



[2022] JMSC Civ 115

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2018 HCV 03058

BETWEEN **ARLENE ELMARIE PETERKIN** (On behalf of herself **APPLICANT**
and 32 other residents in the community of Industry **/CLAIMANT**
Cove, in the parish of Hanover)

AND **NATURAL RESOURCES** **1ST RESPONDENT**
CONSERVATION AUTHORITY **/1ST DEFENDANT**

AND **TOWN AND COUNTRY** **2ND RESPONDENT**
PLANNING AUTHORITY **/2ND DEFENDANT**

AND **NATIONAL HOUSING TRUST** **3RD RESPONDENT**
/3RD DEFENDANT

IN CHAMBERS

Mr Kent Gammon instructed by CollieLaw for the Applicant/Claimant

**Ms Faith Hall instructed by the Director of State Proceedings for the 1st and 2nd
Respondents/1st and 2nd Defendants**

**Lord Anthony Gifford Q.C. instructed by Pollard Lee Clarke and Associates for
the 3rd Respondent/3rd Defendant**

Heard: April 13, 20 and 26, 2022

Civil Procedure – Application to have affidavits stand as filed – Affidavits filed in support of an application for leave to apply for judicial review – Whether those affidavits filed at the leave stage can be utilized in the judicial review proceedings – Whether the failure to file a supporting affidavit invalidates the fixed date claim form – Whether the failure to file a supporting affidavit is an irregularity – Whether the irregularity can properly be regularized by the court – Whether the affidavit evidence is relevant to the just disposal of the judicial review proceedings – Civil Procedure Rules, 2002, rules 3.7, 3.9, 8.1(2), 56.3, 56.4(12), 56.9(1), 56.9(2), 56.9(3), 56.11(1) and 26.9

A. NEMBHARD J

INTRODUCTION

[1] By way of a Notice of Application for Extension of Time to File Redacted Affidavit of Arlene Peterkin and for Other Affidavits to Stand as Filed, which was filed on 23 March 2022, the Applicant, Arlene Elmarie Peterkin, on her own behalf and on behalf of thirty-two other residents of Industry Cove, in the parish of Hanover, seeks the following relief: -

- I. An Order granting an extension of time for the Claimant's redacted Affidavit in Support of the Fixed Date Claim Form be filed on or before March 24, 2022;
- II. An Order that the Affidavits of Nallis McNish, Everol English and Stedford Everton Samuels, each filed on 27 August 2018 and that of Peter Wilson-Kelly, which was filed on 19 October 2018, in support of the Claimant's Application for Leave to Apply for Judicial Review, stand as filed;
- III. That the costs of this Application are to be costs in the Claim;
- IV. Such further or other relief as this Honourable Court deems fit.

ISSUES

- [2] The application raises the following issues: -
- i. Whether the affidavits filed in support of the Application for Leave to Apply for Judicial Review ought properly to be permitted to stand as filed; and
 - ii. Whether Ms Peterkin ought properly to be permitted to present that evidence as part of her case in the judicial review proceedings.

BACKGROUND

- [3] The application is made against the background of a decision of the Natural Resources Conservation Authority (“the NRCA”) to grant environmental licences to the National Housing Trust (“the NHT”). These licences permit the NHT to construct and operate a wastewater treatment plant; to discharge the treated effluent therefrom onto the Industry Cove Beach, in the parish of Hanover; as well as for the relaxing of standards for the discharge of sewage effluent. This is in order to serve a housing development to be constructed by the NHT in that area. Ms Peterkin asserts that she is the owner of property situate at Industry Cove, in the parish of Hanover and contends that these decisions will have a direct impact on her property.
- [4] Ms Peterkin maintains that the NRCA granted these licences without requiring the NHT to submit an Environmental Impact Assessment (“EIA”) along with its application for these licences and in contravention of the Natural Resources Conservation Authority Regulations (“the Regulations”).
- [5] By way of a Notice of Application for Leave to Apply for Judicial Review, which was filed on 14 August 2018, Ms Peterkin sought leave to apply for judicial review of these decisions of the NRCA.
- [6] On 16 September 2019, Ms Peterkin was granted leave to apply for judicial review in the following terms: -
- (i) Time enlarged for the Application for Leave for Judicial Review. In all the circumstances, the Applicant is granted leave to apply for Judicial

Review to apply for an Order of Certiorari and Prohibition questioning the decision of the Natural Resources and Conservation Authority (NRCA);

- (ii) The Leave granted shall operate as a stay until Judicial Review is heard;
- (iii) Matter to be treated as urgent and given expeditious treatment pursuant to rule 26.1(2)(c)
- (iv) Notice is to be given to the parties affected; and
- (v) Leave is conditional upon the filing of the Fixed Date Claim Form within fourteen (14) days of this Order.

