IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Judicial Review No. 6 of 2012

THE STATE **v** **Director, Department of Town & Country Planning**, 4 Gladstone Road Government Buildings, Suva (Government Office for Western Division, Lautoka).

1st Respondent

The Secretary, Nadroga Rural Local Authority, Health Office, Sigatoka.

2nd Respondent

AND **Craig & Evette De La Mare** of the Hotel Site, Lot 14, Maui Bay Estate Baravi, Nadroga, Fiji.

Applicants

Appearances	:	Applicants in Person
	:	Ms. Chand, Office of the Attorney-General, Lautoka, for the Respondents
Date of Ruling	:	26 March 2013

R U L I N G

(my jurisdiction was extended by the Honourable Chief Justice pursuant to Order 59 Rule 2(l) to hear all matters coming to the High Court within the powers of a puisne judge up to 31 October 2013).

BACKGROUND

1. The Maui Bay Development Estate (**"Maui Bay estate"**) is a large up market, low key, mixed residential "A" type and Special Use (Villa) subdivision, with ancillary services and amenities. The estate is located along the Coral Coast Tourism Zone in Nadroga (described as bal CT 2872 Maunivunise, Nadroga Lot 114). Its planning scheme details the standards and/or criteria which every proposed development must comply with to create and maintain the desired *up-market residential/special use villa* character of the scheme. The scheme's planning regulations are set out in the Specific Development Guidelines for the Maui Bay Estate Development Precinct (**"SDGMB"**). This document was compiled by the Director of Town & Country Planning (**"DTCP"**). The SDGMB sets out the way the Lots in the scheme are to be used and developed and classifies areas for land use. Its provisions are designed to coordinate infrastructure and development and to maintain the character of the scheme. Ultimately, the aim is to create and maintain a lifestyle for the residents. Hence, amongst other things, the SDGMB would:

   (i) prescribe the proper ratio of facilities to accommodation and the size of the residential lots (to range from the minimum 1000 square meters to over 4000 square metres).
   (ii) seek to maximize harmony[1] between the estate's natural setting and the human facilities[2].

[1] (e.g. any proposed further subdivision of any existing allotment will strictly take into consideration the physical features (topography, foreshore areas), sufficient building area and merit issues of the subdivision. Further subdivision may not be entertained if it does not provide proper building areas. The buildings should depict cottage/villa/bure designs that blend in well with the rural development setting).

[2] The provisions of the SDGM were put in place to protect among other things, the natural resources, including the water table, the reef, natural resources, other lot owners and the hotel site. This development as it stands with no reticulated sewage disposal and no reticulated water supply, can not sustain this type of high density development.

(iii) forbid the construction of budget/dormitory and backpacker type accommodation.
(iv) forbid any Villa unit from operating any licensed restaurant or bar on their premises.
(v) reserve the foreshore and creek for public access (e.g. the layout of building for the foreshore lots shall ensure that the foreshore is kept clear at all times.
(vi) the layout of buildings on the landward side shall be in keeping and sympathetic with the topography[3].

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

2. Before me is an application for leave to issue Judicial Proceedings under Order 53 of the High Court Rules 1988. The applicants (the De La Mares) are South African nationals who have purchased a lot which is marked "Hotel Site" at the Maui Bay Scheme. They have also invested in two other residential lots (namely Lots 55 and 101) on the same scheme plan. These Lots are still in the name of the developer and will be registered in the De La Mare's names in due course as a matter of formality.

3. Maui Beach Villa Ltd Subdivision (**"MBVLS"**) is also an investor in the Maui Bay Development Precinct. It owns Lot 7 on the scheme plan which is a foreshore lot.

4. The decision in question concerns certain approvals granted by the DTCP to rezone Lot 7 from a Residential Lot to Special Use Villa and subsequent approvals granted on 22 March 2012 to MBVLS to subdivide Lot 7 into Lots 1 and 2 DP 9979. Incidental to these approvals, the DTCP granted an easement which gave MBVLS exclusive use of the foreshore fronting Lot 7. MBVLS has since completed the subdivision and has commenced development and construction work at the site in 2012.

5. The De La Mares seek leave for judicial review of all building plans and outline applications of MBVLS development on Lots 1 & 2 DP 9979. They also seek a mandatory injunction to compel DTCP and NRLA to withdraw building permissions they have granted to MBVLS and that new plans be submitted strictly in line with the SDGMB and for the demolition of all building work carried out in violation of the SDGM including, but not limited to all structures built on the foreshore and the 4th bedroom.

