[2024] JMSC Civ 148

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU 2023CV03067**

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| **BETWEEN** | **AXIA JAMAICA INSURANCE AGENCY LIMITED** | **APPLICANT** |
| **AND** | **THE FINANCIAL SERVICES COMMISSION** | **RESPONDENT** |

**IN CHAMBERS**

**Mr Kevin Williams and Ms Regina Wong instructed by Grant, Stewart, Phillips & Co. for the Applicant**

**Mrs Symone Mayhew, KC instructed by Mayhew Law for the Respondent**

**Heard: February 22 & November 28, 2024**

**Judicial Review – Application for leave – Insurance intermediary company – Registration cancelled – Whether the decision was unreasonable, unjust or ultra vires – Delay**

**Part 56 Civil Procedure Rules**

**The Insurance Act, sections 2, 77**

**WINT-BLAIR, J**

**[1]** By way of Notice of Application for court orders filed on September 27, 2023, the applicant seeks leave to apply for judicial review for orders relating to a decision of the respondent to enforce cancellation of the claimant's registration as an insurance intermediary pursuant to section 77 of the Insurance Act ("the Act"). The respondent opposes the application for leave and contends that the application should be refused.

**[2]** The applicant is a company registered on or about October 10, 2014, as an insurance intermediary company and duly licensed by the respondent to operate as an insurance agent. Section 2 of the Act permits the applicant to solicit applications for insurance or to negotiate, effectuate and countersign insurance contracts on behalf of an insurance company.

**[3]** On or about February 14, 2019, the respondent issued a notice of intention to cancel the registration of the applicant as an insurance intermediary under the Act. In the notice, the applicant was given an opportunity to be heard in relation to the intended action of the respondent.

**[4]** By letter dated August 2, 2019, the applicant indicated that it wanted to be heard and sent in its written submissions concerning the respondent's intended action on September 30, 2019. On June 2, 2020, the matter was heard by a panel of the Board of Commissioners ("the Board.") The claimant was granted permission to and did present both oral and written submissions to the panel.

**[5]** By letter dated June 16, 2020, the applicant was informed by the Board that having duly considered the written submissions and oral representations made in response to the notice of intention to cancel the applicant's registration, the Board proposed to cancel the said registration.

**[6]** In response, on or about July 7, 2020, the applicant filed a notice of appeal to the Financial Services Commission Appeal Tribunal ("the tribunal"). The appeal was heard on or about April 2022 and July 2022. The tribunal delivered its ruling confirming the decision of the respondent to cancel the applicant's registration.

Following the tribunal's decision, the respondent issued a letter dated August 12, 2022, cancelling the applicant's registration.

**[7]** By letter dated August 23, 2022, the applicant wrote to the respondent requesting two things, the first, a reconsideration of their position and the second, for a period of eight months of monitored operations.

**[8]** On or about December 2022, the respondent wrote to the applicant acceding to these requests and placed the applicant under observation for a period of six months. The respondent in its letter reminded the applicant that the decision to cancel its registration was as set out in its letter of August 12, 2022, and that this decision remained in effect; however, the implementation of the decision was stayed pending the respondent's determination of the applicant's request.

**[9]** By letter dated September 4, 2023, the respondent issued a letter to the applicant again confirming the cancellation as stated in its letter of August 12, 2022, which directed the applicant to close its business.

**[10]** The applicant now seeks the following orders from this court:

a) An order of certiorari to quash the respondent's decision to cancel the registration of the applicant as an insurance intermediary company pursuant to section 77 of the Act.

b) An order of prohibition preventing the respondent from cancelling the registration of the applicant as an insurance intermediary company pursuant to the notice dated June 16, 2020.

c) An order for reinstatement of the said registration.

d) Damages.

**[11]** The grounds of the application are that the decision was unreasonable, unjust, irrational and an improper exercise of the discretionary power given to the respondent pursuant to section 76(2) of the Act. Also, the purported reasons for the cancellation of the registration are no longer valid or apparent for the exercise of its discretion.

