced by the NHT, hence there was a need for the Minister to consider their application. By virtue of the provisions of the Act the Minister was required to be satisfied that the flood-water control scheme was in the public interest.

[51] Although the Claimant was a company with property in the area the ultimate aim of the Order was to protect the public interest as a whole as distinct from one particular land owner. The relevant considerations under public interest would include the basis for the scheme. This was satisfied by the reports from the NHT and the NWA outlining the circumstances of storm runoff in the area and the need for the construction of drains to prevent flooding to the land belonging to prospective lot owners as well as surrounding communities.

[52] The Affidavit of Tomica Georgia Daley outlines the information which was shared with the Minister based on her review of the file records. At paragraph 13 she made reference to a letter dated September 3, 2014, which indicated that the Saint Thomas Parish Council would not take over the scheme prior to the construction of the concrete drain to address the matter of storm water runoff. Her review of the file found that the Minister was guided by the provision of advice from the technical team in the MTWH as well as the NWA.

[53] Mrs. Helen Pitterson on behalf of the NHT provided further information in respect of the documents presented to the Minister. At paragraph 10 of her Affidavit she stated,

> *"…from as early as 2013 when discussions broke down, the NHT…wrote to the MTWH describing that we sought permission from Treebros to construct a drain through its property and that after protracted negotiations, Treebros had refused to grant consent. We further described that the St. Thomas Parish Council had refused to take over the development resulting in 140 lot owners being unable to obtain the requisite building approvals to commence construction of houses."*

[54] At paragraph 17,

> *"The implementation of the scheme was in the public interest ; it included the rights of adjoining landowners in relation to the control of water in the flood-prone Creighton Hall area; it included preserving the integrity of the access way of the Yallahs to Morant Bay main road against flooding; it included preserving the rights of over 140 lot owners to obtain requisite building approvals to commence construction of houses; it included preservation of public funds and safeguard against what could be wastage of millions of dollars of the public purse."*

[55] Mrs. Pitterson's letter outlining the reasons for the scheme was not just accepted at face value. The evidence is that in response to that letter there was a request

for further information which would put the Minister in a better position to make his decision. Mrs. Moncrieffe Wiggan in her evidence on behalf of the 1st Defendant, indicated that the Minister would have to be provided with all the necessary information to put him in a position to make a decision.

[56] Given the information which was before the Minister as outlined in the affidavits, and as set out in the timeline previously mentioned, it cannot be said that he acted unreasonably. The area was flood prone and the drain was required to alleviate that problem. The failure to advise of the details of the litigation between the Claimant and the NHT is secondary to the more important issue of resolving the construction of the drain.

[57] Mr. Earle also submitted that the Minister was misled into thinking that the Claimant was refusing to consent to the grant of an easement over their property. The evidence is that the negotiations broke down, not because of anything that the Claimant did but because the NHT did not respond to their requests

[58] The fact that one of the landowners would not give their consent was only one of the reasons put forward in support of the request which was made for the area to be declared a flood-water control area. It was therefore not the only factor that the Minister had to consider. In the circumstances I find that it was not unreasonable, given the information available to him, for the Minister to hold that the NHT needed to carry out the necessary drain works in order to enable prospective and actual lot owners to obtain the benefit of their property. This would be the paramount issue for consideration by the Minister and I do not find that the failure to outline the scope or nature of the litigation, nor the semantics as to the issue of consent is relevant to the exercise of the Minister's discretion under the Act.

[59] For the reasons outlined above the Claimant has failed to prove that the Minister's decision to declare the Creighton Hall area a flood-water control area was tainted by illegality or irrationality.

Discretionary Bar – Delay

[60] The submissions on behalf of the Defendants commenced with the contention that although leave was granted, the court still had the jurisdiction to determine whether the Claimant was subject to any discretionary bars in seeking to obtain judicial review.

[61] Rule 56.3 of the Civil Procedure Rules (CPR) indicates that in order for a person to apply for judicial review leave must first be obtained. "**An application for leave to apply must be made promptly and in any event within three months from the date when grounds for the application first arose"**[18].

[62] It is settled law that the relevant date when the grounds for the application first arose is the date of the decision and not the date the Claimant first became aware of the decision, **City of Kingston Co-operative Credit Union Limited v. Registrar of Co-Operatives Societies and Friendly Societies and anor**[19]**.**

[63] The impugned decision was the declaration of the Minister which was gazetted on the 25th of February 2016. The Application for leave to apply for judicial review was filed on the 11th of March 2019. On the face of it therefore, there is significant delay in the filing of this application.

[64] The Defendants referred to the case of **R v. Dairy Produce Quota Tribunal ex. p. Caswell**[20] and submitted that even though an extension of time had been granted and the Claimant was granted leave to apply for judicial review, this did not prevent the court at the hearing of the claim for substantive relief from considering the issue of delay.

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[18] CPR Rule 56.6 (1)
[19] Claim 2010 HCV 0204 delivered October 8, 2020.
[20] [1990] 2 AC 738

[65] The judgment of the court was delivered by Lord Goff of Chieveley. He examined the role of the court in the hearing of a substantive claim for judicial review where the issue of delay was raised anew. It was held that on an application for judicial review the court could grant the application and still refuse substantive relief.

> **"It follows that, when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless it considers that there is good reason for extending the period; but, even if it considers that there is good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in section 31(6) or would be detrimental to good administration.[21]"**

[66] The CPR 56.6 (5) makes it clear that a court must consider the following two factors in determining whether to grant relief in circumstances where there is delay. The rule is similar to the principles for consideration outlined in the **Ex p. Caswell** case.