6. The De La Mares grievance is couched in the following tone:

(i) the value of their hotel site has diminished. They are directly affected by MBVLS' proposed Special Use Villa development. Not only will it put a strain on resources[4], it will also lead to an increase in the number of rooms offered by these residential sites to tourists. That means competition for the De La Mares' Hotel Site. They say that their Hotel Site was intended - under the SDGMB - to be the only hotel site.

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[3] The planning scheme even details how detached bedroom units may be allowed, how individual kitchens are not permitted for the detached bedrooms, how such bedrooms shall be connected to the main building by covered walkways, the maximum floor area of any detached bedroom, the minimum space allowed between the front, side and back yard against the internal subdivision road, the high water mark as shown on the survey plan for foreshore allotments, the river/creek bank access, the maximum elevation for a 2-storey building etc

[4] (e.g. water from boreholes and destruction of the reef and overcrowding).

(ii) all development and construction work ensuing from DTCP and NRLA approvals have not complied with environmental and planning laws of Fiji and of the SDGMB[5].

(iii) the approval has overstepped their (as well as other lot owners') rights to the foreshore which was originally intended to be a public amenity accessible to all.

(iv) MBVLS's development work downgrades the value of their investment on the scheme[6] by threatening to change the character of the development from low-a key up-market development, to an overcrowded and a high density one in contradiction to the SDGMB.

7. The De La Mares argue that the DTCP approval does not comply with the law and is *ultra vires* the powers of the DTCP. Lot 7 was a single foreshore lot comprising 2060 square meters, with a road frontage of 31.81 meters, on DP 9240. The size of the frontage means that the lot could not legally be subdivided. After the subdivision, Lot 1 has a street frontage of only 16 meters and Lot 2 - of only 15.81 meters, as per plan, CT 36183 lots 1 &2.

LOCUS

8. The De La Mares own the largest single commercial lot in the Maui Bay Estate development, Lot 114, the Hotel Site. They are apparently not yet registered proprietors of these Lots. But this is mere formality – I gather – because title will be transferred to them in due course. As purchasers, they have an equitable estate over all the Lots which they have purchased in the estate. On top of that – they actually reside on their property in the Maui Bay subdivision. In my view, the nature of their estate – the fact of their occupation - and their expectations that the DTCP would uphold the promise of a low key residential development as set out in the SDGMB – these are sufficient cause for the De La Mares be aggrieved by the actions of the DTCP– and therefore – to give them locus under Order 53.

DELAY

9. The Office of the Attorney-General argues that the application is out of time. The De La Mares argue that because the DTCP had not advertised the proposed relaxation of the scheme, which it was obliged to do under the law[7], they had no

[5] The De La Mares argue that since this is a commercial development on the foreshore, the developer would have to comply with the Environment Act of 2005 compelling him to have gone through an EIA as required, at which point, the terms of reference for his OEMP would have set out, including his building Environmental Management Plan. All government agencies are bound by the Environmental Act of 2005, including the Director of Town and Country Planning. To date, no EMP or OEMP for this development has been completed or approved. That an immediate stop work order be put into place, until such time as an approved OEMP has been granted.

[6] The De La Mares also argue that the MBVLS' plot ratio exceeds the legal limits allowed under the law (Cap 139) and MBVL has been given permission to build four bedrooms for eight people, even though their site is only 1044 square meters

The structure in place does not allow the public to cross the beach area during some high tides. The Wall effectively causes a barrier and is a potential danger if one is caught between it and the sea. The wall blocks the view to the west from the club house and reduces the appeal of the club house setting.

The pool is at a height of almost 2 meters above ground level. We are unable to establish the location in relation to the building line but the pool behind the wall.

Maui Beach Villas Ltd is building a 2 meter high deck all the way up to the foreshore building line. The 2 meter wall is on the Foreshore line. Picture C & D. Maui Beach Villas Ltd drilled a bore hole on this lot which is 1044 sq meters as it is on the foreshore. Picture B. To date no Environmental Management Plan (here after referred to as EMP) or, Operational environmental Management Plan (here after referred to as OEMP) has been completed by Maui Beach Villas Ltd. However, the DTCP have approved their plans and Maui Beach Villas Ltd, have commenced building.

