[2016] JMSC Civ 186

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 04868

BETWEEN	**ELLEN WILLIAMS**	**APPLICANT**
AND	**STRATA APPEALS TRIBUNAL**	**1ST RESPONDENT**
AND	**COMMISSION FOR STRATA CORPORATION**	**2ND RESPONDENT**
AND	**JOSINA JACKSON**	**INTERESTED PARTY**

IN CHAMBERS

Mr. R.N.A. Henriques QC and Ms. Sue-Ann Williams Attorney at Law for the Applicant

Ms. Catherine Minto instructed by Messrs. Nunes, Scholefield, DeLeon & Co for the 1st Respondent

Ms. Symone Mayhew Attorney at Law for the 2nd Respondent

Mr. Andre Earle instructed by Earle and Wilson for the interested party Ms. Josina Jackson

Heard: 2 June 2016, Delivered: 27 October 2016

Judicial Review – Application for leave to apply for Judicial Review – Whether the Strata Appeals Tribunal's conclusion was sound – Whether criteria under CPR 56 has been met – Whether there is an arguable case for judicial review.

BERTRAM LINTON, J (AG.)

BACKGROUND

[1] In order to fully appreciate the quintessential elements of this case, it is important to understand how it evolved. The 1st Respondent (herein after called The Tribunal)

has upheld a decision by the 2nd Respondent (herein after called The Commission) to order the removal of the Applicant's dog from her apartment in the Property known as Strata Plan No. 595 (herein after called PSP 595) located at 23 Kings Drive, Kingston 6.

[2] Subsequent to the order for removal, a complaint was lodged with The Commission by Josina Jackson and the Executive Committee of PSP 595 about the dog, named "Chico Williams", housed in the Applicant's Lot 6 apartment. On April 29, 2013, The Commission issued an order that the dog was to be removed from PSP 595, however, on October 15, 2013, the order for removal of Chico was rescinded.

[3] On March 12, 2014, the Commission commenced a hearing in which all parties concerned (Ms. Jackson, Mrs. Williams and the 'Executive Committee' of PSP 595 and their representatives) were able to ventilate the issue at hand. At the end of the hearing, The Commission sanctioned a 90-day time period within which Chico was to be removed.

[4] On June 12, 2014, Mrs. Williams filed an appeal with The Tribunal in an effort to reverse the decision made by The Commission. Her appeal was later dismissed on July 17, 2015.

THE APPLICANT'S CASE

[5] Mrs. Williams claims that she has had Chico since March 2011 and on August 17, 2011, she was issued with a letter signed by the Complex President and Complex Manager requesting that the dog be removed from the Strata complex.

[6] She contends that no annual general meeting of the Strata Corporation was held in order to facilitate the selection of an Executive Committee. This Executive Committee would, in her mind, be the appropriate authority to issue a notice requesting Chico's removal. Thus, the lack of a functioning Executive Committee nullifies the notice she was sent in relation to the dog on August 17, 2011.

[7] Counsel Mrs. Williams further contends that the complaint lodged by PSP 595 with The Commission would have been ultra vires since it did not emanate from a functioning Executive Committee. As a direct result, the Commission would have had no jurisdiction to order Chico's removal.

[8] Additionally, since The Commission had no jurisdiction to properly hear the matter, Counsel considered the findings of The Tribunal ill-advised, unreasonable and based on an error of law. It was argued that The Tribunal failed to adequately consider the fact that a functioning Executive Committee was absent even when The Commission held its hearing on March 12, 2014.

THE 1ST RESPONDENT'S CASE

[9] The Tribunal's case was that it had acted within the scope of the law as stipulated by the Registration (Strata Titles) Act. Accordingly, they argued that the role of The Tribunal is to conduct appeals of any person aggrieved by a decision of any Strata Corporation or the Commission. The argument proposed was that there were not empowered to consider new evidence that was not before the Commission.

