In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2024: No. 6

B E T W E E N:

JEFFREY STIRLING

Appellant

and

MINISTER OF HOME AFFAIRS

Respondent

RULING

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Mr Peter Sanderson of Beesmont Limited, for the Appellant** **Ms Lauren Sadler-Best of the Attorney-General's Chambers, for the Respondent**
Date of Hearing:	16 April 2024
Date Draft Circulated:	28 May 2024
Date of Judgment:	30 May 2024

Section 61 (1) of the Development and Planning Act 1974; Rule 3 (3) of the Development and Planning Rules 2018; Leave to Appeal Out of Time; Decision of Planning Board; Good Reasons for Delay; Prejudice to Either Party

RULING of Acting Justice, Alexandra Wheatley

Introduction

1. This is the intended appellant's (hereinafter referred to as **Mr Stirling**) application seeking leave to extend the time within which to file an appeal filed on 2 February 2024 (**the Out of Time Application**) against a decision of the Minister of Home Affairs (who was then the Minister responsible for planning matters) (**the Minister**). This Out of Time Application is being made pursuant to Section 61 (1) of the Development and Planning Act 1974 (**the Act**) and Rule 3 (3) of the Development and Planning Rules 2018 (**the Rules**).

2. The Minister's decision was sent to Mr Stirling on 21 December 2023 (**the Decision**) confirming his refusal to grant planning permission in respect of a proposed development at Lot 8, Hallett Crescent in Pembroke Parish (**the Lot**). Therefore, the deadline for filing an appeal against the Decision expired on 11 January 2024 which means the appeal was filed three weeks out of time.

3. It is important to note that the same matter was previously before the Supreme Court in 2022 in relation to Mr Stirling's appeal against the Minister's decision communicated to him on 23 August 2019 refusing planning permission for the Lot (**the Initial Refusal**). Mr Stirling's application for planning permission in respect of the lot was made in 2018 (**the Planning Application**). The appeal was filed based on several grounds and on 29 June 2022 Justice Subair Williams found that the Minister had incorrectly defined the use of the term "lot size" and remitted the planning application back to the Minister for reconsideration (**Order to Reconsider**). It is that reconsideration which was given by the Minister and communicated to Mr Stirling on 21 December 2024. I will address this previous appeal below as it was only discovered during the hearing that there was a previous decision of the Supreme Court relating to the Lot.

The Appellant's Position

4. Mr Sanderson for the Respondent submitted that the reasons for the delay in filing a notice of appeal as well as this Leave Application are set out in Mr. Stirling's affidavit sworn on 2 February 2024 (**Mr Stirling's Affidavit**).

5. Mr Stirling's reasons can be summarized as follows:

    i. The decision letter was received just before Christmas.

    ii. The decision letter made no reference to a right of appeal or a timeframe within which this must be done.

iii. He wished for his brother who is a lawyer to assist him, but he was overseas for Christmas any unable to assist upon his return.

iv. He was very busy with the Christmas break and with assisting his mother with travel plans for an operation.

v. He contacted Mr Sanderson on 11 January 2024 and was advised by Mr Sanderson that that day was in fact the last day to file the appeal and he would not be able to "*assess merits, identify grounds of appeal, draft the requisite documents and file before the end of that day*".

vi. Mr Sanderson reverted to Mr Stirling after reviewing the decision on 17 January 2024 (with Mr Sanderson being out on sick leave for 1 day between 11 and 17 January 2024).

vii. He was required to pay a retainer to Beesmont and due to "*some banking issues over the transfer as well*" the retainer was not received until 26 January 2024.

6. During the hearing Mr Sanderson also stated that Mr Stirling was on the "*higher end of the spectrum of being disorganized*" as being an additional consideration. Mr Sanderson asserted that during the period between the decision being made and the filing of the Out of Time Application, Mr Stirling had simply been making efforts to obtain counsel of his choice.

