



[2023] JMSC Civ. 15

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2022CV03859**

<b>BETWEEN</b>	<b>HANDSOME CHAP INCORPORATED</b>	<b>APPLICANT</b>
<b>AND</b>	<b>STRATA APPEALS TRIBUNAL</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>THE PROPRIETORS, STRATA PLAN NO. 2466</b>	<b>2<sup>ND</sup> RESPONDENT</b>

**IN CHAMBERS BY VIDEO CONFERENCE**

**Heard: 11<sup>th</sup>, 30<sup>th</sup> January, and 7<sup>th</sup> February 2023**

**Ms. Annaliesa Lindsay instructed by Lindsay Law Chambers for the Applicant,**

**Mr. Andre Earle KC and Ms Melissa Mayne instructed by Earle and Wilson for the 1<sup>st</sup> Respondent,**

**Mr. Jevaughn Leon, Instructed by Legis for the 2<sup>nd</sup> Respondent.**

**Leave to apply for Judicial Review- Legitimate Expectation-Fairness**

**Lorna Shelly Williams, J**

## **BACKGROUND**

[1] The applicant, Handsome Chap Incorporated, is a company whose principal registration is in Anguilla. The applicant is also registered in Jamaica with registered address being 1 Upper Carmel Close, Cherry Gardens, Kingston 8 in the parish of Saint Andrew and is the owner of a unit at Ebony Glades in the parish of St Andrew. The first respondent is a body empowered to hear appeals from

strata corporations, whilst the second respondent is the strata corporation responsible for Ebony Glades.

- [2] The second respondent on the 20<sup>th</sup> of October 2010 passed a resolution that concerned the leasing of the common area adjacent to the units at Ebony Glades. Two units applied for and were granted leases for the common area adjacent to their units pursuant to the October 20<sup>th</sup> 2010 resolution, ie units 7 and 8. In February 202, the applicant applied for a lease for the common area adjacent to their unit. The applicant had fenced this area prior to his application.
- [3] A dispute developed between the applicant and the second respondent concerning the granting of the lease wherein the Strata Commission (the Commission) was asked to intervene. The parties at a meeting with the Commission agreed that an Extraordinary General Meeting (a meeting) was to be convened and the issue as to whether the granting of a lease should be put to a vote by the owners of the units. The majority of the owners of the units voted against granting the lease to the applicant. The applicant then filed an appeal with the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent rendered a decision on the 20<sup>nd</sup> of October 2022 wherein they dismissed the applicant's appeal, giving reasons for their decision.
- [4] Subsequently, the 2<sup>nd</sup> defendant wrote to the applicant indicating that the fencing that had been erected should be removed. The applicant filed a Without Notice Application for leave to apply for judicial review on the 2<sup>nd</sup> of December 2022. The applicant also applied for and was granted an interim injunction that prevented the removal of the fence that had been erected.
- [5] The applicant is seeking in its leave application, the following orders: -
- a. an order for Certiorari to quash the decision made on the 20<sup>th</sup> day of October 2022 by the 1<sup>st</sup> Respondent and contained in its written decision of the same date.
  - b. an order for Mandamus directing the 2<sup>nd</sup> Respondent to reconvene another meeting to hold a vote on the prospect of the Applicant herein

being granted a lease for the immediate common area surrounding its unit in the 2<sup>nd</sup> Respondent.

- c. an order for a stay of the decision of the 1<sup>st</sup> Respondent's decision until the determination of this matter.
- d. an injunction barring the 2<sup>nd</sup> Respondent from demolishing the Application's fence erected on or around its unit the determination of this matter.
- e. such further or other relief that this Honourable Court deems fit.
- f. Cost

**[6]** The grounds under which the Applicant seeks these orders are as follows:

1. *The applicant is the registered owner of unit 6 Ebony Glades, Russell Heights Kingston 6 in the parish of St. Andrew. This property falls within the Strata that is governed by the 2<sup>nd</sup> Respondent, a public body.*
2. *The 1<sup>st</sup> Respondent is the body/tribunal established pursuant to the Registration (Strata Titles) Act to inter alia, hear appeals of any person aggrieved by a decision of a Strata Corporation.*
3. *The 2<sup>nd</sup> Respondent is a registered Strata Corporation, pursuant to the said Act mentioned in Paragraph 2 above, which made a decision, with which the Applicant is aggrieved.*
4. *The Applicant is aggrieved by the decisions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deny its request to lease a portion of the common area in the Strata that immediately surrounds unit 6 owned by it, similar to other owners in the said Strata. No reasons were given for this decision.*
5. *The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's erred in law and in fact in failing to recognize that the applicant had a legitimate expectation in that its request for a lease for the disputed common area would or ought to be granted in terms similar to the 2<sup>nd</sup> Respondent's resolution passed on the 20<sup>th</sup> day of October 2010.*
6. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law and in fact in failing to recognize that the Applicant had a legitimate expectation in that it*

