[2020] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO COA2019APP00139

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE STRAW JA

BETWEEN	**NATIONAL HOUSING TRUST**	**APPLICANT**
AND	**ARLENE ELMARIE PETERKIN**	**1ST RESPONDENT**
AND	**NATURAL RESOURCES CONSERVATION AUTHORITY**	**2ND RESPONDENT**
AND	**HANOVER MUNICIPAL CORPORATION**	**3RD RESPONDENT**
AND	**NEGRIL GREEN ISLAND PLANNING AUTHORITY**	**4TH RESPONDENT**
AND	**THE TOWN AND COUNTRY PLANNING AUTHORITY**	**5TH RESPONDENT**

Written submissions filed by Pollard Lee Clarke & Associates for the applicant

30 March and 19 May 2020

(Considered on paper pursuant to Practice Direction No 1/2020 entitled 'Emergency Directions – COVID 19')

MORRISON P

[1] I have read the judgment prepared by Straw JA in draft. I agree with all that she has said and cannot possibly add anything of value.

BROOKS JA

[2] I have had the privilege of reading, in draft, the judgment of my learned sister, Straw JA. I agree with her reasoning and conclusion.

STRAW JA

[3] The applicant, National Housing Trust ('NHT'), is an affected party relevant to a fixed date claim form for judicial review filed by Ms Arlene Elmarie Peterkin ('Ms Peterkin'). On 14 August 2018, Ms Peterkin had filed an application for leave to apply for judicial review of licences granted to the NHT, allowing it to build a housing scheme with an associated sewage plant at Industry Village in the parish of Hanover. She named the NHT, the Natural Resources Conservation Authority ('NRCA'), the Hanover Municipal Corporation, the Negril Green Island Planning Authority, and the Town and Country Planning Authority ('TCPA') as respondents to her application.

[4] An amended notice of application for leave was filed on 27 August 2018 and a further amended notice on 19 October 2018 by Ms Peterkin. On 26 October 2018, NHT filed a notice of application seeking an order that Ms Peterkin's further amended notice of application should be struck out against them. NHT contended it was not a proper party in the claim, as no decision was made by it which is subject to judicial review. The learned judge, Palmer-Hamilton J, heard the application and made the following orders on 12 April 2019:

> "1. The application for leave for Judicial Review filed on August 14th 2018, the Amended Application for Leave to Apply for Judicial Review filed on August 27th, 2018 and the

Further Amended Application for Judicial Review filed on October 19th, 2018 are struck out against [NHT].

2. Order striking out the Application for Leave to Apply for Judicial Review filed on August 14th, 2018, Amended Application for Leave to Apply for Judicial Review filed on August 27th, 2018 and the Further Amended Application for Judicial Review filed on October 19th, 2018 against [NHT] shall operate as a stay of the decision of [NRCA] to grant licences numbers 2017-09017-EL00021A, 2017-09017-EL00021B, and 2017-09017-EL00021C to the **[NHT] until the determination of the Application for Leave to Apply for Judicial Review.**

3. Application for Leave to Apply for Judicial Review filed on August 14th 2018, Amended Application for Leave to Apply for Judicial Review filed on August 27th 2018 and the Further Amended Application for Judicial Review filed on October 19th, 2018 on behalf of the 32 other residents in the Parish of Hanover is struck out against the Respondents herein.

4. Applicant's application should be amended to reflect order number three herein.

5. No order as to costs." (Emphasis supplied)

[5] One of the orders sought in the further amended notice of application for leave to apply for judicial review was an order requesting the following:

"5. On giving the usual undertaking for an order as to damages, orders for:

a. An urgent interim injunction preventing [NHT] their agents, employees and/or servants from constructing or operating a Sewage Treatment System approved by [NRCA] pursuant to Environmental Licences Numbered **2017-09017-EL00021A** and **2017-09017-EL00021B** respectively and from discharging sewage effluent into the Caribbean Sea from the said Sewage Treatment System pursuant to Environmental Licence Numbered **2017-09017-EL00021C**."