7. It was further submitted by Mr Sanderson that the legal test the court must apply in determining this application is a balancing act of weighing the prejudice to each party against the other. He asserted that there is extremely low prejudice to the Respondent or may be even considered to be non-existent. On the other hand, Mr Sanderson averred that the prejudice to Mr Stirling would be exponential as he had considerable investment in the land which the planning application related to and is of considerable importance to him. Notably, Mr Sanderson did not provide any case law to support his position regarding the correct legal test to be applied.

8. Mr Sanderson also placed great emphasis on the fact that eighteen months had passed since the making of the Order to Reconsider and the Decision Letter referring to it as an "*extensive delay*". He submitted that it simply could not be right that the Minister should be allowed to take such an unreasonable period to reconsider the Planning Application and then for Mr Stirling to be penalized for just being three weeks out of time in filing his appeal. It was, however, conceded during the hearing that neither the Act nor the Rules provide a timeline for which decisions and/or reconsiderations must be completed by.

9. As the Decision referred to "*the appeal*" in its content, I requested that Mr Sanderson clarify this. It was only at this time that Mr Sanderson advised me of the previous action in the Supreme Court in relation to the Initial Refusal as well as the Order to Reconsider.

10. Given this discovery, I queried whether the Initial Refusal was filed within the statutory time limit where Mr Sanderson also represented Mr Stirling. I was able to review the Judgment of Justice Subair Williams during the hearing as it was published online (**the Judgment**). Regrettably, the Judgment did not make any reference to the appeal being out of time and the Court file had been archived so I was unable to refer to it. Mr Sanderson also confirmed that he had no paperwork from the previous appeal but stated that he does recall that it was also filed slightly out of time, i.e. by two weeks.

11. However, Ms Sadler-Best was able to locate an affidavit of Mr Stirling which was filed in those proceedings wherein it was stated that it "*was in support of his application to file an appeal out of time*". Again, Mr Sanderson accepted time was an issue and the parties accepted that there had been no hearing in relation to obtaining leave, so the only logical conclusion is that this point was agreed between Counsel at that time.

The Respondent's Position

12. Ms Sadler-Best attacked the evidence produced in Mr Stirling's Affidavit by asserting that it provided weak reasons based on bare assertions and as such, urged that this relaxed approach should not be adopted by the court. In particular, Ms Sadler-Best submitted that none of the evidence provided any definitive timelines in the chronology of Mr Stirling's Affidavit. For example, there is no mention of how long his brother was overseas, when he returned and when Mr Stirling found out that his brother was not able to assist him. Likewise, Mr Stirling's statement at paragraph 4 that "*I was also very busy during this period, both with the Christmas break and with helping my mother to plan to travel for an operation*", did not expand as to why he was busy simply due to it being Christmas and what assistance he provided his mother as well as there being no evidence as to when the medical procedure was required.

13. The case of *In the Matter of Waxoyl Ltd, Civil Appeal No. 29 of 1993*, Ms Sadler-Best cited a passage within *Waxoyl* of the Court of Appeal case of *Smith v Secretary of State for the Environment* (1987), The Times Newspaper, July 6:

> "*It is not an explanation of delay, sufficient to justify the Court exercising its discretion to extend time…for a party merely to set out the chronology of events which had resulted in delay without giving any reasons which would tend to excuse it.*"

Waxoyl has subsequently been applied in several cases.

14. The Court of Appeal decision of *Sampson v Anderson and others* [2017] CA BDA 14 Civ is a case where the extension of time to file appeal was granted. However, in *Sampson* the court emphasized that this was an exceptional case. Justice of Appeal Clarke at paragraph 31 stated as follows:

> "*31. First, this is an exceptional case where a combination of factors has led to the result. Time limits are there to be observed. It is not acceptable to delay filing applications because of the shock of losing, the possibility of settlement, and inertia, or the engagements of counsel...*" [Emphasis added]

15. Ms Sadler-Best also relied on the case of *De Silva (t/a Bermuda Quarry Supplies)* v *Minister of Environment, Planning and Infrastructure* [2012] SC (Bda) 45 App which specifically concerned an application seeking leave to appeal out of time in accordance with the Act and the Rules. Ms Sadler-Best submitted that *De Silva* establishes the legal principle that it is only when the court accepts that the reason for delay in filing an appeal is a good reason, that the court would then look at any prejudice to the parties by granting or denying the extension. Ms Sadler-Best submitted that the first hurdle of showing good reasons for the delay is not met, so the Court need not go further.