[7] On 27 September 2019, a Fixed Date Claim Form was filed and is fixed for hearing during the period 9 May 2022 to 12 May 2022, inclusive.

[8] At the Pre-Trial Review Hearing that was fixed for 13 April 2022, the Court made the following Orders: -

- (i) The Pre-Trial Review Hearing is adjourned to Wednesday, April 20, 2022, at 11:00 a.m., for a duration of one (1) hour, before A. Nembhard J;
- (ii) The hearing of the Further Notice of Application to Appoint Expert Witness, which was filed on 23 March 2022, as well as that in respect of paragraph 2 of the Notice of Application for Extension of Time to File Redacted Affidavit of Arlene Peterkin and for Other Affidavits to Stand as Filed, which was filed on 23 March 2022, is adjourned Part Heard to April 20, 2022 at 11:00 a.m.;
- (iii) The time within which the Applicant/Claimant, Arlene Peterkin, is to comply with the Order of Master R. Harris, which was made on 31 March 2022, is hereby varied and extended to 22 April 2022;
- (iv) The Respondents/Defendants are at liberty to file and serve Affidavit(s) in Response to the redacted Affidavit of Arlene Peterkin, filed and

served pursuant to paragraph (iii) of this Order. All such Affidavit(s) are to be filed and served on or before 29 April 2022;

- (v) Costs to be costs in the Applications; and
- (vi) Messrs. Pollard Lee Clarke & Associates are to prepare, file and serve these Orders.

THE LAW

- [9]** There are several rules of the Civil Procedure Rules, 2002 (“the CPR”) that are relevant for present purposes. Part 8 of the CPR treats with the manner in which civil proceedings are to be commenced. It states, inter alia, that, a claimant who wishes to commence proceedings must file a claim form in form 1 or 2 and, except in cases of emergency and one can so certify and, an application has been filed to obtain the permission of the court or the permission of the court has been obtained not to do so, the particulars of claim or an affidavit, providing the details of the claim as required, must also be filed. The rules provide that the proceedings are commenced when the claim is filed,¹ which is when it is received in the registry of the court.² There is no rule that provides a sanction where the claim form is filed and the particulars of claim or the affidavit providing the details of the claim is not filed.
- [10]** The rules also provide that the claim form may be issued (when sealed by the court)³ and served without the particulars of claim or affidavit, as the case may be.⁴
- [11]** Part 56 of the CPR deals with administrative law which includes applications for judicial review. The rules establish that, a person wishing to apply for judicial review must first obtain leave to do so.⁵ The leave, when obtained, is conditional on the applicant making a claim for judicial review within fourteen

¹ See – Rule 8.1(2) of the CPR

² See – Rule 3.7 of the CPR

³ See – Rule 3.9 of the CPR

⁴ This is provided that the matters set out in rules 8.6, 8.7, 8.8, 8.9 and 8.10 of the CPR are included in the claim form and the court has given permission, or the case is one of emergency and the claimant has so certified or applied to the court for permission.

⁵ See – Rule 56.3 of the CPR

(14) days of receipt of the order granting leave.⁶ This condition refers to “making a claim”. The leave as stated is not absolute but conditional and is inchoate unless the claim is made within the fourteen (14) day period prescribed by the CPR.

[12] It is equally well established that an administrative order must be made by way of a fixed date claim form, in form 2, identifying whether the application is for judicial review, relief under the Constitution, a declaration or for some other administrative order and naming it, as the case may be. It must also identify the nature of the relief sought.⁷ A claimant must file with the claim form evidence on affidavit and the affidavit must state the address of the claimant and the defendant and details identifying the nature of the relief sought.⁸

[13] The rules do not state that a claim for judicial review is not made if the affidavit is not filed with the fixed date claim form. The rules do not impose a sanction for the failure to file an affidavit along with the fixed date claim form. What is clear, is that the rules provide that an application for an administrative order is made by a fixed date claim form, in form 2 and that proceedings are commenced when the claim form is filed.