[6] The licences referred to in order number two set out at paragraph [4] above are the three licences which are the subject of the stay granted by Palmer-Hamilton J which NHT is seeking leave to appeal. This order as indicated above, states that the order made striking out NHT, as a party, is to operate as a stay of the decision of NRCA granting the three licences to NHT until the determination of the application for leave. As such, a notice of application seeking permission to appeal was filed on 29 April 2019 and heard by Palmer-Hamilton J on 1 July 2019. The learned judge refused leave to appeal.

Background

[7] A chronology of the history of the proceedings up to this point along with a short background will be outlined for the purposes of considering the present application before this court.

[8] The NRCA is the statutory body established under the Natural Resources Conservation Authority Act ('NRCA Act'). It is empowered to *inter alia* grant environmental permits and licences for enterprise, construction or development in prescribed areas. The TCPA is a statutory body established under the Town and Country Planning Act. The TCPA is empowered to *inter alia* take decisions, grant approvals and make recommendations for orderly development and planning permission.

[9] NHT is the recipient of an environmental permit for the construction of a housing development, a beach licence for construction, placement and maintenance of a

pipeline as well as the three environmental licences listed above from NRCA. The said three environmental licences authorises it to (i) construct a wastewater treatment plant (2017-09017-EL00021A), (ii) operate a wastewater treatment plant (2017-09017-EL00021B) and (iii) discharge sewage effluent in the environment (2017-09017-EL00021C). This authorisation is related to approval being given for the subdivision of lands relevant to a real estate development located at Industry Cove, Hanover for construction purposes.

[10] In relation to the above permits (which are referred to as "licences" in the actual documents), sections 9 and 12(1) of the NRCA Act are relevant:

> "9 (1) The Minister may, on the recommendation of the Authority, by order published in the Gazette, prescribe the areas in Jamaica, and the description or category of enterprise, construction or development to which the provisions of this section shall apply, and the Authority shall cause any order so prescribed to be published once in a daily newspaper circulating in Jamaica.
>
> **(2) Subject to the provisions of this section and section 31, no person shall undertake in a prescribed area any enterprise, construction or development of a prescribed description or category except under and in accordance with a permit issued by the Authority**.
>
> (3) Any person who proposes to undertake in a prescribed area any enterprise, construction or development of a prescribed description or category shall, before commencing such enterprise, construction or development, apply in the prescribed form and manner to the Authority for a permit, and such application shall be accompanied by the prescribed fee and such information or documents as the Authority may require.

(4) Where a permit is required under subsection (2) and any activity connected with the enterprise, construction or development will or is likely to result in the discharge of effluents, then, application for such permit shall be accompanied by an application for a licence to discharge effluents as required under section 12.

(5**) In considering an application made under subsection (3) the Authority—**

> **(a) shall consult with any agency or department of Government exercising functions in connection with the environment; and**
>
> **(b) shall have regard to all material considerations including the nature of the enterpirse [sic], construction or development and the effect which it will or is likely to have on the environment generally, and in particular on any natural resources in the area concerned,**

and the Authority shall not grant a permit if it is satisfied that any activity connected with the enterprise, construction or development to which the application relates is or is likely to be injurious to public health or to any natural resources.

(6) …

(7) …"

"12(1) Subject to the provisions of this section, no person shall –

> **(a) discharge on or cause or permit the entry into waters, on the ground or into the ground, of any sewage or trade effluent or any poisonous, noxious or polluting matter; or**
>
> **(b) construct, reconstruct or alter any works for the discharge of any sewage or trade**

> **effluent or any poisonous, noxious or polluting matter,**
>
> **except under and in accordance with a licence for the purpose granted by the Authority under this Act."** (Emphasis supplied)

[11] The "Authority" referred to in the NRCA Act is the NRCA. As indicated above, the NRCA issued the relevant three licences on 2 May 2018 pursuant to section 12 of the NRCA Act.

[12] Ms Peterkin is a resident of Industry Cove and an adjoining landowner to the above-mentioned construction site. She claims that she will be negatively impacted by the proposed sewage treatment plant as the said plant to be built, as designed and approved, does not have an outfall pipe. She contends that this would result in the pollution of the marine environment relative to the beach which is used by the wider community for recreational purposes and fishing. She states that the beach is located within an environmentally sensitive wetland.