16. It was further highlighted by Ms Sadler-Best that even if it were accepted that there were good reasons for the delay, Mr Stirling's Affidavit did not speak at all to the assertion that he would suffer exceptional prejudice by not being granted the Out of Time Application, nor did he provide any evidence regarding the merits of the appeal and its prospects of success. Ms Sadler-Best said the Court should take note that in addition to there being no evidence, there were also no submissions made in relation to the merits of the appeal or its prospects of success. In any event, Ms Sadler-Best submitted that even if Mr Stirling has an arguable case and this matter is of great importance to him (which is not accepted as there was also a lack of evidence to support this), *De Silva* clearly set out at paragraph 12 that this is not enough:

> "*12. The mere fact that the appeal is arguable and extremely important to the appellant as it involves an attempt to ensure the continuation of a business in a location where is has operated for a number of years cannot justify the careless way in which the appellant responded to actual and constructive notice of the Minister's rejection of his planning appeal...*" [Emphasis added]

17. Ms Sadler-Best also noted that there was no provision in the Act or the Rules which requires a decision to be made within specific timeframe; however, she emphasized that there is a statutory timeline for an appeal to be filed in accordance with the Rules. Moreover, she

submitted that under other statutes there is express statutory provision to advise the applicant of his or her right of appeal as well as the timeframe in which this must be done. Ms Sadler-Best noted that there is no such requirement in the Act or the Rules.

18. It was also emphasized by Ms Sadler-Best that Mr Stirling had already filed an appeal to the Supreme Court regarding the Initial Refusal wherein he swore affidavit evidence with the Court which was stated as being "*in support of his application to lodge his appeal out of time*". Ms Sadler-Best noted that in paragraph 2 of Mr Stirling's Affidavit it is alluded that he was unaware of a timeline for filing an appeal. Therefore, it was submitted that there can be no doubt that Mr Stirling was aware of the twenty-one day limit.

19. Moreover, Ms Sadler-Best relied on the Court of Appeal case of *Rayclan Limited* v *Trott* [2003] BDA LR 42 which involved an appeal against an order granting leave to appeal out of time. In *Rayclan*, the court considered that such a reason is one the law does not recognize "*since everyone is presumed to know the law*". Therefore, Ms Sadler-best emphasized that in accordance with *Rayclan,* Mr Stirling cannot rely on his purported lack of knowledge of the time limit.

20. In Justice of Appeal Worrell's decision in *Rayclan* he cited the following remarks from *Ratnam* v *Cumarasamy and Another UNK* [1964] 3 ALL ER 933 as providing useful guidelines for determining these matters at paragraph 10:

> "*10. ...The rules of the court must, prima facie, be obeyed and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation.*" [Emphasis added]

Findings

21. I will not make any findings as to whether there was an "*extensive delay*" by the Minister to reconsider the Planning Application as there has been no evidence presented for such a determination to be made. Had Mr Sanderson filed a skeleton argument, Ms Sadler-Best would have had an opportunity to obtain evidence from the Minister or the Department of Planning regarding this. Additionally, there was no evidence in Mr Stirling's Affidavit speaking to the issue of a delayed decision. Nonetheless, there is a definitive statutory timeframe within which to appeal, and there is no such limit in respect of rendering decision. Therefore, I do not accept that the purported "*extensive delay*" assists Mr Stirling's position.

22. I do not accept Mr Sanderson's submissions regarding the legal test(s) to be applied. The authorities provided by Ms Sadler-Best are the cases which clearly the legal principles that I must apply to the facts of this case. They are summarized as follows:

(i) ***Sampson, Waxoyl* and *De Silva***

The Court must first look at whether there is a good reason for the delay, only after being satisfied of this the Court must consider any prejudice to the parties. Additionally, whilst the Court may consider that there is an arguable case, and that the matter is of great importance to the appellant, it must first be convinced there is good reason for the delay[1].

