

Public Law Side

IN THE MATTER of an application
by Byron Bullard (T/A B&B Horseback riding
for leave to Apply for Judicial Review (Order 53, r.3)

BETWEEN:

BYRON BULLARD
(T/A B & B HORSEBACK RIDING)
Applicant

AND

THE MINISTER RESPONSIBLE FOR LANDS AND SURVEYS
Respondent

Before: The Honorable Madam Carla Card-Stubbs

Appearances: Geoffrey Farquharson - Applicant
Kenria Smith, Office of the Attorney General - Respondent

Hearing Date: February 19, 2024

Application for leave to apply for Judicial Review – Whether Applicant must provide particulars of a decision at leave stage – Part 54, The Supreme Court Civil Procedure Rules, 2022, as amended ('CPR')

Held: An Applicant must allege a decision and provide particulars/evidence of the decision on an application for leave to apply for judicial review. The Applicant must do so in order to enable the court to determine whether the decision is justiciable, whether the Applicant has standing, whether the Applicant has an arguable case with a reasonable prospect of success and whether the application for leave to apply for judicial review is made in a timely manner.

RULING

Card-Stubbs, J:

INTRODUCTION

1. This is the Claimant's application for leave to apply for judicial review relating to what is said to be threatened eviction from property which the Claimant claims to own by virtue of possession.

2. On February 19, 2024, this Court heard the application and refused leave, with reasons to follow. This ruling sets out the decision as well as the reasons for the decision.

BACKGROUND

3. On February 10, 2023 the Claimant filed an Application for leave to apply for judicial review. The matter was not listed for hearing until after the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') were brought into force on March 1, 2023. Therefore, the matter fell to be determined under the CPR.
4. In the filed Application, the decision identified for review is described as "Proposed eviction of the Applicant And destruction of his stables".
5. There are some 13 reliefs sought in that application. They are:

RELIEF SOUGHT

1. A declaration that the Applicant is the absolute owner in fee simple in possession of the land the subject of this application.
2. A declaration that the rights guaranteed to the Applicant under Article 27 of The Constitution of The Bahamas have been infringed by the Respondent.
3. A declaration that the Respondent has acted maliciously, corruptly, unlawfully, high handedly and oppressively.
4. A declaration that the Respondent has acted in contravention of the rules of natural justice and in breach of the Applicant's constitutional right to due process.
5. A declaration that the Respondent has created a nuisance upon the Applicant's property.
6. A declaration that the Respondent has unlawfully harassed and continues to unlawfully harass the Applicant.
7. Mandamus to compel the Respondent to remove from the Applicant's property any bar, impediment, obstruction, restriction, order of fiat of and kind whatsoever affecting the Applicant's said property.
8. Mandamus to compel the Respondent to execute the necessary documents confirming the Applicant's ownership of the said property.
9. Certiorari to quash the decision to interfere with the Applicants free and unrestricted use of the said property.
10. An Injunction to restrain the Respondent from interfering with the Applicant's free and unfettered use of the said property.
11. An order that all further proceedings against the Applicant be stayed pending the outcome of the application for judicial review.
12. Costs.
13. Damages including damages for breach of constitutional rights, and Aggravated damages.

6. The remainder of the application reads:

GROUND ON WHICH RELIEF IS SOUGHT

THE FACTS

1. The Applicant is the most recent proprietor of a horse-riding business which has occupied the land in question for more than 60 years.
2. The Applicant himself has operated this business since the late 1980's.
3. The business has operated from the same location since its inception in the 1950's.
4. By operation of law, the Applicant is the fee simple owner in possession of the land in question the Respondent's rights thereto (if such right ever existed) having been extinguished for more than a generation.

THE LAW

1. Title to land can be acquired by appropriating a piece of land of another and remaining in undisturbed possession of it for the period prescribed by statute without acknowledging the title of the true owner.
2. As against the Respondent, the statutory period is 30 years.

Submissions

The Applicant submits that:

1. The Applicant has himself been in continuous undisturbed possession for more than 36 years, and as the proprietor of a business which has been in continuous operation for more than sixty years.
 2. He is by operation of the law the fee simple owner in possession of the land.
 3. By operation of the Limitation Act, the Respondent is barred from setting up a claim to the land.
 4. Accordingly, it is humbly submitted that the Applicant is entitled to the relief prayed.
7. The application is supported by the affidavit of the Applicant. The Applicant is extensive in his averments in giving the history of the property and how he came to be in possession of same. The affidavit relays an antagonistic relationship with a hotel occupying adjacent land, and allegations are made of threats of eviction by the Respondent, one such threat issued by way of a letter.

SUBMISSIONS OF THE PARTIES

8. The submissions of the parties were made orally.
9. From a review of the documents before the Court, it was unclear what decision was made by whom and when. What was also unclear was the nature of the decision. The Court invited Counsel for the Applicant to clarify the matter and make submissions on this point.