[7] The De La Mares emphasise that the DTCP had never, at any time, even advertised the proposed relaxation of the scheme which she is obliged to under Provisions 6 and 7 of the SDGMB. Upon their investigations, De La Mares say they were to learn that the DTCP and the

inkling of all that was happening until MBVLS started construction and development work in 2012. Since then, they have made all due inquiries and found – at the bottom of it all – that the NRLA and DTCP had granted the approvals in question to MBVLS. If all that is taken into consideration – then they have been prompt in filing the application[8]. This argument rests ultimately on – firstly - whether or not the DTCP is obliged under law to advertise the proposed relaxation of the scheme and - secondly – whether or not the approvals and the subsequent development and construction work – actually do amount to a relaxation of the scheme. But - as these are substantive questions for the judicial review proper – I reserve the issue of delay for later. Suffice it to say that the time limit can be extended and that there is supportive case law authority that – where there is delay – the Court must first scrutinize with care the reasons for the delay before extending the time limits[9].

Nadroga Rural Local Authority (**"NRLA"**) had relaxed the SGDMP without notice to the lot owners at Maui Bay, which did not comply with Provisions 6 and 7 of the Scheme.

Provisions 6 and 7 say as follows:

"Provision 6: Relaxation from General Provisions

1. The Council may, subject to the approval of the Director consent to a relaxation of any of the requirements laid down in these General Provisions and so long as the use or development is in accordance with the terms of such consent no offence against these provisions shall be deemed to be committed by such use or development.

2. Such consent, which shall be in writing, may be granted only when it is considered that the proposed development in respect of which relaxation is sought would not conflict with the overall principles of the Scheme.

Any such consent may be for a limited period named therein and subject to such conditions or restrictions as to use or otherwise as the Director and the Council may think fit to impose.

Provision 7: Notification of Relaxations

Where the Council with the consent of the Director proposes to exercise the discretionary power vested in it under Provision 6 of these General provisions.

(a) It shall publicly notify at the applicant's expense, its intention so to do by an advertisement published in the Republic of Fiji Gazette and in two issues of a paper circulating in the district at an interval of not less than seven days.

(b) Every Owner or Occupier of property within the area covered by the Scheme shall have a right of objection to the proposed exemption, and may, by notice in writing addressed to the Council, give notice of such objection and the grounds thereof at any time within 30 days after the first public notification of Council's intention.

(c) Before arriving at a decision, the Council shall take into account any objections submitted to it and may afford objectors the right to be heard at a special meeting of the Council to be called for the purpose.

Provided that where the relaxation of the requirements of these General Provisions is of such a minor nature as to appear to cause no inconvenience or detriment to owners of affected land the Council and the Director may dispense with the requirements of sub-clauses (a), (b) and (c) and further provided that the Council shall seek the comments of owners of properties likely to be affected by the relaxation."

They also rely on S.20 of the Town Planning Act (Cap 139) which states:

"every owner or occupier of land within the area covered by a scheme shall have a right of objection to the scheme, and may, by notice in writing addressed to the local authority, give notice of such objection, and of the grounds thereof, at any time within three months after the first public notification of the scheme as required by this section"

[8] The De La Mares argues that in April 2012, they came to know that Maui Beach Villas Ltd had applied to build a Special Villa Resort that did not comply with SDGMB. They approached the NRLA and gave him written concerns regarding this new special villa development and voiced concerns. They also met with DTCP in April 2012 to address their fears about the SDGM.

In October 2012, the De La Mares discovered that the building of the Special Villa had gone ahead with the permission of the DTCP even though it did not and still does not comply with the SDGMB. The plaintiffs also discovered at this time that Lot 7 had been subdivided into two lots (1 and 2 on DP 99979 CT 36183) and the Plaintiffs were informed that DTCP had used her "discretion" and granted easements to Maui Beach Villas Ltd. They also discovered around this time that lot 7 had been subdivided into 2 lots, 1 and 2 on DP 9979 CT 36183.

It was then that they started writing to NRLA and copied it to DTCP on 10 October 2012 demanding an explanation and informing the Departments that they would take the matter to court. To date the Plaintiffs has never received a response for any correspondence sent to NRLA or the DTCP. The Plaintiffs also contacted the Ministers Office who referred them back to DTCP.

Even if DTCP wanted to grant easements, there is a process that must be followed as set out in Cap 139. The Director cannot just grant easements at will.