> **"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) cause substantial hardship to or substantially prejudice the rights of any person; or**
> > **b) be detrimental to good administration."**

[67] The Claimant did not challenge the jurisdiction of the court to determine the issue of delay at this stage of the proceedings. The submissions focused on the difficulty they had obtaining information from the Defendants, the fact that the NHT was not relying on the FWCA at the previous trial, and that the NHT did not commence

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[21] Ibid. p. 747

work on the Claimant's land until after they were served with a notice under the FWCA.

[68] Counsel for the 1st Defendant focused on the second of the two limbs, that is, that the court should refuse to grant relief as it would be detrimental to good administration. She relied on the case of **O'Reilly v. Mackman** [22]**.** It was submitted that the decisions sought to be impugned, were taken to facilitate a housing project. Good administration required decisiveness and finality unless there are compelling reasons to the contrary. The prerogative remedies were exceptional and ought not to be available to those who sleep on their rights. It was contended that in this case there were no compelling reasons put forward by the Claimant, as it appeared to be a belated afterthought. Given the stage of the works and the importance of the project the court should refuse to grant relief due to the inordinate delay on the part of the Claimant.

[69] Queen's Counsel on behalf of the 2nd Defendant, also made reference to the case of **O'Reilly** and submitted that the evidence to support their contention that the granting of relief would be detrimental to good administration is contained in the affidavit of Mrs. Helen Pitterson. Counsel also submitted that the NHT as undertakers of the scheme had already carried out significant works pursuant to the Order. If the court grants the relief as claimed, it would result in substantial prejudice to the many homeowners who purchased lots in the Creighton Hall development.

Analysis

[70] Neither witness on behalf of the 1st Defendant made specific reference to the effect an order for certiorari would have in respect of good administration. However, the

[22] [1983] 2 AC 237

affidavit of Mrs. Helen Pitterson on behalf of the 2nd Defendant was instructive in that regard. At paragraph 7 she indicated that,

> *"…the subdivision approval for the Creighton Hall housing development was contingent on the NHT formalizing this natural drain through the building of a concrete storm drain that would direct the water's course towards the sea."*

[71] At paragraphs 29 and 30

> *"…that quashing the Minister's decision at this late stage would adversely impact some 140 titleholders of NHT service lots. As contributors to the trust they would be robbed of the ability to obtain requisite building approvals to commence construction of houses; and their investments in purchasing these service lots, now close to 10 years ago, would amount to a complete loss of their NHT's benefit. That I also verily believe that disrupting the Minister's order would adversely affect several other third parties, like the adjoining owners to the south. To the best of my knowledge, long before the NHT became the undertakers under the Minister's Order, and in an attempt to address the drainage concerns in the flood-prone Creighton Hall area, the NHT concluded payments of several millions of dollars to acquire easements from landowners (of Lots 2 and 24), south of Treebros' property. Subsequently and around July 2012, the NHT constructed drain works in Lot 2 at millions of dollars and in circumstances where the work undertaken on the drainage route was wholly dependent on its connection to the drain to be constructed on Treebros' land. These landowners have become dependent and reliant on a "flood water controlled scheme", and a reversal of the Minister's Order would depreciate their land value and indeed render their lands almost obsolete."*

[72] It was also her evidence that a reversal of the Order would result in non-completion of the drain thereby resulting in continuous flood water damage to the Yallahs to

Morant Bay main road. Reference was also made to the cost to the NHT which may result due to potential lawsuits. There were also significant sums spent on the construction of the drain which would be irrecoverable and would be at a cost to taxpayers since the money is held on trust for the people of Jamaica. In summary the 2nd Defendant maintains that the prejudice to the lot owners as well as the hardship which would result from a reversal of the Order had both social and economic implications which could not be ignored.

[73] The determination as to the question of what is detrimental to good administration is contextualized in the judgment of Lord Goff in **Ex. p. Caswell**. It was described as the interest in good administration, and the necessity for citizens to know where they stand. Lord Goff made the following comment:

> **"Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be re-opened."**

[74] In the instant case the Claimant seeks to have the Order quashed. That would mean that it is void in law. It would no longer exist. The implications of such an order would be far reaching. I accept the evidence of Mrs. Pitterson, which was unchallenged, as to the works that have been carried out by the NHT in furtherance of the Order of the Minister. I also accept that the result of the decision being quashed would lead to damage to the surrounding community which may arise as a result of flooding. The impact on the community and the tax-payers at large cannot be downplayed and must be considered by this court when determining the issue of delay. The citizens of the Creighton Hall scheme are no doubt acting on the premise that the NHT has the authority to carry out the works and so have invested their money in these lots in hope of attaining their dream of owning a home.

[75] The hardship and prejudice to the persons who have acted on that decision is also an important factor in the court's determination as to whether to grant relief in

judicial review proceedings where delay is a factor. In this case the evidence of Mrs. Pitterson is that the NHT has expended considerable financial resources to purchase property as well as to carry out the works necessary in order to construct the drainage system for the development. The lot owners have purchased lots and are awaiting building approval which is dependent on the drainage system being fully operational. The matter has been long standing and the title owners have waited patiently to have the potential of their lots fully realized.

[76] The order of certiorari would prove prejudicial not just to the NHT but also to contiguous land owners. In the circumstances, I am of the view that the inordinate delay in bringing this matter to the court is a bar to the Claimant obtaining relief by way of judicial review.

Conclusion

[77] In summary, the delay in making the application will result in substantial hardship and prejudice to the NHT, as well as the adjoining land owners. I also find that a grant of relief would be detrimental to good administration. In any event the Claimant has failed to prove that the decision of the Minister to grant the Order in 2016 was tainted by illegality or irrationality. Having regard to the reasons outlined the claim for judicial review is refused.

Order:

1. Judgment for the Defendants.

2. Costs to the Defendants to be agreed or taxed.