**Submissions**

*The Applicant*

**[12]** Mr Williams failed to file written submissions as had been ordered by the court. The oral submissions set out here were made upon the court's decision not to grant an adjournment to allow for compliance. Mrs Mayhew, KC filed and served her written submissions in time as ordered. The application proceeded.

**[13]** The applicant argued that the cancellation of the registration took effect in 2023, therefore the court is not in a position to grant leave and a grant of prohibition is no longer applicable. What remains is an order of certiorari to quash the decision of the respondent as stated in its letter dated September 5, 2023. Cancellation having taken effect, the decision of the respondent cannot now be stayed.

**[14]** It was submitted by the applicant that the respondent is a statutory body pursuant to section 4 of the Act whose decisions are amenable to judicial review. It exercises regulatory powers and is subject to prerogative orders. The decision made by the respondent on April 20, 2022 took effect on September 15, 2023. The application was filed on September 27, 2023, therefore delay is not in issue.

**[15]** The application was supported by the affidavit of Hugh Meredith which shows correspondence dating back to 2016 concerning the minimum capital reserve of the applicant having fallen below the statutory requirement and that this needed to be regularized. There was correspondence between the parties over the period 2016 to 2019. The parties met on June 2, 2020. In a letter dated June 16, 2020, the respondent advised the applicant that it had failed to honour its regulatory obligations, it advised of its intended decision to cancel and the right to appeal. Then the respondent wrote intending to cancel the registration of the applicant.

**[16]** The applicant disputes the events leading up to the tribunal's decision of April 20, 2022. The applicant had been filing monthly regulatory reports with the respondent showing that its business was now compliant. The applicant relies on the statement in the report of the tribunal which recommended to the respondent that it take another look at the applicant's business.

**[17]** The respondent undertook monitoring of the applicant's business for six months. The applicant had by then become profitable, its capital ratio had been brought up and reports were submitted to the respondent as required. The applicant's audited financial statements up to December 2022 showed that the applicant was profitable and its previously experienced difficulties no longer existed. The applicant showed a profit up to July 2023, its capital ratio was both met and maintained.

**[18]** The letter of September 4, 2023, cancelling registration is at the heart of the application. That letter was based on the monitoring period and shows an unreasonable and irrational position subject to a quashing order. On that date, none of the bases for cancellation then existed. Monitoring of the operations of the applicant showed that to be a fact. It referenced the cancellation in 2022 which no longer existed in 2023.

**[19]** Further, the test for reasonableness was set out in **Re Duffy**[1] in which Lord Bingham said, if seised with all relevant facts, is this a decision a reasonable authority would have made have on the subject matter before the court. The respondent did not base its decision on false audited reports or unacceptable levels of capital solvency, it based its decision on paragraph three of its report which does not state the basis for cancellation, but on the historical position in 2022. That is an insufficient basis for the conclusion and it is irrational.

**[20]** The test of a realistic prospect of success as set out in **Sharma v Brown-Antoine**[2] is passed. The applicant took advantage of the alternate remedy, lodged its appeal and was heard and the appeal disposed of. There is no alternate remedy here as renewal of registration is not an alternate remedy, nor is it part of the application.

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[1] [2008] UKHL 4
[2] [2006] UKPC 57, [2007] 1 WLR 780

*The Respondent*

**[21]** The application should be refused as the applicant does not meet the threshold for the grant of judicial review having no arguable case with any merit that would call for a full investigation by the court.

**[22]** Additionally, delay operates as a bar to the grant of the remedy sought as the application is out of time. The notice of application challenges a decision of the respondent that was not made on September 4, 2023, as has been said, rather, the decision of intended cancellation of registration was set out in a letter dated August 12, 2022, and communicated to the applicant.

**[23]** The report of the tribunal confirmed the decision of the respondent without variation. The decision for cancellation therefore followed the statutory regime.

**[24]** The decision having already been made, was not therefore being made on September 4, 2023. The decision of the respondent was confirmed on appeal. The respondent had no jurisdiction to revisit, stay or withdraw the decision. To the extent that the respondent at the applicant's request may have allowed a period of observation after August 2022 during which its decision was "stayed" it would have acted without jurisdiction.

