2009 No. 56 – M DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

In the matter of an application by **IAN MC DONALD, KAMINI DEVI WIGHT and GREGORY GASKIN** to intervene in these proceedings as an added Defendant (Respondent) under Order 14, Rules 14 and 15 and Order 40 Rule 6 of the Rules of the High Court and/or the inherent jurisdiction of the Court

- AND –

In the matter of the Constitution of the Co-operative Republic of Guyana

- AND -

In the matter of an application by **PROPERTY HOLDINGS INC.** for redress under Article 153 of the Constitution for contravention of its fundamental rights guaranteed by Article 40 and 144 (8) and (9) of the Constitution

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GUYANA SUPREME COURT LAW LIBRARY

BETWEEN:

PROPERTY HOLDINGS INC.

(Plaintiff)

- AND-

THE ATTORNEY – GENERAL

(Defendant)

HON. MR. JUSTICE IAN CHANG, S.C, C.C.H – CHIEF JUSTICE (ag.)

Mr. Rex Mc Kay, S.C, Mr. Edward Luckhoo S.C, Mr. Nigel Hughes and Mr. Stephen Fraser for the added Defendants – the applicants herein

Mr. Timothy Jonas for the Plaintiff, Property Holdings Inc.

Mr. Naresh Harnanan for the Defendant, the Attorney-General

HEARD ON:

2012

DECISION

This application was made by Ian Mc Donald, Kamini Devi Wright and Gregory Gaskin (the added defendants herein) for the following orders:

> "(a) An Order discussing the application under Notice of Motion by Property Holdings Inc. for redress under Article 153 of the Constitution for the purported contravention of its fundamental rights on the ground that the said application discloses no legal basis for constitutional redress, is frivolous and vexations and an abuse of the process of the court
>
> (b) Such further or other relief as may be just
>
> (c) Costs."

The grounds of this application as stated in the Notice of Motion are as follows:

> ***"1. The applicant has misused the fundamental rights provisions of the Constitution as a substitute for the normal procedures provided by the Rules of the High Court.***
>
> ***2. The said application is frivolous and vexations and an abuse of the process of the Court.***
>
> ***3. The reliefs sought by the applicants in respect of the Orders of Mr. Justice Brassington Reynolds dated 5th August 2008 and 12th January 2009 in Actions No. 18W of 2008 do not give rise to a right to constitutional relief pursuant to Article 144 (8) and 144 (9) of the Constitution of the Co-operative Republic of Guyana."***

In his Affidavit in support of Motion, the added defendant, Gregory Gaskin, deposed therein on behalf of himself and the other added defendants that

> ***(1) On the 21st January 2008, Justice Jainarayan Singh granted an order or rule nisi against the Central Housing and Planning Authority (CHPA) to show cause why its decision of the 11th December 2007 should not be quashed. The Order or Rule nisi reads inter alia:***
>
> ***".....It is HEREBY ORDERED that the Order nisi of Certiorari be issued to the Central Housing and***

Planning Authority to show cause why the decision of the Central Housing and Planning Authority made on or about the 11th December 2007, giving permission to Property Holdings Inc. to change the use of the open space in Bel Air Gardens known to proprietors thereof as the Park from a recreational area to residential and building purposes without the consent of the proprietors of Bel Air Gardens should not be quashed on the grounds that the said decision was arbitrary, unlawful, unconstitutional, made without or in excess of jurisdiction in breach of natural justice and contrary to the legitimate expectations of the residents of the Bel Air Gardens, Georgetown."

(2) On the 16th May 2008, Property Holdings Inc. (PHI) applied to the Court "to be made a party to the proceedings as a respondent" in suit No. 18W of 2008. That application has not yet been determined.

(3) On the 8th July, 2008, the applicants applied by way of Summons in suit No. 18W for an order that the Central Housing and Planning Authority (C.H.P.A) make discovery upon oath of the documents set out in the Summons filed. By consent of the Applicants and the Respondents' Attorneys-at-law the Court made the following orders (1) that the Respondent made discovery upon oath of the following documents within 21 days:

(a) The application for permission by the National Industrial and Commercial Investments Limited (NICIL) for the development of the area in the centre of the Bel Air Gardens Scheme

(b) The permission granted by the C.H.P.A at which NICIL for the development of the area in the centre of Bel Air Gardens.

(c) Minutes of the meeting of C.H.P.A at which permission was granted to NICIL for the development of the area in the centre of Bel Air Gardens.

(d) On failure (by C.H.P.A) to comply with the said orders within 21 days of its making, the Affidavit in Answer be struck out.

