REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01498

BETWEEN

IN THE MATTER OF THE JUDICIAL REVIEW ACT, NO. 60 OF 2000

AND

IN THE MATTER OF THE TOWN AND COUNTRY PLANNING ACT, CHAPTER 35:01

AND

IN THE MATTER OF THE DECISION OF THE MINISTRY OF PLANNING AND SUSTAINABLE DEVELOPMENT TO GRANT PLANNING PERMISSION TO EDFAM LIMITED TO DEVELOP THE PREMISES SITUATE AT #129 LONG CIRCULAR ROAD MARAVAL AS A SCHOOL

BETWEEN

PATRICIA BRYAN
MARLENE GUY

Claimants

AND

THE HONOURABLE MINISTER OF PLANNING AND SUSTAINABLE DEVELOPMENT

Defendant

AND

EDFAM LIMITED

Interested Party

BEFORE THE HONOURABLE MME. JUSTICE DEAN-ARMORER

APPEARANCES:
Mr. Vivek Lakhan-Joseph, Mr. Kiel Taklalsingh instructed by Mr. Rajiv Rickhi, Attorneys-at-law on behalf of the Claimants.
Mr. Dinesh Rambally for Mr. Larry Lalla instructed by Ms. Amrita Ramsook, Attorneys-at-law on behalf of the Defendant.
Mr. Gregory Pantin, Attorney-at-law on behalf of the Interested Party.

JUDGMENT

Introduction

1. In these proceedings, the Claimants have challenged the decision of the Minister of Planning and Sustainable Development by way or judicial review. They seek certiorari and declaratory relief in respect of the Minister's decision of the 5th February, 2015, to grant conditional and temporary planning permission to the Interested Party, EDFAM Limited, for the use of No. 129, Long Circular Road as a school.
2. In the course of this judgment, the Court has considered the grounds of irrationality and the doctrine of legitimate expectation. The Court has also considered whether a Court ought to grant relief, when to do so would be entirely academic.

Evidence

3. The evidence before this court was based on the affidavit evidence filed by all parties.
4. On behalf of the Claimants, the following affidavits were filed by the deponents, as specified:
    - Marlene Guy filed on the 8th May, 2015
    - Patricia Bryan filed on the 15th May, 2015, together with a Supplemental Affidavit of Patricia Bryan filed on the 27th May, 2015, and a Second Supplemental Affidavit of Patricia Bryan filed on the 10th April, 2015.
5. On behalf on the Defendant, the Affidavit of Clyde Watche was filed on the 9th March, 2016 and a Supplemental Affidavit was filed on the 10th March, 2016.
6. Kirk De Souza swore an affidavit on behalf of the Interested Party[1]. A short affidavit was also sworn by Anthony Alleyne, who was the owner of the premises at No.129, Long Circular Road[2].

[1] Mr. De Souza's affidavit was filed on the 18th December, 2015
[2] Affidavit of Anthony Alleyne filed on the 17th December, 2017

Facts

7. The Claimants reside at Champs Elysee Road, Maraval. The First Claimant, Patricia Bryan had lived at her home at #1A Champs Elysee Road since early 2007, but had inherited the property in 2004. The Second Claimant, Ms. Marlene Guy lived at #2A Champs Elysee Road since November, 1979.

8. They have instituted judicial review proceedings in their own capacity but claim to represent the views of other residents of Lower Maraval and in particular those of the members of the Lower Maraval Residents Association.

9. The Interested Party, EDFAM Limited is a non-profit company, incorporated under the laws of Trinidad and Tobago[3]. It manages three bilingual schools, Trimont, Rosewood and Arbor. Arbor is a kindergarten, while Rosewood and Trimont are respectively schools for girls and boys.

10. In July, 2014, it became necessary for the Interested Party to relocate the Arbor kindergarten school. They were referred, by a real estate agent, to premises situated at No. 129, Long Circular Road Maraval. These premises belonged to Anthony and Karen Alleyne. Anthony Alleyne, who swore an affidavit on behalf of the Interested Party, deposed that he owned the premises with Karen Alleyne, and that he had leased it to tenants since 2002.

11. In early July, 2014, renovation works began at the subject premises. Surrounding residents voiced their objections and on the 24th July, 2014, representatives of EDFAM Limited met with residents. Following this meeting, residents made a formal complaint to the Town and Country Planning Division and to the Ministry of Works and Transport.

[3] See the Affidavit filed on the 18th December, 2015 by Kirk De Souza.