[13] After the orders were made by Palmer-Hamilton J, Ms Peterkin filed a further further amended notice of application on 25 April 2019 for leave to apply for judicial review. In this further further amended notice of application she sought, *inter alia*:

> "1. …
>
> 2. …
>
> 3. A declaration that [NRCA] acted illegally or in the alternative irrationally in not requiring the National Housing Trust to submit with their application for a permit for the

> construction and operation of a sewage treatment plant pursuant [sic] an Environmental Impact Assessment (EIA) [pursuant] to regulation 5(3)(c) of the Natural Conservation (Wastewater and Sludge) Regulations 2013.
>
> 4. On giving the usual undertaking for an order as to damages, orders for:
>
> a. An order of certiorari quashing the decisions made by the [NRCA] and [TCPA] relating to Environmental Licences Numbered 2017-09017-EL00021A and 2017-09017-EL00021B for the construction and operation of a sewage treatment system and Environmental Licence 2017-09017-EL00021C for the discharge of sewage effluent into the Caribbean Sea from the said sewage treatment system.
>
> b. An order of prohibition preventing the [NRCA] and [TCPA] from granting environmental permission for the sub-division of lands located at Industry Cove, Hanover. In the alternative if the [NRCA] and [TCPA] have granted environmental permission, an order of certiorari quashing any such decision.
>
> c. An order of prohibition preventing the [Hanover Municipal Corporation] and [Negril Green Island Planning Authority] from granting any planning permission, building permission and/or sub-division approval pursuant to the Town and Country Planning Act, the Parish Buildings Act and the Local Improvements Act which may permit the construction of the said sewage treatment system."

[14] In the orders requested in this further further amended notice of application, there was no specific request for an interim injunction in relation to the three relevant permits (since this was apparently obtained by the order at paragraph 2 of the orders of Palmer-Hamilton J made on 12 April 2019). However, paragraph 7 of the application referred to the general request for any other order that is deemed fit by the court. Paragraphs 12, 13, 14 and 16 of the grounds set out in the further further amended notice, describe Ms Peterkin's controversy with NRCA's grant of the environmental

permits relevant to the sewage treatment plant. Paragraph 24 of the grounds also makes reference to the court's power to grant an interim injunction pursuant to rule 17.1(1)(a) of the Civil Procedure Rules ('CPR'); paragraph 25 refers to rule 17.4(2) of the said rules and references an undertaking to abide by any order made as to damages made on the granting of the injunction or for any extension of any such order.

[15] In reliance on section 9(5) of the NRCA Act, Ms Peterkin contends, in her affidavit filed on 14 August 2018, that an environmental permit is not to be granted if the NRCA is satisfied that any activity connected to a development is likely to be injurious to public health or to any natural resource. In that regard, she complains that NRCA breached its duties under the NRCA Act in granting the permits.

[16] On 16 September 2019, Gayle J considered the further further application for leave to apply for judicial review. At this time, NHT would no longer have been a party to the claim and would not have been represented before Gayle J, but it is noted that attorneys on behalf of NHT were present and observing the proceedings. Leave to apply for judicial review was granted by Gayle J in the following terms:

> "1. Application for extension of time has been granted
>
> 2. Applicant granted leave to apply for Judicial Review as follows:
>
> i. To apply for orders of certiorari and prohibition against the 2nd and 5th Respondents (Natural Resources Conservation Authority and The Town and Country Planning Authority respectively).
>
> ii. Leave granted to operate as a stay until Judicial Review is heard.

iii. Matter treated as urgent and given expeditious treatment as per rule 26.12(c) [sic] of the Civil Procedure Rules.

iv. …

v. …

vi. …

vii. The 3rd and 4th Respondents (Hanover Municipal Corporation and Negril Green Island Planning Authority respectively) are removed.

…"

[17] On 20 November 2019, NHT applied to be joined to the claim as an affected party. The other parties all consented and the application was granted. The first hearing of the judicial review was adjourned to 21 January 2020. On that date, the first hearing was further adjourned to 21 September 2020. An order was also made fixing the hearing of the substantive matter (that is, the actual application for the judicial review hearing) for 16 September 2021.