(e) It was further ordered that "if the Respondent fails to comply with the Order of Court that the Affidavit in Answer of the Respondent be struck out and the Order nisi obtained on the 21st January 2008 be made absolute."

(4) The C.H.P.A, having failed to comply with the said Order of court, on the 27th August 2008, the said Order nisi was made absolute by Justice Reynolds on the applicants' application.

(5) Despite the fact that the Attorneys-at-law for P.H.I admitted that they were aware since the 8th July 2008 of the summons filed by the applicants and dated the

5th July 2008 (which resulted in the discovery order made by Justice Reynolds on the 5th August 2008), P.H.I took no step to have its Motion for joinder heard before the hearing of the summons nor did P.H.I make an application for the adjournment of the hearing of that summons pending the hearing and determination of its application for joinder.

(6) *Although the Attorneys-at-law for P.H.I were admittedly aware of the Order nisi being made absolute since the 19th January 2009, P.H.I did not take any step in respect of that Order until the filing of the Motion on the 4th May 2009. As such, P.H.I is guilty of undue delay and laches and should be deprived of any constitutional redress.*

(7) *Although the Attorneys-at-laws for P.H.I were admittedly aware of the summons for production and discovery of documents, P.H.I took no steps to have the fonder proceedings heard so enable it to contest the jurisdiction of the court being fully aware that the Attorney-at-law for C.H.P.A had consented to that Order.*

(8) *PHI took no steps whatsoever to avail itself of the right to appeal to the Court of Appeal following its applications for fonder.*

(9) *The orders sought by PHI in respect of the Orders of Justice Reynolds dated 5th August 2008 and 12th*

January 2009 do not give use to a right to constitutional relief pursuant to Article 144 (8) and (9) of the Constitution and amounts to an abuse of the court's process."

In the Affidavit in Answer filed by the P.H.I on the 12th March 2010 and sworn to by Winston Brassington, a director of P.H.I, it was deposed that the Order nisi was granted in Action No. 18 W of 2008 and that, in that Action, P.H.I applied to be joined and that, at the time that C.H.P.A consented to the Order for discovery, NICIL was not yet a party to the proceedings. The judge did not record the presence of Mr. Gino Persaud as Attorney-at-law for NICIL. Mr. Brassington further deposed that no application appeared to have been made by the Order nisi to make the Order nisi absolute and no such application was served on PHI or its Attorneys-at-law or on C.H.P.A, the named respondent in the Action.

It was contended that P.H.I was entitled to have the application for joinder before any Order was made against its interests which were liable to be affected in the proceedings on account of its proprietary and pecuniary interests in the property which was the subject matter of the proceedings.

Mr. Brassington further deposed that, despite the formal application of P.H.I to be joined in the proceedings Summons dated the 5th July 2008 was not served on counsel for P.H.I and P.H.I received

belated informal notification from State Counsel for C.H.P.A which afforded it no opportunity of examining the summons or to peruse its contents.

Mr. Brassington denied that P.H.I was guilty of undue delay given that the procurement of the Court's records, inquiries by counsel and counsel's advice to P.H.I and the determination of what appropriate action to take were time – consuming.

P.H.I did not object in principle to the production of the documents sought in the interest of having the issues clarified before the court but was unaware of an application for an Order absolute in the event that C.H.P.A failed to produce the required documents. Mr. Brassington denied that P.H.I did not take steps to have its application for joinder heard and that a right of appeal was available to P.H.I. He stated that P.H.I only became aware of the Order absolute long after the time for filing an appeal had expired and, in any event, he had not been joined as a party to the action.

Article 144 (8) and (9) of the Constitution provides:

> ***"(8) Every court or other tribunal prescribed by law <u>for the determination of the existence or extent of any civil right or obligation</u> shall be established by law and shall be independent and impartial, and where proceedings for <u>such a determination</u> are instituted by any person or***

other tribunal, the case shall be given a <u>fair hearing</u> within a reasonable time.

(9) Except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence and extent of any civil right or obligation before any other tribunal, including announcement of the decision of the court or other tribunal should be held in public."

Since the respondent (P.H.I) has contended in its constitutional Motion that its right to a fair hearing under Article 144 (8) and (9) of the Constitution has been violated by the court presided over by Justice Brassington Reynolds in judicial review proceedings (No. 18 W of 2008), the basic and fundamental question which arises in this application is whether the judicial review proceedings instituted by the applicants herein for a Writ of Certiorari to quash the decision of the C.H.P.A to change the purpose of the use of the open space in Bel Air Gardens from recreational to residential and building were proceedings for the determination of the "existence or extent of any civil right or obligation" within the context and meaning of Article 144 (8) and (9) of the Constitution.