[10] Consequently, The Tribunal could only review arguments put before the original tribunal i.e. The Commission. The validity of the council was not raised before The Commission and therefore, outside the scope of their consideration. It was being

argued that the introduction of, what could easily be considered as, new evidence should be prohibited thereby nullifying most of the Applicant's arguments.

[11] In light of the foregoing, The Tribunal further argued that, to the extent that the validity of the Executive Committee was not placed before nor addressed by the original tribunal i.e. The Commission, then an application for leave to apply for Judicial Review ought to be denied as there would be no reasonable prospect of success as this new evidence should not be reviewed.

[12] Even if the Applicant's arguments are taken into account, The Tribunal contends that based on the interpretation of The Registration (Strata Titles) Act, there was no need for PSP 595 to have selected an Executive Committee in order to serve the notice or to prompt The Commission to hold a hearing in relation to the dog. The Applicant's counsel clearly failed to consider the broad roles of The Commission as expressed in The Registration (Strata Titles) Act.

[13] Furthermore, the Applicant's case failed to consider the rights of other proprietors in the midst of their dissemination of the administrative flaws with the Strata complex. The Tribunal contends that Ms. Jackson had a right to seek redress by filing a complaint with both the complex management and The Commission. With this in mind, the Tribunal argues that The Commission was well within their jurisdiction to hold a hearing with all the relevant parties and further to that order removal of the dog at the conclusion of said hearing.

[14] Finally, The Registration (Strata Titles) Act does not require written notice to be given in relation to Strata policies or by-laws. As such there was no need to issue

a formal notice to the Applicant informing her about the 'no animals' rule. Additionally, she was present at an Executive Committee meeting on march 29 2000 when the issue came up in relation to another proprietor and the 'no animal rule' was adopted.

THE 2ND RESPONDENT'S CASE

[15] The Commission adopted the views taken by The Tribunal with very few points to add. They accepted that it was well within its rights to conduct hearings as their role was set out in The Registration (Strata Titles) Act.

[16] The validity of the complex president and manager as agents of the Executive Committee of PSP 595 was never raised before them. Therefore, the notion that the notice of August 2011 was invalid could not be and was not relevant to their considerations and should not now be allowed.

INTERESTED PARTY

[17] Counsel on behalf of Ms. Jackson argued some of the points taken by the 1st and 2nd Respondent. The few points which in my estimation were substantially different from that of the Respondents are briefly discussed below.

[18] One of the most important points argued, was that the application of Ms. Jackson was separate and distinct from the issues bound up with the Executive Committee and their validity and that the decision handed down was as much a review of the Commission's May 19 2014 removal as it was her complaint.

[19] Furthermore, the application is one which seeks review of The Commission's May 19, 2014 removal of the dog. With this date in mind, counsel argued that the application for leave for Judicial Review was one that was made outside of the time stipulated in CPR 56. The fact that The Applicant had failed to adequately account for this failure to apply within the required time means that the application must fail.

[20] Mr. Earle, further contends that if consideration was given to the chronological history of this matter it could easily be argued that there has been an abuse of process and The Applicant seems to be using the judicial system to delay the removal of her dog.

[21] This he says constitutes inordinate delay which represented a bar to judicial review and as such the application should not be entertained.

ISSUES

[22] The substantive issues which are left to be considered in light of this application are:

a. Whether the application was made in keeping with the requirements of CPR Rule 56; and

b. To what extent does the Applicant have an arguable ground for judicial review with a reasonable prospect of success?

ANALYSIS

I have given careful thought to all the submissions presented and all the arguments and case law as cited. I have no intention of rehashing them here in detail but will refer to them as is relevant to explain my reasoning and decision in this matter.

Was the application completed in time?