*would or ought to be allowed to enclose the said disputed common area in keeping with those enclosures that exist for units 7 and 8 and other owners that are a part of the 2<sup>nd</sup> Respondents.*

- 7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents erred in law and in fact in limiting the Applicant's entitlement to fence the common area around its unit to an interpretation of the 2010 resolution passed by the 2<sup>nd</sup> Respondent.*
- 8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to take account of the other unit owners in the 2<sup>nd</sup> Respondent that had also erected fences on common areas of the strata without the prior approval of the Executive Committee of the 2<sup>nd</sup> Respondent and or by a Majority vote of the owners registered in the 2<sup>nd</sup> Respondent.*
- 9. The 2<sup>nd</sup> Respondent failed to provide any or any sufficient reason to the Applicant for denial of the lease proposed by the Applicant.*
- 10. The 2<sup>nd</sup> Respondent failed to provide any or any sufficient reason to the Applicant for denial of the similar benefit of other owners in the Strata of erecting a fence, within the prescribed heights in the 2<sup>nd</sup> Respondent, on common areas immediately surrounding its unit.*
- 11. The decision of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are by virtue of the Wednesbury principle, unreasonable in the circumstances.*
- 12. The applicant stands to be prejudiced if any injunction or a stay is not ordered pending the determination of this matter, because the 2<sup>nd</sup> Respondent has indicated its intention to act on the decision of the 1<sup>st</sup> Respondent and demolish the Applicant's fencing which is to the certain detriment of the Applicant herein.*
- 13. If the stay of execution injunction is granted, there will be no prejudice to either the 1<sup>st</sup> or 2<sup>nd</sup> Respondent in the circumstances.*
- 14. It would be right and just in keeping with the overriding objective for the orders sought herein to be granted.*

## APPLICANT'S SUBMISSIONS

- [7] Ms. Lindsay, Counsel for the applicant, broke down the questions for the determination of the Court into three main issues:
- i. whether the decision of the 1<sup>st</sup> respondent is susceptible to a challenge by judicial review;
  - ii. should the grant of leave to apply for judicial review act as a stay of proceedings; and
  - iii. should the interim injunction granted be further extended?
- [8] As to the first issue, Counsel argued that it is trite law that a court may grant relief on an application for judicial review if it finds that the decision of the respondent was ultra vires, illegal, unlawful and/or irrational. She relied on the case of **Council of Civil Service Unions v Ministry of Civil Service** [1985] AC 374 to support this position.
- [9] Counsel submitted that the 1<sup>st</sup> respondent, being a public body established by the Registration (Strata Titles) Act to hear appeals brought by any person aggrieved by a decision of a Strata Corporation, that their decisions are challengeable by way of judicial review. Counsel found support for this submission in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1948] 1 KB 233.
- [10] Ms. Lindsay argued that the 1<sup>st</sup> respondent fell into error in both law and fact in making its decision. She based her submission on the fact that the 1<sup>st</sup> respondent treated the applicant's appeal solely on the basis of what she describes as, the strict interpretation of the 2<sup>nd</sup> respondents October 2010 resolution. She complained that the 1<sup>st</sup> respondent restricted its mandate in the appeal. Her position was that the 1<sup>st</sup> respondent failed to consider the circumstances that existed in the Ebony Glades community, in that there were other residents that have acted in a manner that was similar to the applicant. She argued that this raised the possibility of the applicant having a legitimate expectation that its

request to avail itself of the lease outlined in the resolution would have been approved. She argued that legitimate expectation ought to have been explored, examined and considered by the 1<sup>st</sup> respondent in the appeal. Counsel relied on the case of **Ellen Williams v Strata Appeals Tribunal, Commission for Strata Corporations and Josina Jackson** [2020] JMSC Civ 132 to advance her position.

- [11] In addition to this, Counsel submitted that the 2<sup>nd</sup> respondent did not provide reasons for its decision which pointed to the fact that the applicant had been unfairly treated. She submitted that based on these issues that leave to apply for judicial review should be granted.
- [12] Counsel's final submission was that there were no alternate forms of redress.