The application for extension of time

[18] On 8 July 2019, NHT filed an application seeking an extension of time to apply for leave to appeal the order of Palmer-Hamilton J. This is the application which is presently before this court. The grounds on which this application are made are as follows:

> "1. On the 12th day of April 2019, the Hon. Mrs. Justice Lisa Palmer Hamilton made an order granting the Applicant's/First Respondent's application to strike out as against the First Respondent, the Respondent's/Claimant's Notice of Application for Court Orders, Amended Notice of Application for Court Orders and Further Amended Notice of Application for Court Orders for leave to apply

for judicial review filed by the Claimant/ Applicant in the court below.

2. That the Honourable Judge went on to grant a stay of the licenses already issued by the 2nd and 5th Respondents to the Applicant/First Respondent until the determination of the application for judicial review.

3. That the decision of the 2nd Respondent was an executive decision requiring no further action on the part of the said Respondent and to be implemented by the 1st Respondent and as such was not amenable to a stay of execution in accordance with the Law as clearly laid down in the Privy Council decision of **Minister of Foreign Trade v Vehicles and Supplies Ltd** [1991] 4 All ER 65.

4. The granting of the said stay significantly affects the Applicant/First Respondent as it casts doubt upon the Applicant's/First Respondent's ability to continue with its development and effectively prevents it from so continuing without further order of the court.

5. That the balance of injustice equation or balance of convenience as considered in accordance with the applicable guidelines, would not have been in favour of the grant of a stay and no stay should have been granted in the circumstances.

6. That the Applicant/ First Respondent was not given an opportunity to make any submissions in relation to the issue of the granting of a stay.

7. Alternatively, that in such circumstances it would have been incumbent upon the court to impose an undertaking for damages upon the Claimant/ Respondent however the court failed to do so;

8. That further the Learned Judge made no order as to costs although the application was determined in the Applicant's/First Respondent's favour;

9. That the Applicant/ First Respondent is desirous of appealing these aspects of the decision of the Honourable Judge as it is materially affecting the 1st Respondent's development and causing the First Respondent severe prejudice;

10. That the First Respondent has good grounds for the appeal as outlined in the draft Notice of Appeal exhibited to the Affidavit of Jhade Lindsay which is filed herewith;

11. That the Applications for leave to apply for and for Judicial Review made by the Claimant/Respondent to this application have no reasonable prospect of success.

12. Rule 1.8 (1) of the Court of Appeal Rules provides that where an appeal may be made only with the permission of the court below or the Court of Appeal, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought;

13. That where the application for permission may be made to either court, the application must first be made to the court below vide Rule 1.8 (2) of the Court of Appeal Rules;

14. That on the 1st [June] 2019, the Applicant/ First Respondent sought leave to appeal from the court below, viz the Honourable Mrs. Justice L. Palmer-Hamilton, Judge of the Supreme Court, which leave was refused and thus permission is sought from this Honourable Court;

15. That the Appeal has a real prospect of success as per the Applicant's/First Respondent's Affidavit in Support filed herewith;

16. That it is in accordance with the overriding objective that leave be granted to appeal."

Relevant principles

[19] The present application before the court concerns the same two issues which this court considered in **Garbage Disposal & Sanitations Systems Ltd v Noel Green et al** [2017] JMCA App 2. As such it is convenient to adopt the following statement of F Williams JA in relation to the court's approach to these types of applications:

"[16] The court now has before it two issues to consider: (i) whether it should grant permission to appeal; and (ii)

> whether it should extend time to apply for permission to appeal.
>
> **A primary rule**
>
> [17] In relation to addressing the question of what approach the court should adopt when hearing both these types of applications together, I am not without guidance. As recognised by Smith JA in the case of **Evanscourt Estate Company Limited v National Commercial Bank** SCCA No 109/2007, judgment delivered on 26 September 2008, if permission to appeal ought not to be given, it would be futile to enlarge the time within which to apply for permission. This, then, will be the primary rule that will guide the resolution of the application for the orders. The application for permission to appeal will be addressed first."

[20] However, based on the submissions of counsel in relation to the issue of the time required to file the notice of appeal, this court takes a judicious approach in order to remind counsel of the relevant rules in relation to time and the computation of same. As such, the issue of the application for extension of time will be considered first.