10. Much of the submissions of Counsel related to the claim of the Applicant that he was entitled to possession of the land and to a declaration for ownership. As it relates to the decision submitted for review, Counsel for the Applicant indicated that it was 'the Junior Minister' who had written a letter and that the letter would be exhibited if leave were granted. Counsel for the Applicant submitted that while the letter would be produced to the court in the substantial proceedings, it was not essential for the leave proceedings. Counsel for the Applicant submitted that he merely needed to satisfy the court that there is an arguable case and that the applicant has standing. Counsel for the Applicant also argued that the Respondent ought to be able to enquire whether a letter was written and ought to be able to locate and find the relevant letter although he did note that personnel from the Ministry indicated that they were unaware of the letter
11. Counsel for the Respondent objected to leave being granted. Counsel for the Respondent submitted that the matter appears to be a claim in land law and that judicial review proceedings were not the appropriate procedure to determine who owns the land. Counsel for the Respondent submitted that the Applicant has not shown that a decision was made. She questioned whether a decision was in fact made, who made the decision and when it was made. She submitted that if a decision had been made, then the Applicant must show compliance with Part 54, Rule 54.4 CPR which provides that application for leave must be made promptly. Counsel submitted that, from her perusal of the affidavit and relief sought in the application, the matter appears to be a case to determine ownership of land and that the Applicant ought to be left to his alternative remedy. Counsel cited the case of *Re Bertram Bain* in support of this last point. I understood that to be a reference to the case of *Bertram Bain v The Commissioner of Police, 2017/PUB/jrv/00023*.
12. In response, Counsel for the Applicant advised that there exists a letter dated December 29, 2022 which had not been sent directly to the Applicant nor had it been delivered directly to his client. Counsel advised that the Applicant received the letter in February 2023 but that the Applicant had notice of the letter before that. Counsel also indicated that he could not say when the decision was made but that the letter would show when a decision was communicated.
13. Counsel for the Applicant reiterated that the only considerations for the court at the leave stage were (1) for the Applicant to establish an arguable case which merited detailed examination at a substantive hearing and (2) for the Applicant to show that the Applicant has standing. Counsel for the Applicant submitted that on the principle of *Wednesbury* reasonableness, the test is whether the Applicant has an arguable case. I understood that to be a reference to the principles set out in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation, CA [1948] 1 KB 223* Counsel also submitted that whether the application was brought promptly was a matter for consideration at the substantive hearing and not at the application for leave stage.

LAW AND ANALYSIS

JURISDICTION FOR JUDICIAL REVIEW

14. Part 54 of the Supreme Court Civil Procedure Rules, 2022, as amended ('CPR') sets out the procedure for hearings by way of Judicial Review. Rule 54.1 identifies those cases fit for judicial review and Rule 54.3 sets out the application for leave procedure. That rule provides in part, as far as is relevant here:

54.3 Grant of leave to apply for judicial review.

(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave shall be made without notice to a judge by filing in the Registry —

(a) a notice in Form JR1 containing a statement of —

(i) the name and description of the applicant;

(ii) the relief sought and the grounds upon which it is sought;

(iii) the name and address of the applicant's attorney, if any;

(iv) the applicant's address for service; and

(b) an affidavit which verifies the facts relied on.

...

(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

15. The application for leave must show that the application concerns a matter appropriate for judicial review as provided by Rule 54.1.

16. It is helpful in this instance to reproduce a portion of the guidance notes to Part 54.1 as appear in the Supreme Court Civil Procedure Rules, 2022, Practice Guide January 2024. The first 2 paragraphs read:

Judicial review is concerned "*with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct.*": *Kemper Reinsurance Co. v Minister of Finance [2000] 1 A.C. 1 at 14.*

Judicial Review is the process by which the Court exercises a "*supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties.*": *Phillippa Michelle Finlayson v The Bahamas Pharmacy Council [2019] 1 BHS J. No. 63 at 130.*

17. Part 54, Rule 54.4 provides:

54.4 Delay in applying for relief.

(1) An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

18. In judicial review proceedings, the court is being asked to exercise its supervisory jurisdiction over a public body or decision-maker. This Court has to determine whether leave is to be granted. The leave process is a filtering exercise that serves to prevent inappropriate cases or applicants without a sufficient interest from proceeding with challenges that have public law implications.
19. While the threshold for leave to apply for judicial review is not high, the application for leave is not a perfunctory exercise as Counsel for the Applicant would suggest. Counsel for the Applicant correctly describes the threshold as “arguability”. In this case, “arguability” means whether there is an arguable ground for judicial review which has a realistic prospect of success.
20. The test for leave was articulated by the Privy Council in *Antoine v Sharma* [2007] 1 WLR 780. The judgments of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe at p. 787 record:

“The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, Ex p Hughes* (1992) 5 Admin LR 623, 628 and *Fordham, Judicial Review Handbook* 4th ed (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. ...

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to “justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”: *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 733.”

21. It is clear from Part 54, Rule 54.4 that the timeliness of the application is a factor to be taken into account at the application for leave stage. This was confirmed by the Privy Council in *Antoine v Sharma, supra*.
22. The Applicant must show an arguable case having a realistic prospect of success. In the matter before me, this includes showing that a decision-maker susceptible to judicial review has come to a decision in a manner not allowed in law and that the decision has adversely affected, or is likely to adversely affect, the applicant.