[14] The pronouncements of Phillips JA, in the authority of **Chester Hamilton v Commissioner of Police**,⁹ are instructive. There, the claimant failed to file the affidavit in support of the fixed date claim form. At paragraph [49], Phillips JA had the following to say: -

“[49] ...

(i) (a) ...

(b) ...

(c) *The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for*

⁶ See – Rule 56.4(12) of the CPR

⁷ See – Rule 56.9(1) of the CPR

⁸ See – Rules 56.9(2) and 56.9(3) of the CPR

⁹ [2013] JMCA Civ 35

judicial review does not satisfy the requirements of rule 56.9(2) and (3).

- (ii) *The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refilling [sic] of the affidavit, filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules.”*

SUBMISSIONS

Submissions advanced on behalf of Ms Peterkin

- [15] It was submitted on Ms Peterkin’s behalf that the Affidavits of Messrs. Nallis McNish, Everol English and Stedford Everton Samuels, each filed on 27 August 2018, in support of the Application for Leave to Apply for Judicial Review, have not changed and that the facts set out in each are relevant to the just disposal of the judicial review proceedings. It was further submitted that the Respondents/Defendants are fully cognizant of the facts deponed in each and, as a consequence, those facts will not take anyone by surprise. Ms Peterkin contends that the facts deponed in these affidavits will afford the court additional evidence, which, it is submitted, serves the interests of justice.
- [16] Ms Peterkin also maintains that the evidence of the deponents and that of the proposed expert, Mr Peter Wilson-Kelly, will assist the court in appreciating the evidence with respect to the Town and Country Planning (Negril and Green Island Area) Provisional Development Order, 2013.
- [17] To buttress these submissions, the Court was referred to the Commonwealth Caribbean Text on Civil Procedure by Gilbert Kodilinye and Vanessa Kodilinye. The Court was specifically directed to the dictum of Jones J, in the case of *Relay Roads*, at page 80 as well as the Court of Appeal decision of **Sean Greaves v Calvin Chung**.¹⁰

¹⁰ [2019] JMCA Civ 45

Submissions advanced on behalf of the NRCA and the TCPA

- [18]** For her part, Learned Counsel Ms Faith Hall submitted on behalf of the NRCA and the Town and Country Planning Authority (“the TCPA”), that, an examination of Part 56 of the CPR reveals that there is no specific provision that permits affidavits filed at the leave stage to stand in the claim for judicial review. Ms Hall asserts that the application for leave to apply for judicial review and the claim for judicial review are two (2) separate and distinct proceedings. This, she maintains, is the reason that an applicant is required to file a claim for judicial review within fourteen (14) days of the grant of leave. A failure to do so results in a lapse in the grant of leave to apply for judicial review. This requirement, Ms Hall submits, signals that fresh proceedings are being commenced.
- [19]** In the result, Ms Hall maintains, the affidavits filed at the leave stage should not be permitted to stand in a claim for judicial review. ‘Fresh’ affidavits should be filed after the grant of leave.
- [20]** Finally, Ms Hall submits that leave having been granted on 16 September 2019, it would be contrary to the expeditious and just disposal of the Claim for judicial review to allow the affidavits filed at the leave stage to stand as filed and to permit Ms Peterkin to present that evidence as part of her case, for the purposes of the judicial review proceedings. This, Ms Hall asserts, would severely prejudice both the NRCA and the TCPA, as these affidavits were not served in the judicial review proceedings and the NRCA and the TCPA would not have had an opportunity to respond to the averments contained in them.

Submissions advanced on behalf of the NHT

- [21]** Lord Anthony Gifford Q.C. submitted that rule 56.11(1) of the CPR provides that, on the grant of leave to apply for judicial review, it is the fixed date claim form and the supporting affidavit(s) that originate the judicial review proceedings. Lord Gifford contends that the court has regularly ruled that ‘fresh evidence’ must be filed in the substantive application for judicial review, after which evidence is filed ‘in answer’, as prescribed by rule 56.12 of the CPR.