[21] Rule 1.8 of the Court of Appeal Rules ('CAR') speaks to when an appeal is to be filed:

> "1.8 (1) Where an appeal may be made only with the permission of the court below or the court, a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought."

[22] In relation to how rule 1.8(1) of the CAR is to be applied, Phillips JA, in **The Attorney General of Jamaica v John McKay** [2011] JMCA App 26, aptly stated:

> "[4] Permission was [sought] in the court below in the required time frame and was refused, but was not filed in time in this court, which was why the application also requested an extension of time to do so. The interpretation

> to be given to rule 1.8 of the Court of Appeal Rules (CAR) has been set out with clarity by Smith JA in **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** SCCA No 109/2007, delivered 26 September 2008. He stated that rule 1.8(1) of the CAR stipulates "that permission to appeal must be made within fourteen days of the order against which permission to appeal is sought. By virtue of rule 1.8(2) of the CAR the application for leave, in such a case, must first be made to the court below". Smith JA also held that, 'it seems clear to me that the application to this court for permission must be made in writing and within fourteen (14) days of the order appealed. **The fact that the application to the court below was made with the prescribed time does not remove the time limitation in respect of an application to this court'.** As a consequence if an order is not obtained in the court below within the 14 day period, then an application should also be filed timeously in the Court of Appeal **abundante cautela**." (Emphasis supplied)

[23] Based on rule 1.8(1), therefore, NHT ought to have applied for permission to appeal to this court within 14 days of the order of Palmer-Hamilton J made on 12 April 2019.

[24] In **Paul Thompson v Industrial Disputes Tribunal and anor** [2020] JMCA App 11, a recent judgment of this court, Fraser JA (Ag) set out how time is calculated:

> "How time is calculated
>
> [11] How time is to be calculated is governed by rule 3.2 of the Civil Procedure Rules (CPR), which is incorporated into the CAR by virtue of rule 1.1(10)(f). The latter rule provides:
>
> > '(10) The following Parts and rules of the Civil Procedure Rules 2002 apply to appeals to the Court subject to any necessary modifications –
> >
> > (a) …

(f) Part 3 (time, documents);

…'

[12] Rule 3.2 of the CPR states, in part:

'(1) …

(2) All periods of time expressed as a number of days are to be computed as clear days.

(3) In this rule 'clear days' means that in computing the number of days –

(a) the day on which the period begins; and

(b) if the end of the period is defined by reference to an event, the day on which that event occurs or should occur are not included.

(4) Where the specified period –

(a) is 7 days or less; and

(b) includes

(i) a Saturday or Sunday; or

(ii) any other day on which the registry is closed, that day does not count.

...

(6) …'"

[25] It is also necessary to have regard to rule 3.2 (5) of the CPR, which states:

"When the period specified by-

(a) these Rules;

(b) a practice direction; or

(c) any judgment or order,

> for doing any act at the registry ends on a day on which the registry is closed, it shall be in time if done before close of business on the next day on which the registry is open."

[26] The approach adopted by this court in assessing applications for extension of time is set out in **Leymon Strachan v The Gleaner Co Ltd and anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 12/1999, judgment delivered 6 December 1999 at page 20:

> "The legal position may therefore be summarised thus:
>
> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been non-compliance with a time-table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider –
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

Submissions on the delay

[27] Counsel submitted that the application for leave to appeal made in the court below was refused on the basis that it was made out of time. This is noted on the

minute of order. It was submitted however that the application was filed within the period prescribed.

[28] According to counsel's timeline, the relevant order was made on 12 April 2019 and the application for leave to appeal was filed in the court below on 29 April 2019. Counsel submitted that, based on rules 3.2(3) and 3.7(2) of the CPR which speak to the computation of time by reference to clear days and the deemed date of filing, the application was made within time as 19 and 22 April 2019 were public holidays and on 27 April 2019 when the filing should have taken place, the registry was closed as it was a Saturday. Therefore, it was submitted that the filing on 29 April 2019 was within time and any other view would not accord with the overriding objective.