12. On the 4th August, 2014, Town and Country Planning Division despatched a letter of advice to Mr. Phillip Hamel-Smith of EDFAM Limited[4]. It was addressed to EDFAM Limited, in the care of Phillip Hamel-Smith and signed by Clyde Watche on behalf of the Town and Country Planning Division. By this letter, the Town and Country Planning Division referred to complaints received from the residents of Champs Elysee in respect of the establishment of the Arbor and Rosewood Schools, at #129, Long Circular Road. By his letter, Mr. Watche, on behalf of the Town and Country Planning Division, also informed EDFAM Limited that their records revealed that there had been no planning permission for the establishment of a school.

13. The Town and Country Planning Division advised EDFAM Limited to seek planning permission within fourteen (14) days of the letter. It is useful to set out the caveat which was issued by this letter:

> *"YOU ARE HEREBY ADVISED that you will be in breach of the provisions of Section 8(1)[5] if the schools and related facilities are established without the prior grant of planning permission.[6]*
>
> *YOU ARE FURTHER ADVISED that within fourteen (14) days of the receipt of this letter you are required to submit an application for planning permission pursuant to s14(1) of the said Act…[7]*

[4] The letter of advice is annexed to the affidavit of the Claimant, Patrice Bryan and marked "PB2".
[5] Section 8(1) of the Town and Country Planning Act Ch. 35:01
[6] Paragraph 5 of letter of advice dated 4th August, 2014 annexed as "PB2" to the affidavit of Patricia Bryan filed on the 15th May, 2015
[7] Paragraph 6 of letter of advice dated 4th August, 2014 annexed as "PB2" to the affidavit of Patricia Bryan filed on the 15th May, 2015

YOU ARE HEREBY ADVISED that under the present planning policy…the proposed school and or proposed car parking and or other facilities on the subject sites will not be permitted…"[8]

14. The Claimants also despatched written complaints to the Ministry of Works and to the Town and Country Planning Division. Pursuant to these complaints the Director of Highways wrote to the Acting Assistant Director of the Town and Country Planning Division, suggesting that the location of the school was ill-advised. The letter dated 6th August, 2014 and signed by the Director of Highways was exhibited as *"PB4"* to the affidavit of Patricia Bryan.

15. On the 12th August, 2014, EDFAM Limited filed its application for planning permission. On the 27th August, 2014, the Acting Director, Town and Country Planning Division wrote to Mr. Hamel-Smith[9], and alluding to a meeting held on the 14th August, 2014, and indicated the following:

"I wish to re-iterate that no further consideration can be given to your proposal until consent from the Lower Maraval Residents Association is obtained."

The second paragraph is significant:

"Any continuance of development …without the necessary planning permission shall be in breach of the Town and Country Planning Act and subject to litigation."

16. On the heels of the letter of the 27th August, 2014, was a letter dated the 29th August, 2014 in which the Honourable Minister Dr. Bhoendradatt Tewarie referred to the earlier letter and

[8] Paragraph 7 of letter of advice dated 4th August, 2014 annexed as "PB2" to the affidavit of Patricia Bryan filed on the 15th May, 2015

[9] This letter is exhibited as "MG6" and annexed to the affidavit of Marlene Guy filed on the 8th May, 2015.

to his meeting with the Interested Party on the 15th August, 2014. In that letter, the Honourable Minister had this to say:

> *"…we carefully explained that the objections in writing had come from the community, that the Town and Country Planning Division could not consider granting permission for the opening of a school in the face of widespread community objection and indicated that no further consideration could be given to this matter unless a consensus were achieved."*[10]

17. In response, EDFAM Limited commissioned a Traffic Impact Assessment which was prepared by LF Systems Limited, Traffic and Transport Engineering and submitted to the Town and Country Planning Division[11]. On the 1st October, 2014, the Minister met with members of the residents association. The Honourable Minister raised the possibility of conditional permission. This was met by a resounding *"no"* by members of the community.

18. On the 5th February, 2015, the Minister of Planning and Sustainable Development, acting pursuant to powers conferred at section 11(1) of the ***Town and Country Planning Act***[12] , granted conditional and temporary approval to EDFAM Limited for the use of the premises as schools. The Notices by which EDFAM Limited received conditional permission have been exhibited in these proceedings as *"KDS3"* to the affidavit of Kirk De Souza filed on the 18th December, 2015. The Notices clearly indicate that permission had been granted for one (1) year.