[9] In **The State v The Secretary, Public Service Appeal Board The Permanent Secretary for Health ex parte Maca Temoirokomalani** Judicial Review No. HBJ 020 of 2004,

> Where there is delay, the court must scrutinize with care the reasons for that delay before finding that there is good reason for extending the time limits. The authorities do not set forth any comprehensive definition or good reason since much depends on the facts of the case and the extent to which the court might regard the actions taken by the applicant as reasonable in the circumstances. Delay caused by the applicant's lawyer in making the application will not be a good reason for extending the time-limit unless the reasons for the delay are satisfactorily explained – **R v Institute of Chartered Accountant in England & Wales, ex p. Uandreou (1996) 8 admin L.R. p. 557**, **R v Secretary of State for Health, ex p. Furneaux [1994] 2 All E.R. 652.**
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> The delay may be considered to be excusable if it resulted from facts outside the applicant's or her advisors control.

THE LAW

10. The principles of judicial review adopted by this Court in **Fiji Public Service Association v. Civil Aviation Authority of Fiji and Attorney General of Fiji and Airports Fiji Limited (JR No. 015 of 1998L, 30 November 1998** are taken from **O'Reilly v Mackman [1983] 2 AC 237**, at 279 per Lord Diplock:

> ... I have widened the much-cited description by Atkin LJ in ***Rex v. Electricity Commissioner; Ex parte London Electricity Joint Committee Company*** [1920] 1 KB 171, at 205 of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative remedies ... by excluding Atkin LJ's limitation of the bodies of persons to whom the prerogative writ might issue, to 'those having the duty to act judicially' ...
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> Wherever anybody of persons has authority conferred by legislation to make decisions [judicial, quasi-judicial and administrative only] it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded him by the rule of natural justice of fairness, viz, to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made. Therefore, as a most basic principle, an application for judicial review must show on the evidence, that one or more of the common law or statutory rights or obligations of the applicant has been adversely affected by the decision complained against.

11. At leave stage, the threshold is low. What needs to be established is 'an arguable case' to be resolved only by a full hearing of the application for judicial review. A full review of the facts is unnecessary. But, a court is obliged to sufficiently pursue the material provided to determine whether an applicant raises an issue arguably involving: an error in law, a serious error in fact, a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application.

An Applicant, who is not informed that the decision has been taken has good reason for the delay, so long as she moves expeditiously once she is aware of the decision – **R v Commissioner of Local Administration, ex p. Croydon London Borough Council [1989] 1 All E.R. 1033 at 1046.**

In **In re Application by Waqavonovono [1995] FJHC 41; Hbj0030d.1994s (24 February 1995)**, Pathik J referred to **Application for Judicial Review, 2nd Ed by ALDOUS & ALDER p.136** as follows:

In **ALDOUS & ALDER (supra p.133) it is stated**:

"In the leading case of Caswell v Dairy Produce Quota Tribunal for England and Wales (1990 2AC 738 Lord Goff emphasised that questions of delay are best dealt with in depth at the substantive hearing. Leave should, therefore, only be refused in clear cases of unjustifiable delay. In Caswell itself leave was granted even though nearly two years had passed. In R v Comr for Local Administration, exp Croydon London Borough Council, Woolf LJ stated that the delay provisions should not be construed technically and should not be invoked strictly against an applicant who has behaved sensibly and reasonably. Nevertheless, an applicant delays at his peril."

In this case there was an ***"unjustifiable delay"*** and the applicant did not behave ***"sensibly and reasonably"***.

As stated in **ALDOUS & ALDER**.....as the above provision in Order 53 r4 shows, application for judicial review are subject to time limits and the Court can refuse leave as a result of quite short periods of delay. If it was not so, public authorities would be saddled with dealing with unjustifiably late applications. The provisions regarding delay from the Rules and authorities can be summarised thus:

(a) applications must be made promptly and in any event within three months but the court may extend time if there is a good reason to do so;
(b) for undue delay the court may refuse leave if the granting of relief would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration;
(c) failure to apply promptly or in any event within three months will be treated as undue delay;
(d) the courts still treat the issue of delay as a matter of discretion within the express provisions.

It was once argued in **State v Connors, ex parte Shah [2008] FJHC 64; HBJ47.2007 (7 April 2008)** that the threshold at leave stage is 'potential arguability' rather than "arguable case".

> i.e. 'whether the materials before the court disclose matters which might, on further consideration, demonstrate an arguable case for the grant of relief claimed. It is not necessary to show an arguable case at the leave stage', citing ***R. v. Director of Immigration; Ex parte Ho Ming-Sai*** (1993) 3 HKPLR 157.