The reasons provided in Mr Stirling's Affidavit as set out in paragraphs 5 and 6 above, merely provides a vague and unhelpful chronology of what occurred once he received the Decision. As confirmed in *Waxoyl*, a chronology of events is insufficient if no reasons are provided to excuse the delay. I find that there are entirely insufficient reasons provided to clear the first hurdle of being "*good reason*" for the delay. Notably, *Sampson* confirms that the engagement of counsel as a reason for the delay is not acceptable.

Moreover, had I accepted there was "*good reason*", Mr Stirling failed to provide any evidence to support the position that the merits of appeal and its prospects of success. Mr Sanderson made no submissions on this point. All Mr Stirling put forward is a bare assertion that the Minister's decision was wrong in the application of policy and standards.

As it relates to the importance of the appeal to Mr Stirling, Mr Sanderson's submissions were limited in stating there would be no prejudice to the Respondent compared to that of Mr Stirling as he had considerable investment in the Lot and is of considerable importance to him. Mr Stirling did not provide any evidence of how this appeal is of great importance to him which would have addressed, *inter alia*, his "*considerable investment*".

Consequently, I cannot agree that based on the evidence of Mr Stirling and Mr Sanderson's submissions, that this is a matter of great importance to Mr Stirling or that there is a reasonable prospect of success.

[1] *De Silva*

In relation to the point raised in Mr Sanderson's responding submissions that *De Silva* can be distinguished as the delay in that case was five months in comparison to this matter where Mr Stirling was three weeks out of time, this is inaccurate. Paragraph 2 of *De Silva* confirms there was a three-month delay:

> "*Although rule 2(2) of the [Rules] requires a notice of appeal to be given within 21 days, the appeal to the Minister was lodged almost three months later on June 22nd, 2011.*" [Emphasis added]

Regardless, I do not accept that this comparison with *De Silva* has any bearing on the legal principles set out therein which would make them inapplicable to this case. This does not take Mr Sanderson's position any farther.

(ii) ***Rayclan***

Ignorance of the law cannot be relied on to be considered a good reason for delay. Whilst Mr Stirling suggested that he was unaware of the twenty-one day period to file his appeal, I find this difficult to accept when this matter had been before the Court previously. Moreover, Mr Stirling provided affidavit evidence at that time regarding his reasons for filing outside of the twenty-one day period. Therefore, I reject that Mr Stirling was unaware of the time limit to file his appeal. Nevertheless, had I accepted that Mr Stirling had not known, in accordance with *Rayclan*, his lack of knowledge is not a good enough reason.

Conclusion

23. It appears to me that there has been a lackadaisical approach to adhere to the statutory time frames in this matter (both now and in the previous application). The sparse evidence provided as well as not producing any authorities to the Court gave me the impression this application was not taken seriously as there may be some misconceived expectation that such an application is simply a rubber-stamping exercise for the Court. I reiterate the findings in the Court of Appeal case of *Sampson* that whilst leave to file out of time was granted, Justice of Appeal Clarke ensure that it was known there were exceptional circumstances in that case which lead to its decision, but ultimately stressed that "*[t]ime limits are there to be observed*".

24. Consequential to the findings made in paragraphs 21 and 22 above, I do not accept that Mr Stirling has met the threshold to be an exceptional case which would justify exercising my

discretion to extend the time within which to appeal. The Out of Time Application is therefore dismissed.

25. During the hearing Mr Sanderson conceded that whatever the decision, due to the nature of this application, Mr Stirling would be required to pay the costs of the Respondent for the Out of Time Application and I order as such. Costs are awarded on a standard basis and shall be taxed if not agreed.

DATED: 30 May 2024

ALEXANDRA WHEATLEY

ACTING PUISNE JUDGE OF THE SUPREME COURT