- [22] Lord Gifford submitted further that there are paragraphs contained in all three (3) affidavits that have been struck out by the court and that, when the remaining paragraphs are examined, there is nothing contained in the three (3) affidavits that is relevant to the just disposal of the claim for judicial review.
- [23] Finally, Lord Gifford asserts that the application to have the affidavits stand as filed is being made at too late a stage in the proceedings and that, as a consequence, the application should be refused.

ANALYSIS

Whether the affidavits filed at the leave stage ought properly to be permitted to stand as filed

- [24] It is clear from a careful examination of the CPR that the rules do not contain a specific provision that allows for an affidavit filed as part of the application for leave to apply for judicial review, without more, to form part of the affidavit evidence in respect of the hearing of the claim for judicial review.
- [25] It is equally clear that the application for leave to apply for judicial review and the substantive claim for judicial review are separate and distinct processes. Leave to apply for judicial review is conditional on a successful applicant filing a fixed date claim form and supporting affidavit(s) within fourteen (14) days of the grant of leave.¹¹
- [26] The Court adopts the pronouncements of Phillips JA in **Chester Hamilton v Commissioner of Police**. The failure to file the affidavit required by rule 56.9(2) of the CPR with the fixed date claim form does not invalidate the claim but is an irregularity. The affidavits filed in support of the application to obtain leave to apply for judicial review do not satisfy the requirements of rules 56.9(2) and (3) of the CPR. The court is nonetheless empowered, by virtue of rule 26.9 of the CPR, to 'put matters right', by extending the time to file the required affidavit, and/or directing the re-filing of the affidavit which was filed in support of the application for leave to apply for judicial review.

¹¹ See – **Andrew Willis v Commissioner Taxpayer Audit and Assessment Department** [App. No. 190/2009], judgment delivered on 19 January 2010

- [27] In the present instance, the Court observes that a supporting affidavit of Ms Peterkin was in fact filed along with the Fixed Date Claim Form, which was filed on 27 September 2019. What she seeks, by virtue of her application, is an Order permitting the Affidavits of Messrs. Nallis McNish, Everol English and Stedford Everton Samuels, each filed on 27 August 2018, to be permitted to stand as filed and to form part of her evidence for the purposes of the Claim for judicial review.
- [28] The issue for the Court's determination is then whether that affidavit evidence is relevant to and whether it is reasonably required for the just disposal of the judicial review proceedings. To that end, the Court has examined the affidavit evidence on which Ms Peterkin is proposing to rely. It is submitted on behalf of Ms Peterkin that the primary purpose of the affidavit evidence of Messrs. McNish, English and Samuels is to establish that there was no effort at consultation on the part of the authorities. To that end, the Court would have no difficulty in granting the Order sought in respect of those affidavits. Lord Gifford has indicated that he has examined the affidavit evidence and that he does not intend to file any affidavits in response to it nor does he require the attendance of these deponents for the purposes of cross-examination.
- [29] Ms Hall has indicated that, out of an abundance of caution, she would wish an Order permitting the NRCA as well as the TCPA to file affidavit evidence in response. Again, the Court has no difficulty in granting an Order to that effect.
- [30] In the result, the Court will make an Order permitting the affidavit evidence of Messrs. McNish, English and Samuels to stand as filed and permitting Ms Peterkin to have that affidavit evidence presented on her behalf for the purposes of the hearing of the Claim for judicial review.

DISPOSITION

- [31] It is hereby ordered as follows: -
- (1) The Applicant/Claimant, Arlene Elmarie Peterkin, is permitted to have the Affidavits of Nallis McNish, Everol English and Stedford Everton Samuels, each filed on 27 August 2018, stand as filed and is permitted to have that

evidence presented on her behalf for the purposes of the hearing of the Claim for Judicial Review;

- (2) The application in respect of the Affidavit of Peter Wilson-Kelly, which was filed on 19 October 2018, is refused;
- (3) The costs of the Application to have other Affidavits stand as filed, which was filed on 23 March 2022, are to be costs in the Claim;
- (4) Messrs. CollieLaw are to prepare, file and serve these Orders.