[29] Alternatively, it was submitted that the length of delay was minimal, only by a day or two, so even if this court takes the view that the application was filed out of time, the court should invoke its power under rule 1.7(2)(b) of the CAR and extend the time. Further, in the affidavit of Jhade Lindsay filed on 8 July 2019 in support of this present application, it is stated that if there is any breach of the rule as it relates to time, it was not deliberate but due to a genuine misapprehension of the rules.

Analysis and decision on the timeline issue

[30] The computation of time by counsel as it relates to the application made for permission to appeal below does not appear to be in accordance with the CPR. As set out above, rule 3.2(5) provides that where the period ends on a day the registry is closed, then it shall be in time if done before close of business on the next day on

which the registry is open. However, when one counts 14 clear days from 12 April 2019, the correct date for filing the application for permission to appeal would have been by 26 April 2019. This is because the public holidays of 19 and 22 April 2019 would not have been excluded as per rule 3.2(2) and (4) of the CPR.

[31] The application would therefore have been properly refused by Palmer-Hamilton J on the basis that it was made out of time. However, the application for permission to appeal made to this court was not filed until 8 July 2019, some 87 days after the order which NHT is seeking to appeal was made (that is, on 12 April 2019). As such, an extension of time to file the appeal in this court would clearly be required, which NHT has recognised. However, they have given no good explanation or reason for this drastic delay in the filing of the application before this court. It has only been indicated that any breach was due to a misapprehension of the rules.

[32] Harrison JA in **Leymon Strachan** stated at page 5 that "[t]he reasons for the delay must be given by the applicant [for extension of time] and if his affidavit fails to disclose a sufficiently satisfactory one, the court is unlikely to exercise its discretion in his favour." This principle was reiterated by Morrison P in **Harold Miller v Carlene Miller** [2019] JMCA App 22, paras [12] and [13], but he stated at paragraph [7] that the overriding principle is that justice is to be done, so the court is not bound to refuse an application for extension of time in the absence of good reason for the delay.

[33] In **Harold Miller**, at paragraph [15], Morrison P assessed the affidavit of counsel (which merely stated that the failure to file the notice of appeal within the

stipulated time was not wilful) as "singularly unhelpful". He concluded that the appellant had given no sufficient reason for the delay, but accepted that it was open to the court to exercise its discretion in the appellant's favour if he could show that he has an appeal with a reasonable prospect of success.

[34] In the present circumstances, this court also concludes that no sufficient reason for the delay has been given but will go on to consider whether NHT has an arguable case.

Arguable case

[35] It is to be noted that counsel for Ms Peterkin was served with written submissions in respect of the present application and elected not to file written submissions in response.

[36] Rule 1.8(9) of the CAR sets out the considerations for determining whether permission to appeal ought to be granted. It provides:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[37] In **Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace** [2015] JMCA App 27A, Morrison JA (as he then was), observed at paragraph [21] that "this court has on more than one occasion accepted that the words 'a real chance of success' in rule 1.8(9) of the CAR are to be interpreted to mean that the applicant for leave must show that, in the language of Lord Woolf MR in

Swain v Hillman and another [2001] 1 All ER 91, at page 92, 'there is a 'realistic' as opposed to a 'fanciful' prospect of success'".

[38] It is also useful to set out the basis on which this court will interfere with the exercise of a judge's discretion. The case of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, 1046 is the authority for the principle that an appellate court is generally unwilling to disturb a decision, which is the result of an exercise of a discretion given to the judge at first instance. It will only do so if it is shown that the judge made an error of law, or misinterpreted or misapplied the facts involved in that exercise or made an order that is so aberrant that no reasonable judge would have made, in the circumstances of the case.

Submissions on behalf of the applicant

[39] Counsel for the applicant, in written submissions, has complained that the order for the stay by Palmer-Hamilton J was not made where there were either written or oral submissions before the court requesting the same and without the benefit of full argument. Counsel further submitted that if the court below had the benefit of arguments, it may have decided that NRCA's grant of the licences was not amenable to a stay. Counsel relied on the recent decision of this court in **Symbiote Investments Limited v Minister of Science and Technology and anor** [2019] JMCA App 8 where the Privy Council decision of **Minister of Foreign Affairs Trade and Industry v Vehicle Supplies Ltd and another** [1991] All ER 65 was applied. It was submitted that the granting of the licences by NRCA is akin therefore to the executive decision of the Ministers in the above cases.