12. This construction was based on what Lord Diplock had said in **Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617, at p. 644A**:

> If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

13. But the English Court of Appeal six months earlier –in **R. v. Legal Aid Board; ex parte Hughes (1992) 24 HLR 698. At pp. 702-703**, Lord Donaldson MR said:

> Lord Diplock may well have been right in 1981 to have said [what he did] … However, things have moved on since then. This was an *ex parte* application. In such a case leave is or should now only be granted if prima facie there is already an arguable case for granting the relief claimed. This is not necessarily to be determined on 'a quick perusal of the material', although clearly any in-depth examination is inappropriate. Furthermore, a 'prima facie arguable' case is not established merely by the disclosure of 'what *might on further consideration* turn out to be an arguable case' (my emphasis). It is only when there is clearly an arguable case that leave should be granted *ex parte*. Equally, it is only when prima facie there is clearly no arguable case that leave should be refused *ex parte*. Usually *ex parte* applications fall into one or other of these categories, but not always. There is also a small 'I really need to know a bit more about it' category and in such cases the aspirate course is to adjourn the application for an *inter partes* hearing … This is quite different from a substantive hearing in that the respondent need only summarise its answer sufficiently to enable the judge to decide whether there is or is not an arguable case.

14. The difference between the two approaches is – one will grant leave only where an arguable case is clearly made out. The other - if the court at first instance thinks a Court dealing with the substantive application will think the Applicant has an arguable case. The first test is appropriate if the rationale for obtaining leave is only to weed out those cases which are obviously hopeless, in which case the court would not investigate the case in any depth at all. The second test is appropriate if it was intended that only those cases which are genuinely arguable should go to a full hearing, in which case the arguability of the case would have to be considered in a meaningful way. In Fiji, the arguable case test is applied (see Scutt J in **State v Connors, ex parte Shah**[10]).

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[10] Scutt J said as follows:

> The issue as to which is the correct test will have to be addressed at some stage, but I do not think that this is the appropriate case in which to do so, because in my view on either test the Applicant should be granted leave. However, it may be that the test should be a flexible one so that, for example, if the issue in the case is, say, one of statutory construction, the Applicant has to show that his construction is arguable, whereas if the issue in the case is, say, one of procedural unfairness, the applicant only has to show that once the facts are investigated, he may then have an arguable case that the decision challenged should be quashed. It is sufficient for me to state that I do not regard the present case as a relatively straightforward one ...: at 7
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> > Keith, JA seeks to distinguish between cases or grounds so as to explain the existence of two tests, a potentially arguable case and an arguable case. In my opinion, the difference in cases or grounds simply means that one applies the arguable case test so as to take into account the circumstances and issues in each particular case. In any event, to use Keith, JA's words, in my view the correct approach is to 'consider the arguability of the case in a meaningful way'.
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> In Fiji, as earlier observed, an arguable case has been required for leave. In my view, this is the correct standard and I apply it rather than 'potentially' arguable case per ***Ho Ming-Sai***. If this is a two-step process – application for leave, then application, the latter

CONCLUSION

15. In my view, the applicants have demonstrated an arguable case of a denial of natural justice. And accordingly, I grant leave to issue Judicial Review.

16. However, for the sake of clarity – I make no direction that this grant of leave shall operate as a stay or as an interim injunction against all development works at Maui Bay by MBVLS. The plaintiffs had sought an urgent interim stop work order but I am not inclined to grant this as it is clear from their submissions that they have no intention of joining MBVLS in these proceedings at any time.

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Master Tuilevuka

At Lautoka
26 March 2013.

being the hearing of the substantive matter, can the first simply be a 'potentially arguable case'? That implies that at the second step all that is necessary is an 'arguable case'. Yet at the final stage what is necessary is a 'winnable case'. That is, one must win or lose at the application stage and hence it is not an arguable case that is called for there, but a conclusive one, or one which persuades the Court, on the balance of probabilities, that the application is sound, the Applicant 'right' and hence they win their application; it is no good for the Applicant at this second and final stage simply to come up with an arguable case. If they cannot meet the test of conclusiveness on the balance of probabilities, then the application is not sustainable and the Respondents must succeed. On the basis of ***Ho Ming-Sai*** the alternative is that Respondents at final stage lose simply because the Applicant has 'an arguable case'. Surely this cannot be so. In any event, this is not the law in Fiji.