**[25]** It is settled law that where a public authority acts outside of its jurisdiction any decision taken in this regard is void and of no effect. There is no authority in the Act and regulations granted to the respondent to stay its decision to cancel registration. The respondent had no power express or implied to stay its decision which was confirmed by the tribunal and communicated to the applicant by letter dated August 12, 2022.

**[26]** Any new material submitted by the applicant, after the decision to cancel registration had been confirmed, would have been ineffectual and could have no bearing on the decision which had already been made nor could it create any rights or expectations on the part of the applicant.

**The test for leave**

**[27]** The case of **Sharma v Brown-Antoine et al** sets out the principles of which are regarded as the modern test for leave to apply for judicial review. The Judicial Committee of the Privy Council held that judicial review will only be granted where there is a realistic prospect of success and there is no discretionary bar.

**[28]** In the case of the **Hon. Shirley Tyndall, O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**[3], Mangatal J (as she then was) stated:

> *"It is to be noted that an arguable case with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful nor frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth, though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*

**Discussion**

**[29]** The record of proceedings filed by the applicant demonstrates that it was advised by letter on June 16, 2020, of the respondent's proposed decision to cancel its registration as an insurance intermediary. On July 27, 2020, the claimant filed an appeal against that proposal which was heard on April 6, 2022. The appeal to the board confirmed the decision of the respondent.

**[30]** The tribunal affirmed the decision of the respondent to cancel the applicant's registration and the respondent issued a letter dated August 12, 2022, cancelling the applicant's registration. By letter dated August 23, 2022, the applicant wrote to the respondent requesting a reconsideration of their position and for a period of eight months of monitored operations.

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[3] (unreported) Claim No. 2010HCV00474 Delivered on February 12, 2010

**[31]** It has been argued by the applicant that the decision of the respondent was stayed. What decision would this be? There had to have been a decision from which to appeal and upon which a request for a reconsideration and monitoring was based. The question of the decision of the respondent is therefore moot. The decision, based on the history and the applicant's own conduct could not have been made in September 2023.

**[40]** Delay is therefore a live issue in this application. There is no application for an extension of time before the court. Where the remedy of certiorari is sought, the date on which the grounds for the application first arose must be determined, in other words, what was the date of the impugned decision.

**[41]** Rule 56.6 of the CPR, which addresses the issue of delay, provides: that an application for leave to apply for judicial review must be made promptly, that is within three months from the date when grounds for the application first arose. The court may extend the time if a good reason for doing so is shown. Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.

**[42]** On a proper construction of rule 56.6(1), the date of the impugned decision is the date when grounds for the application first arose. This means that in keeping with rule 56.6(1), the grounds for the application first arose from the decision contained in the letter of August 12, 2022, the alternate remedy of an appeal to the Board and further appeal to the tribunal having been exhausted.

**[43]** In **Garrett Francis v the Industrial Disputes Tribunal and another**[4], Williams, J in dealing with the issue of delay, noted that Rule 56.6 of the CPR, which dealt with delay in judicial review applications at both the leave and substantive stages, indicates that the application must be made promptly and within three months from

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[4] [2012] JMSC Civ 55

the date when the grounds for the application first arose. The learned judge noted that *"much depends on the view taken as to when the grounds for the application first arose".*

**[44]** In that case, the award of the Industrial Disputes Tribunal was issued on July 21, 2009, and the application for leave to apply for judicial review was filed on October 20, 2009, which appears to be on or just before the final day of the allowed time limit. The application was later heard on March 23, 2010. Thus, it seems that the filing occurred at the very end of the prescribed timeframe, presuming that the date the grounds for the application arose was the award date. The award provided two alternatives, reinstatement or compensation. The claimant's main grounds for application may only have arisen after the second defendant chose compensation. If the second defendant had opted to reinstate the claimant, there would have been no grounds for the claimant's application.