[40] Counsel contended that the concept of a stay implies the halting of some decision making process which has not been completed; that the decision being questioned in the present case is the grant of the environmental licences by NRCA under its powers given by section 12 of the NRCA Act. The NRCA had no further act to perform and it is an executive decision which is not amenable to a stay.

[41] It was submitted also that the Privy Council considered in the case of **Minister of Foreign Affairs Trade and Industry v Vehicle Supplies Ltd and another**, whether an injunction could be granted and concluded that an injunction cannot be granted as a "side wind". Counsel also submitted that an injunction had not been sought before the learned judge at the hearing and in fact no submissions were made for any interim orders.

[42] Counsel submitted that the court could, in theory, grant an injunction against the NHT but that would have required the conducting of a balancing exercise as set out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and an undertaking as to damages would have to be given by the claimant (Ms Peterkin). It is counsel's further submission that, if the appeal in respect of the order of Palmer-Hamilton J succeeds, the stay granted by Gayle J would have to be set aside either by this court or an order remitting the matter to the Supreme Court for consideration.

Analysis

[43] Before embarking on an analysis of these submissions in order to determine whether there is any realistic prospect of success, it is useful to set out certain

provisions in the CPR that regulate applications for administrative orders and judicial reviews.

[44] Rule 56.3(1) of the CPR mandates that a person wishing to apply for judicial review, must first obtain leave. Such an application is to be considered forthwith by a judge of the court per rule 56.4(1). Rules 56.4(9) and (10) state as follows:

> "(9) Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings.
>
> (10) The judge may grant such interim relief as appears just."

[45] Part 17 of the CPR treats with interim remedies including interim injunctions. Mangatal J in **Shirley Tyndall et al v Hon. Justice Boyd Carey (Ret'd) et al** (unreported), Supreme Court, Jamaica, Claim No 2010HCV00474, judgment delivered 12 February 2010, in considering rules 56.4(9) and (10) as well as part 17, opined that the stay of proceedings is not to be considered an interim remedy since the issue of an interim remedy is dealt with in a separate provision (rule 56.4 (10)).

[46] Rule 17.4(1) deals with interim injunctions and similar orders and rule 17.4(2) provides that the usual rule is that a party applying for an interim order under this rule must undertake to abide by an order as to damages "**unless the court otherwise directs**" (emphasis supplied).

[47] Rule 56.4(8) is also instructive as it empowers the judge to grant leave on such conditions or terms as appear just. However, this rule appears to relate to rule 56.5(1)

and is therefore relevant to conditions imposed on the applicant including any limit on the scope of the leave that is granted.

[48] An order therefore seeking to restrain the activity of NHT could properly be considered within the context of a grant of an interim injunction. The learned judge would have had the authority to consider such an interim remedy even without full arguments by counsel as such an order also could have been made, even *ex parte* but that would have been restricted to 28 days (see rule 17.4(4)). Subsequently, an *inter partes* hearing date would then have to be set. It is clear also, that the learned judge could have exercised her discretion in granting such an interim injunction to direct that no undertaking as to damages is to be visited on Ms Peterkin (see rule 17.4(2)).

[49] There is, however, no realistic prospect of success on this appeal although it is acknowledged that there may have been some prospect of a successful challenge to the order of Palmer-Hamilton J within the context of the rules as set out above and the authorities referred to by counsel.

[50] In **Vehicles and Supplies Ltd**, the learned judge made an order, staying all allocations of quotas and/or proceedings consequent on the allocations made by the Jamaica Commodity Trading Company on the direction of the relevant Minister in relation to the importation of motor vehicles. In examining whether the learned judge was correct in doing so, the Privy Council defined "stay of proceedings" as an order which put a stop to the further conduct of proceedings in court or before a tribunal, at the stage then reached, the object being to prevent the hearing or trial taking place.

The Board concluded that there was no proceeding to be stayed and that a stay of proceedings could not apply to an executive decision of the Minister.

[51] This principle was acknowledged by Brooks JA as binding on the courts in this jurisdiction and applied by him to the factual circumstances in **Symbiote**. Symbiote Investments Ltd had applied for an interim injunction or a stay of implementation of an order made by the relevant Minister in which he had revoked six licences that he had previously issued to them under the Telecommunications Act.