19. The reasons upon which the Defendant issued the impugned permission were set out in the affidavit of Clyde Watche, who at the time had been Acting Assistant Director of the Town

[10] This letter is exhibited as "MG6" to the affidavit of Marlene Guy filed on the 8th May, 2015
[11] The Traffic Impact Assessment is exhibited to the affidavit of Patricia Bryan and marked "PB6"
[12] Town and Country Planning Act Ch 35:01

and Country Planning Division. At paragraph 14 of his affidavit, Mr. Watche refers to and produces the Report which had been prepared and submitted to the Honourable Minister.[13] It was Mr. Watche's evidence that the Honourable Minister accepted the recommendation contained in the Report.

20. By his affidavit, Mr. Watche explained that the subject premises had not always been residential and had been the subject of planning permission in 1987 for the construction of a building for the use of a recording studio. Mr Watche produced the report, which had been prepared as Acting Director of the Town and Country Planning Division. Mr. Watche referred as well to a petition from residents who supported EDFAM's application for development. It was his evidence that 220 residents supported EDFAM's application[14].

21. Subsequently, on the 6th March, 2015, the Honourable Minister, Dr. Tewarie addressed the issue in the Lower House of Parliament. On this occasion, Dr. Tewarie responded to an enquiry, which had been made by the Honourable Member for Diego Martin North East. The relevant Hansard Report was exhibited by the Claimant, Marlene Guy and no objection was made by either party, to its use for the truth of its contents. The Minister's contribution in Parliament provides insight into the reasoning which underlay his decision to grant conditional approval. In the course of his contribution, the Minister noted that his decision was not an assumption of expertise on traffic management,

> *"but a deliberation on the facts that were pertinent to the case of which the opinion of the director of highways was only one element…"*[15]

[13] See the Report exhibited as "C.W.1"
[14] See Exhibit C.W.1.(A)Supplemental Affidavit of Clyde Watche filed on the 10th March, 2016
[15] The Hansard Report is exhibited to the affidavit of Marlene Guy and marked "MG7"

In the course of his contribution, the Honourable Minister also identified the factors which informed his decision. Among the factors identified was the following:

"6) Existing policy permits full commercial use south of Long Circular Road…"[16]

22. The Honourable Minister also alluded to a traffic management plan as proposed by EDFAM Limited. The Honourable Minister noted that the Traffic Management Report was led by Dr. Rae Furlong. He described Dr. Rae Furlong in this way:

"…a transportation expert, who is known to have provided traffic management advice to the Ministry of Works and to NIDCO…"[17]

23. The Honourable Minister alluded as well to the need to balance the competing interests. He had this to say:

"while having regard to the concerns of residents, which are particular to the area this has to be balanced against the wider community interest, government policy- including government policy to promote education as a major pillar of development…"[18]

Discussion

24. In the course of this discussion, I have considered written submissions and have sought to apply the law to the facts.

25. The matter which engages the Court's attention is an application for judicial review of the decision of the Minister of Planning and Sustainable Development to grant conditional and temporary permission to the interested party, under section 11(1) of the ***Town and Country Planning Act***[19] which states as follows:

[16] Ibid at page 333
[17] Ibid at page 337
[18] Ibid at page 340
[19] Town and Country Planning Act Ch 35:01

"11. (1) Subject to this section and section 12, where application is made to the Minister for permission to develop land, the Minister may grant permission either unconditionally or subject to such conditions as he thinks fit, or may refuse permission."

26. It bears repetition that in applications for judicial review, the Court does not exercise an appellate function, but examines the decision-making process in order to ascertain whether it is flawed on any ground set out at Section 3 of the ***Judicial Review Act***[20]**.**

27. In these proceedings the Claimant has relied on the following grounds:

- that in arriving at the impugned decision, the Honourable Minister took into account irrelevant considerations;
- that the decision of the Honourable Minister was irrational;
- the decision of the Honourable Minister was in breach of the legitimate expectation of the Claimants.

28. Accordingly, the issues which arise for my consideration are:

- Whether the Minister acted irrationally;
- Whether the Minister took into account irrelevant considerations;
- Whether the Minister frustrated the legitimate expectation of the Claimants; and
- Whether the Minister breached the right of the Claimants to consultation.

29. In addition to the foregoing issues of substance, the Court must consider, whether this matter is merely academic and thus whether it ought not to engage the Court's attention.

[20] Judicial Review Act, Ch. 7:08

30. Out of deference to learned Counsel for the Claimants, and to their well written and erudite submissions, I will consider the substantive arguments first and then proceed to consider whether the grant of relief is merely academic.