**[45]** The learned judge reasoned that the claimant should not be penalized for any delay in filing his application, as he was waiting to see if the second defendant would opt for reinstatement by the Tribunal's set date of August 12, 2009. Alternatively, August 27, 2009 (when compensation was first offered) could mark the point when it became clear which option the second defendant chose. The claimant's primary grievance was non-reinstatement, so other issues would not have arisen if he had been reinstated. The grounds for the claimant's application could reasonably be considered to have arisen on either August 12, 2009 (the deadline for reinstatement) or August 27, 2009 (when compensation was first offered). If this approach is accepted, the application would have been filed 22 days before the end of the three-month deadline. The key issue is determining the exact date on which the grounds for the application first arose.

**[46]** In the case of **George Anthony Levy v The General Legal Council**,[5] which cited the case of **City of Kingston Co-operative Credit Union Limited v Registrar of Co-Operative Societies and Friendly Societies**,[6] a decision of McDonald-Bishop, J (as she then was) states:

> *"[52] The settled law is that the operative time for the ground to have arisen and which set the timeline within which the application is to be made, is the date of the judgment order or decision and not the date that the applicant became aware of the decision... By 10 May 2008, Mr. Levy would also have known that the hearing had started so that would have been the date he would have been aware of the proceedings against him, in any event.*
>
> *[53] It follows from this that Mr. Levy would have to act promptly after 10 May 2008, the date of the impugned 'decision', or, in any event, within three months of that date..."*[7]

**[47]** It is unquestionable that the applicant was aware of the letter dated August 12, 2022, and there is no evidence to the contrary. It was the date of the decision and the date on which grounds for this application arose, it is the date on which time began to run for the purposes of this application.

**[48]** September 27, 2023, is the date on which this application was filed, that is over thirteen months of delay and far in excess of the three-month time limit. This failing on the part of the applicant is considered undue delay. The rules require that the applicant make application promptly and certainly within three (3) months. Where the application is not made within three (3) months it cannot prevail unless there is good reason to justify why an extension should be granted by the court. Ackner

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[5] [2013] JMSC Civ 1

[6] (unreported) Claim No 2010HCV0204 delivered October 8, 2010

[7] [2013] JMSC Civ 1 paras 52 & 53

L.J. in **R v Stratford-on-Avon DC, ex p Jackson**[8] expresses the effect of the rule in these terms:

> *"…we have concluded that whenever there is a failure to act promptly or within three months there is 'undue delay'. Accordingly, even though the court may be satisfied in the light of all the circumstances including the particular position of the applicant, that there is good reason for that failure, nevertheless the delay, viewed objectively, remains 'undue delay'. The court therefore still retains a discretion to refuse to grant leave for the making of the application or the relief sought on the substantive application on the grounds of undue delay, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."*

**[49]** In the case at bar there has been both a failure to act promptly as well as to act within three months of the decision to cancel registration. There is no good reason to extend time before the court in the form of an application to extend time supported by affidavit.[9]

**[50]** I find that delay operates as a bar to the grant of the orders sought. I accept the submissions of the respondent on this issue as they are in line with my own view. The time limits set down by the rules cannot be exceeded and moreso without explanation.

**[51]** To add to the delay is the fact of the unmeritorious submission that in the present case judicial review is appropriate. It is unclear to me how the applicant can argue that it exhausted all alternate remedies leaving itself no other avenue but that of judicial review while simultaneously arguing that no decision was made until

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[8] [1985] 3 All ER 769

[9] R(Young) v Oxford City Council (2002) EWCA Civ 240

September 2023, given the history of the matter and the factual circumstances of this case.

**[52]** There will be an order for costs in keeping with the prevailing law as set down by the Court of Appeal in **Kingsley Chin v Andrews Memorial Hospital**[12]. As a consequence of the foregoing, the court makes the orders set down below:

**Orders:**

1. The application for leave to apply for judicial review is refused.
2. Costs to the respondent to be agreed or taxed.

Wint-Blair, J

[12] [2022] JMCA Civ 26