[52] Brooks JA determined (at paragraph [33]) that the Minister's order revoking the licences was an executive exercise as compared to the role of the Office of Utilities Regulation (the regulator) in implementing the executive order which was in the nature of a quasi-judicial order. He concluded that "the Minister, having confirmed the revocation of the licence, had no further authority or task to perform…The main principle from **Vehicles and Supplies** is completely applicable. The Minister's decision was not subject to a stay of execution."

[53] In the circumstances being considered, whether a stay of the decision of NRCA would fall into the same category of an executive decision as existed in **Vehicles and Supplies Ltd** and **Symbiote** would be a live issue. This court would have to consider the role played by NRCA in granting environmental licences, in particular section 9(5). Based on section 9(5) of the NRCA Act, the decision whether to grant such permits must be made after certain relevant factors have been considered. These

considerations would also include whether it is necessary to conduct an environmental impact assessment (see section 10 of the NRCA Act).

[54] NRCA also has the power to revoke or suspend any permit if it is satisfied that there has been a breach of any term or condition subject to which the permit was granted (see section 11 of the NRCA Act). The decisions of NRCA could therefore be viewed arguably as quasi-judicial in conduct; in that event it could be argued that the court would therefore not be barred from making an order in the terms used by Palmer-Hamilton J.

[55] However, as indicated earlier, while there may be the basis for an arguable case, the flaw in this application is that, in any event, any order made by the learned judge is no longer extant. It no longer exists because it was ordered to have effect only until the hearing of the application for leave to apply for judicial review.

[56] As stated above, that application was heard by Gayle J and leave granted to proceed to judicial review. The inference to be made is therefore that the learned judge was satisfied that the claimant demonstrated that she had an arguable ground for judicial review having a realistic prospect of success (see **Satnarine Sharma v Carla Brown-Antoine and ors** (2006) 69 WIR 379). Gayle J certainly would have been in a position to consider whether an interim injunction ought to have been granted in relation to the permits, although the NHT (through its own actions) would not have been a party to the proceedings at that time.

[57] As noted above, at the hearing of the application for leave, rule 56.4(9) of the CPR would have allowed the learned judge to make an order that leave to appeal is to operate as a stay of the proceedings, but it is clear from the authorities that, a stay of proceedings has a distinctive meaning and would not be applicable to the decision of the NRCA. However, it is noted also that Gayle J did not specifically use the terminology of "stay of proceedings" as set out at rule 56.4(9). In his order, he stated that the leave granted (which related to applications for orders of certiorari and prohibition against both NRCA and TCPA) was to operate as a stay until the judicial review is heard. It is not clear therefore what the words "leave to operate as a stay" mean in the context of the factual circumstances. Was it again, a stay of the decision relating to the permits being referred to, or a stay of the sewerage construction works or a stay of the entire construction process itself?

[58] Bearing this in mind, NHT would therefore be back at ground zero in relation to the consideration of any appeal as the relevant order affecting its operation would now be the order of Gayle J and the learned judge's order has not been challenged before this court. Contrary to counsel's submission, this court would have no basis to set aside the order of Gayle J during any consideration of the present application. It is for the above reason that we considered that the hearing of any appeal against Palmer-Hamilton J's order as set out would be futile, as it has been superseded by the order of Gayle J.

Conclusion

[59] The application for extension of time to apply for permission to appeal and for leave to appeal should therefore be refused. In passing, this court reiterates that the CPR recognises that these applications are to be brought and heard as quickly as possible as they usually involve administrative or quasi-judicial decisions that are time-sensitive (see rules 56.4(1), (11), and 56.6(1)). It may be that the limitations caused by the COVID-19 pandemic, affecting the country, have hampered an early hearing of this matter, although that still does not explain why a date for the first hearing was set for 21 September 2020 as compared to a date in May or June 2020, and the full hearing set for 16 September 2021. It may be that an application ought to be made to the court below to have an earlier hearing date set for the resolution of this matter.

MORRISON P

ORDER

1) The application for extension of time to apply for leave to appeal and for leave to appeal is refused.

2) No order as to costs.