[23] After perusal of the submissions made on this point, I have concluded that The Applicant has indeed filed the application for leave for judicial review in time in keeping with CPR 56.6 (1) which stipulates that:

> *'an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when the grounds of the application first arose'*

[24] It is important to pay close attention to the dates of the various applications made by The Applicant in all the circumstances. Of particular importance to this point is the fact that The Tribunal's decision was handed down on July 17, 2015 and her application for leave was filed on October 15, 2015 which is well within the parameters of the requirements of the CPR 56.

[25] Strong submissions were proposed by counsel Mr. Earle that any review of The Commission's ruling would have been filed out of time having regard to the fact that the decision was handed down on May 19, 2014. His argument is that judicial review against The Commission's ruling would have been made out of time but review of the The Tribunal's ruling would been made on time. Thus, any review of The Commission's ruling cannot be entertained. I must reject this argument for one reason.

[26] It is important to interpret the CPR in its entirety and not construe sections in isolation. In light of this, two sections of the CPR require careful perusal; these being CRP 56.6 (1) and 56.3 (3)(d).

Judicial Review - application for leave

56.3

(3) The application must state -

(a) the name, address and description of the applicant and respondent;

(b) the relief, including in particular, details of any interim relief, sought;

(c) the grounds on which such relief is sought;

(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;

Delay

56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose

(2) However the court may extend the time if good reason for doing so is shown.

When considered together it would appear that, had The Applicant filed an application for leave to apply for judicial review of The Commission's findings rather than The Tribunal then her application though made on time, may not have satisfied CPR 56.3 (d). It should be considered here that judicial review is a last resort application and the existence of a viable alternative form of redress may very well nullify an application for leave to be granted. In the case of **Plds Company Limited V Pendle Borough Council [2012] EWHC 904 (Admin)**, Mr. Justice Gore, QC opined that:

Judicial Review is a discretionary remedy. It is a last resort remedy and ought not to issue when an alternative is available

[27] In other words, the court would have taken the view that an appeal to The Tribunal would have been an alternative form of redress which The Applicant could have explored instead of applying for judicial review. In light of this, if she had applied

for judicial review after The Commission's ruling her application may very well have failed.

[28] In light of the foregoing, it would not be prudent to view the findings of The Commission and The Tribunal as two (2) separate occurrences but as one process from two tribunals which have been established by one central act; The Registration (Strata Titles) Act. This would mean that the appropriate time to file an application for leave to apply for judicial review would indeed be at the end of the process i.e. after receiving the findings of The Tribunal and not before. This, I believe, would justify the application against both The Tribunal and The Commission.

[29] Based on the above, the application for Judicial Review, having been filed on October 15, 2015 is well within the three months stipulated by the CPR.

To what extent does the applicant have an arguable ground for Judicial Review with a reasonable prospect of Success?

[30] It must be highlighted that the submissions on this point, posed by the various counsel involved in the matter, were extensive and detailed. An evaluation as to whether the applicant has a reasonable prospect of success will rest firmly on the what is delineated in the case law and the requirements for Judicial review. It is my view that the Applicant does have an arguable ground for Judicial Review. My reasons are explored below.

[31] One of the most compelling points put forward rests on the consideration of whether new evidence ought to have been considered by the Tribunal and more

particularly within this application for leave. In the case of **Regina (Dwr Cyfyngedig) v Environment Agency of Wales** [2003] EWHC 336 (Admin), it was said that one of reasons for excluding fresh evidence in judicial review is that ***'the court may find itself put in the position of being asked to decide the merits of the case rather than acting as a court of review.'*** This consideration is critical as it is outside the scope of this court to consider the merits of the case at this time as to do so would indeed replicate a mini trial.