The gist of the respondent (PHI)'s contention is that the judicial review hearing conducted by Justice Reynolds was unfairly conducted for reason that P.H.I as a body whose proprietary and pecuniary interests could have been affected by the decision of Justice Reynolds

ought to have been joined and heard in those proceedings. In other words, since reliance is placed by P.H.I on Article 144 (8) and (9) of the Constitution, it is the contention of P.H.I that the fair hearing provision as contained in Article 144 (8) of the Constitution conferred on P.H.I a constitutional right to b e heard in the judicial review proceedings (No. 18 W of 2008) before Justice Reynolds and that Justice Reynolds, by issuing the Writ of Certiorari without having afforded P.H.I an opportunity of being heard, breached P.H.I's constitutional right to a fair hearing. But, Article 144 (8) can be applicable only if the judicial review proceedings involved the determination of the existence or extent of the civil rights and obligations. Were the proceedings for the determination of the existence or extent of the civil right or obligation of P.H.I?

The issue which Justice Reynolds had to determine was simply whether the C.H.P.A acted ultra vires its statutory power in granting permission to P.H.I to change the purpose of the use of the open space in Bel Air Gardens from recreational to residential and building.

The equivalent of Article 144 (8) and (9) of the Guyana Constitution is Article 6 (1) of the European Convention on Human Rights. In Administrative Law by Wade and Forsyth (10th Edition), the learned author stated at pages 375-376:

> ***"Article 6 (1), however, provides for "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".***

However, it only applies to the determination of an individual's civil rights and obligations or any criminal charge against him and the jurisprudence of the Court of Human Rights shows that there is no "determination of an individual's civil rights and obligations"- which was originally intended mean broadly private law rights –in many administrative proceedings."

Similarly, the fair hearing provision in Article 144 (8) is not triggered or engaged when court proceedings do not involve the determination of the existence or extent of a civil right or obligation – even though the court must act with procedural fairness at all times.

As before mentioned, the question which fell for determination by Justice Reynolds was whether the C.H.P.A acted outside of its statutory powers in changing the purpose of the use of the empty space in Bel Air Gardens. It was the C.H.P.A which granted the application of P.H.I to use the land for residential and building purposes rather than for recreational purposes. Surely, Parliament never gave the C.H.P.A the power to create any civil right or obligation and it was not the claim of P.H.I that it was its civil right to use the land for residential or building purposes rather than for recreational purposes. Indeed, if P.H.I as the owner of the open space had such a civil right, it would have been unnecessary to make application to the C.H.P.A for a change of use.

The claim of P.H.I in its Motion is in effect that it had a constitutional right to be joined and to be heard in the judicial review proceedings. If so, its application to be joined in the proceedings was not a matter of judicial discretion but a matter of constitutional right. This court is unable to see on what basis P.H.I can validly claim a constitutional right to be joined in proceedings in which the public law decision of the C.H.P.A was being challenged in judicial review proceedings. If the decision of a Magistrate in criminal proceedings instituted by the Police is challenged, it is difficult to see that the Police would have a constitutional right to be joined in those judicial review proceedings not as a matter of judicial discretion but as a matter of constitutional right. Assuming for the purpose of analysis that the application for joinder made by P.H.I was heard and refused, could such a refusal have grounded an application for constitutional redress for breach of the right to a fair hearing under Article 144 (8) in relation to the substantive Motion i.e in Motion No. 18 W of 2008? The court does not think so. Otherwise, the application for joinder as an interested party would not be a matter of judicial discretion but a matter of course as a matter of constitutional right.

The court is therefore of the view that constitutional Motion (No 56 M of 2009) was misconceived. The Motion to strike out those proceedings therefore succeeds. Motion No. 56 M of 2009 filed by P.H.I is therefore ordered to be struck out.

There will be costs to the applicants in the sum of $75,000 jointly and severally.

This court wishes to mention, *de bene esse*, that it cannot sit on appeal from the decision of Justice Reynolds, a judge of co-ordinate jurisdiction, on the merits. It has jurisdiction merely to determine whether any constitutional right of P.H.I, particularly under Article 144 (8) and (9), has been infringed and to give appropriate redress under Article 153.

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Ian N. Chang, S.C, C.C.H
Chief Justice (ag.)

Dated this 6th day of June, 2012.