23. The Applicant must also show that he is not subject to a discretionary bar such as delay or an alternative remedy.
24. In this case, the Applicant claims to have a legitimate grievance about something gone amiss, or under threat of going amiss. However, what is not before this Court is the decision complained of.
25. The Notice of Application articulates the decision as “Proposed eviction of the Applicant And destruction of his stables.” Nowhere in the relief sought, or in the statement of facts in the grounds, is there any indication of what the decision is and when it was made or, indeed, who made it.
26. The affidavit does not itself provide any necessary details of the decision taken. The Affiant avers, in part, that
- 44. But recently the ownership of the property has been taken over by new operators
 - 45. They recently built cottages remote from the hotel on the beach next to my operation.
 - 46. They then insisted that I must vacate my business, or they would demolish my stables and seize my land.
 - ...
 - 49. And I was contacted by the Junior Minister in the Prime Minister’s Office...
 - 50. I advised the Junior Minister that the Hotel and its management and I were in negotiations over their proposed purchase of the subject land....
 - 53. ... the Hotel and its management renewed their threats to demolish my buildings and seize my land.
 - 54. ...
 - 55. Accordingly, I issued a writ (CLE/gen/1789) against the Hotel.
 - 57. Whereupon I received a letter from the Respondents [sic] purporting to step into the shoes of the Hotel and its management in order to attempt to seize my land and destroy my buildings ...

The Affiant makes several other allegations concluding with the allegation of “high handed and oppressive actions [sic] of the Respondent” at paragraph 60 before continuing at paragraph 61:

61. “Accordingly I am seeking Judicial Review of the actions of the Respondent and an injunction restraining him from interfering with my land, buildings, or any right or any access or egress thereto pending the resolution of this matter.”

27. Counsel for the Applicant says that he has a letter but that letter has not been produced to this Court by way of evidence and the contents have not been ascertained to determine whether there is in fact a justiciable decision by a decision-maker subject to judicial review or that the decision affects the interests of the Applicant.

28. It seems to me that if this Court is being asked to give the relief sought i.e. leave to review the decision, then the decision to be reviewed has to be identified and particularized. To my mind, the identification and specification of the decision at the leave for application stage is necessary for the following reasons:

1. To ground a review. In this instance, the Applicant is challenging the conduct of a public official and this court is being asked to ensure that a certain course of action (namely eviction) does not take place. There is no evidence before me that a decision to evict the Applicant was made.

2. To identify the decision-maker. A court, on deciding whether leave ought to be granted, must be able to determine whether that decision-maker (and the decision or the decision-making process) is susceptible to judicial review and the remedies sought.

3. To assess whether the proper parties are before the court. In considering the decision, a court can assess who the proper parties are and whether the applicant has locus standi or whether the applicant has sufficiency of interest. Generally, this means that the Applicant must show that he is/will be/is likely to be adversely affected by the decision under challenge.

4. Timeliness of the application. The particulars of the decision will give the date that the decision was made and/or communicated to the Applicant. That information is necessary for a court to determine whether the application for leave is timely or whether there is a delay such that would cause a court not to exercise its discretion in favour of the grant of leave.

29. It is clear to me that the decision is not needed merely at the substantial hearing as submitted by Counsel for the Applicant. It seems to me that an applicant cannot demonstrate an arguable case or standing or "sufficient interest in the matter to which the application relates" in an instance such as this unless he can show that some decision was made and that his interests or rights have been infringed, or are under threat of being infringed, by virtue of the decision made.

30. If judicial review is concerned "with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct" as set out in *Kemper Reinsurance Co. v Minister of Finance*, supra, then the decision which is to be subject of such examination ought to be before the court at the application for leave stage.

31. I also note that the Applicant is asserting a claim to the possession of land and has filed suit elsewhere in that regard. Indeed, the first of the remedies sought in the Notice of Application is declaration of ownership of the land. It seems to me that if this is a title issue, then judicial review is inappropriate in the first instance. The Applicant is said to be taking steps to have ownership of the property addressed.

If that is so, and if there is an alternative remedy, then that remedy ought to be pursued. Judicial review is said to be a remedy of last resort. If indeed there is a threatened trespass, then that matter ought to be pursued by the Applicant for a remedy in private law. If judicial review is to be constituted, it may well be that this application is premature.

CONCLUSION

32. The court's supervisory power is being invoked. The supervisory power is invoked to review a decision-making process. This requires a basic element which is the identification of a decision-maker and an identification of the decision complained of. This is the starting point.

33. I find that in the absence of evidence of a decision made by a body subject to judicial review proceedings and in the absence of such a decision affecting the interest of the Applicant, that the Applicant cannot demonstrate that there is a case appropriate for judicial review. In this instance, the Applicant has not demonstrated on the material before me that he has an arguable case with a realistic prospect of success.

34. In the circumstances the application for leave is refused.

COSTS

35. This court makes no costs order.

ORDER

36. The order and directions of this Court are as follows.

1. Application for leave to apply for judicial review is refused.
2. No order as to costs.

Dated this 8th day of March, 2024

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs, J.', with a stylized flourish at the end.

Carla D. Card-Stubbs, J