[32] In light of this, the view posited by Lord Denning MR in the case of **Ashbridge Investments Ltd v Minister of Housing and Local Government** [1965] 3 All ER 371, is very helpful. He stated the following:

> *''Fresh evidence should not be admitted, save in exceptional circumstances. It is not correct for the review court to approach the case absolutely de novo as though the court was sitting to decide the matter in first instance. The Court can receive evidence to show what material was before the Minister; but it cannot receive evidence of the kind which was indicated in the present case so as to decide the whole matter afresh.''*

Lord Denning's position makes it clear that though the general principle is that fresh evidence is not permitted and for good reason, there are clear exceptions provided for in law. These exceptions were highlighted in the case of **Anisminic Ltd v Foreign Compensation Commission** [1969] 2 AC 223 which was reaffirmed in **ATL Group Pension Trustees Nominee Ltd v The Industrial Disputes Tribunal and Catherine Barber** [2015] JMSC Civ. 211. Here, the court highlighted that there were four classes of cases in which a high court could interfere, with a view to review a decision with the introduction of fresh evidence; these being: (a) where the tribunal had no jurisdiction to hear a matter (want of jurisdiction), (b) where the tribunal had the authority to hear the matter but made an order it had no authority to make (ultra vires/excess of jurisdiction),(c) where the tribunal had authority to hear the matter and made an order within the scope of its jurisdiction but made an error in law during the process (abuse of jurisdiction)

and (d) where the tribunal displayed clear bias and disregard for the principles of natural justice.

[33] It would seem that based on these authorities, the jurisdictional issues raised by the Applicant should be given consideration for validating leave to be granted to apply for judicial review. Consideration must therefore be given as to how the jurisdictional issue arose and whether we ought to take Ms. Jackson's complaint into account.

[34] The major challenge for the Applicant was the validity of the Executive Committee of PSP 595. It is contended that the August 2011 notice given to the applicant regarding the removal of Chico was not valid as it can only be signed by the chairman of the Executive Committee and there was none. Paragraph 13 of the First Schedule of the Registration (Strata Titles) Act says:

> *13. There shall be an executive committee of the corporation which shall subject to any restriction imposed or direction given at a general meeting exercise the powers and perform the duties of the corporation.*

[35] This Executive Committee was not formed and the Respondents admit that there was no Executive Committee at the time that the notice was given and even when the complaint was lodged with the Commission. This problem was never really ventilated before The Commission or The Tribunal. The validity of the Executive council, or the lack thereof, is the sole argument used to justify the nullity of the jurisdiction of The Commission and the view that The Tribunal's findings were ill-advised because the Commission's findings were based on the complaint made by a body that did not legally exist.

[36] The Commission, based on their verbatim notes, failed to consider the procedural flaws associated with the Executive Committee. Thereafter, the applicant's sought to bring this issue to The Tribunal's attention but was refused audience because The Tribunal was of the view that they could only take into account matters discussed before the Commission at the original hearing.

[37] The final consideration to be explored is whether the consolidation of the complaints of Ms. Josina Jackson and the Executive Committee of PSP 595 could cure the jurisdictional issues created by the invalidity of the Committee. In order to determine this, the findings of the Commission must be critically analyzed since the extent to which her complaint could be deemed an antidote depends on how much weight the Commission placed on her allegations.

[38] Based on the notes of The Commission, sufficient weight was not placed on Ms. Jackson's complaint. The focal point of their deliberations was the complaint of the Executive Council and the fact that the Applicant refused to comply with the notice ordering the removal of Chico on August 7, 2011. Therefore, it cannot be said that Ms. Jackson's complaint made a significant impact on the Commission in order to substantially affect the findings which they ultimately handed down. As such, the consolidation of the two complaints did not cured the jurisdictional problem.

Conclusion

[39] It therefore stands to reason that the consideration of proper notice of the by-laws and an interpretation of the Registration (Strata Titles) Act in terms of the duties and roles it confers on The Commission are considerations which would be given a keen ear in a trial on the merits. Since the primary focus of this application is to determine whether an issue of legality or procedural impropriety exists then those

are not my immediate concern. My concern is to determine whether the applicant has a case with reasonable prospect of success for judicial review and I hold that they do.

[40] In all the circumstances, I find that the Applicant has a reasonable prospect of success and thus leave to apply for judicial review is granted.