The Ground of Irrationality

31. Learned Counsel for the Claimants have contended that the decision of the Honourable Minister was flawed for irrationality. In particular, they contended that the decision of the Honourable Minister to reverse his earlier decision was irrational.

32. It is well-established, as a matter of principle, that the ground of irrationality is notoriously high. The Court will set aside an impugned decision on the ground of irrationality, only if the decision is proved to be one which could not be made by any reasonable decision-maker[21]. Alternatively, the Court will act on the ground of irrationality, if the decision is shown to be one which is so outrageous in its defiance at logic and accepted moral standards that no decision maker who had applied his mind to it would have arrived at the decision[22].

33. In the proceedings before me, the Honourable Minister by his letter of the 29th August, 2014, expressed his view, in strong terms that it would be unconscionable to grant permission in the face of protestation by members of the community. This was preceded by a letter emanating from the Town and Country Planning Division, on the 27th August, 2014, which letter indicated that no further consideration would be given to the matter until consensus was obtained from the residents association. The Claimants rely on these earlier missives in support of the their contention that the grant of planning permission constituted a reversal of an earlier decision

[21] A principle enshrined and immortalised in Associated Provincial Picture Houses Ltd v. Wednesbury Corp. [1947] 2 All ER 680

[22] CCSU v. Minister for the Civil Service [1984] 3 AER 935 74 per Lord Diplock

34. There is however, clear and un-controverted evidence, from both the Interested Party and the Defendant that following the pronouncement in August, 2014, material was placed before the Honourable Minister to suggest that some two hundred and twenty (220) residents supported the development. In my view, therefore, the apparent departure of the Honourable Minister from his, strongly held position was based on concrete material, which had not been before him in August, 2014.

35. The Honourable Minister, would have been required to balance competing interests of the Interested Party and residents, other than the Claimants and to act proportionally. It is my view that he did so.

36. Learned Counsel, Mr Lakhan has relied on the decision of this Court in ***Pundit Rameshwar Maharaj v. Minister of Planning and Sustainable Development***[23] and I am grateful to learned Counsel for endorsing both my reasoning and my views in that decision. However, it is my view that the facts of this case are distinguishable from those of ***Pundit Rameshwar Maharaj***[24]. In that case, a formal application for planning permission had initially been refused. There was a subsequent application for a review and the Honourable Minister reversed his earlier refusal. In these proceedings however, there was one application for planning permission which was made on the 12th August, 2014. The pronouncement of the Town and Country Planning Division on the 27th August, 2014 and that of the Honourable Minister on the 29th August, 2014 did not constitute decisions on the application for planning permission. If that were so, there would have been an official notification despatched to EDFAM Limited. The letters were in fact pronouncements which were made prior to formal consideration of the application.

[23] Pundit Rameshwar Maharaj v. Minister of Planning and Sustainable Development CV2013-00804
[24] Ibid

37. Learned Counsel Mr. Lakhan has argued that the Honourable Minister acted irrationally by acting contrary to the clearly articulated reasoning of the Director of Highways. In my view, an examination of the reasoning of the Honourable Minister, according to both the affidavits of Mr. Watche and the statement of the Honourable Minister in Parliament[25], demonstrates that the views of the Director of Highways were taken into account. The Minister is clearly not bound to comply with the views of the Director of Highways, in fact, should he do so, his decision could be reviewable for abdication of his discretion to another.

Taking into Account Irrelevant Considerations

38. The Claimants contend that the Honourable Minister placed excessive weight on the Traffic Impact Assessment which was prepared by a private entity and that in this way, the Minister took account of an irrelevant consideration.

39. By section 5(3)(g), ***Judicial Review Act***, a decision is reviewable if, in the course of making a decision, the decision-maker relied on an irrelevant consideration.[26] Section 5(3)(g) is set out below:

> *"5(3) The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following:*
>
> ...
>
> *(g) fraud, bad faith, improper purpose or irrelevant consideration*
>
> ..."

[25] See the statement of the Honourable Minister in Hansard Report exhibited as "M.G.7" to the affidavit of Marlene Guy filed on the 8th May, 2015.

[26] Judicial Review Act Ch. 7:08 s.5(3)(g) states *"5(3) The grounds upon which the Court may grant relief to a person who filed an application for judicial review includes the following: (g) fraud, bad faith, improper purpose or irrelevant consideration"*

40. It is however well-established that in situations where considerations are not prescribed by statute, the question of what is relevant lies within the discretion of the decision-maker. In such a situation, his discretion is reviewable only on Wednesbury grounds.[27]

41. The evidence which was led before this Court suggests that the Traffic Impact Assessment was but one factor considered by the Honourable Minister. This was patent from the contribution of the Minister in Parliament.[28]

42. I applied the Wednesbury yardstick to the Minister's decision and held the view that the Minister had not placed excessive weight on the traffic plan but gave proportional weight to the interests of the community and to the policy of using education as a tool of development.. The Minister had also referred to the professional stature of Dr. Rae Furlong who led the report and to the fact that they had done similar work for the Ministry and for NIDCO and was satisfied that the plan was prepared by a credible professional[29]. It follows that, it is my view, that in respect of the Traffic Management Plan, the Minister had not acted unreasonably.

Failure to Consult

43. This Court accepts submissions by learned Counsel for the Claimants that surrounding residents have a right to be consulted. In this regard, I am guided by the reasoning of the Honourable and learned Mr. Justice Rahim in the case ***Ulric Buggy Haynes v. The Minister of Planning and Sustainable Development CV2013-0522***. The evidence suggests however that the residents were consulted on the 1st October, 2014.

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[27] See Michael Fordham's Judicial Review Handbook (4th Edition) at page 914, paragraph 56.2.4

[28] Evidence of his contribution, and the reasons identified herein was placed before this Court by the Claimants themselves. There was no objections to the use of the Hansard Report in evidence for the truth of its contents. This Court therefore relied on the Hansard Report as a true reflection of the Minister's contribution and of his reasons for the grant of conditional planning permission.

[29] See paragraph 22 herein

44. The Honourable Minister himself met with the residents and put forward the idea of conditional planning permission. He heard their objections. Having heard their objections of the residents, the Honourable Minister had an obligation to give consideration to their representations, but not to comply with them. To do so would once again abdicate his discretion making power.

Natural Justice

45. It has been contended that the Defendant acted in breach of the legitimate expectation of the Claimants. The doctrine of legitimate expectation received judicial considerations throughout the last century and the well settled principles were expounded in ***Nadarajah Abdi v. Secretary of State*** [2005] EWCA 1363, an authority relied on by learned Counsel for the Claimants. At paragraph 68 of his judgment, Laws LJ, had this to say:

> *"The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so…"*

46. In these proceedings, however, no promise was made to the Claimants. The strong statements, which may be found in the letters of the 27th August, 2014 and the 29th August, 2014, were not addressed to the Claimants. They were addressed to the Interested Party and one wonders how they came to the attention of the Claimants.

47. I also hold the view, that there was a proportionate response on the part of the Minister, who was duty bound to consider not only the rights and interests of the Claimants, but also those

of EDFAM Limited. Having considered the latter's application, the Minister acted proportionally by giving them a limited chance by conditional approval.

48. It follows that, it is my view, that the application for judicial review ought to be dismissed on its merits. It is also my view that it would be altogether wrong to grant certiorari of planning permission, which has become non-existent by the effluxion of time. To do so would be to grant a powerful prerogative remedy in vain, beating the proverbial dead horse of planning permission, which has already expired.

49. I entirely agree with learned Counsel for the Claimants, that delay in this application was exacerbated by the many requests by the Defendant for extensions of time. The Claimants by their Counsel, recognise however, that the initial timetable set by the Court at the first Case Management Conference[30] would have required both evidence and submissions to have been completed by March, 2016. (See the Claimants' submissions in reply). This would have been one month after expiration of the grant of conditional leave. In any event therefore, assuming that there had been no application by the Defendant for extension of time, this application for judicial review would perforce have been resolved, after conditional leave had expired. The inevitable result would have been that the merits of the impugned decision would have been rendered academic and devoid of any useful purpose. In this regard, I accept the submission of learned counsel for the Defendant and his reliance on ***R (Zoolife International Ltd.) v. Secretary of State for the Environment***[31], a judgment of the Queen's Bench Division, in which Justice Silber held that academic issues could not and should not be determined by the courts unless there were exceptional circumstances.[32]

[30] The First Case Management Conference was held on the 22nd May, 2015.
[31] R (on the application of Zoolife International Ltd) v Secretary of State for Environment, Food and Rural Affairs [2007] EWHC 2995 (Admin)
[32] Ibid at paragraph 36 per Lord Silber

Orders

50. The application for judicial review is dismissed.

51. Claimants to pay to the Defendants the costs of the application.

Dated this 23rd day of June, 2017.

M. Dean-Armorer
Judge