#### **FIRST RESPONDENT'S SUBMISSION**

- [13] King's Counsel, Mr. Earle, submitted that the process of judicial review is governed by Part 56 of the CPR and pursuant to Rule 56.3 a person wishing to apply for judicial review must first obtain leave. He submitted that in the case of **Sharma v Brown-Antoine and Others** [2006] UKPC 57 Lord Bingham and Walker sets out the test for granting leave to apply for judicial review.
- [14] He further submitted that in the case of **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al Claim No 2010HCV00474** Mangatal J, explained the concept of arguable ground with a realistic prospect of success.
- [15] Mr. Earle argued that the inclusion of the words, "*the Corporation be entitled to assign*" in the resolution of the 20<sup>th</sup> of October 2010, gave the Corporation the discretion to assign the relevant part of the common property, however it did not make assignments an absolute right of the proprietors. Based on this, the applicant would not be automatically entitled to be assigned the common property.
- [16] Counsel pointed the Court to the case of **Legal Officers' Staff Association & Ors v Attorney General & Ord** [2015] JMFC Full 3 where McDonald-Bishop J, (as she then was) examined the principle underpinning the doctrine of legitimate

expectation. He argued that the principle of legitimate expectation does not apply in this case.

[17] It was also submitted in relation to grounds 7 and 8, that the 1<sup>st</sup> respondent did not limit the applicant's entitlement to fencing the common area around its unit to an interpretation of the resolution. Counsel argued that it was evident in the judgment of the 1<sup>st</sup> respondent at paragraphs 15 to 18 that the 1<sup>st</sup> respondent took the treatment of other units into consideration. Additionally, he submitted that the 1<sup>st</sup> respondent's decision was based on the documents provided by the applicant and the 2<sup>nd</sup> respondent, none of which he stated supported grounds 7 or 8. He further submitted that the applicant failed to show that the other unit owners in the 2<sup>nd</sup> respondent had also erected fences on common areas of the strata without the prior approval of the Executive Committee of the 2<sup>nd</sup> respondent and or by a majority vote of the owners registered therein.

[18] Based on the above the applicant has failed to show that there were any arguable grounds for judicial review having a realistic prospect of success.

## **SECOND RESPONDENT'S SUBMISSION**

[19] The 2<sup>nd</sup> respondent's submission focused on whether the interim injunction granted should continue pending the leave for judicial review.

[20] It was the position of Counsel for the 2<sup>nd</sup> respondent that the applicant has illegally captured the common area, built its fence and was now seeking the Court's protection to ratify the breach of the bylaws by extending the injunction. Reliance was also placed on the well-established requirements mentioned above in the *American Cyanamid Co vs Ethicon Limited* [1975] UKHL 1 which Counsel submitted the applicant was unable to meet for a grant of an extension of the injunction.

[21] It was argued that since the 2<sup>nd</sup> respondent was not a public body which was regulated by the 1<sup>st</sup> respondent, it could not be the subject of an application for judicial review. Following on this premise the 2<sup>nd</sup> respondent submitted that the

remedies whether jointly or severally that were being sought, could not be granted against it. Further, that the claim was frivolous and vexatious as it was based solely in the refusal of the lease to the applicant. Counsel also argued that the attempt by the applicant to get the 2<sup>nd</sup> respondent to reconvene another meeting for a vote of the unassigned common area was its attempt to influence and force the corporation to its will and intent. Counsel argued that there was no serious issue to be tried.

**[22]** Counsel further submitted that the loss claimed by the applicant was entirely calculable and was recoverable if the applicant was successful on its application for judicial review.

## **ISSUES**

**[23]** There are three main issues to be addressed in this case. These are: -

- a) Did the Claimant have a legitimate expectation that the lease would have been granted?
- b) Whether the second defendant should have been named as a defendant in this case?
- c) Whether the applicant had established the standard for leave to be granted for judicial review?

## **THE LAW**

### **STANDING TO COMMENCE AN APPLICATION FOR LEAVE**

**[24]** Applicants seeking to apply for leave for judicial review must establish that they have standing as per Rule 56(2) of Civil Procedure Rule (2002) (CPR). Rule 56 (2) states that:

*An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application.*

*(2) This includes –*

- a) *any person who has been adversely affected by the decision which is the subject of the application;*



- b) anybody or group acting at the request of a person or persons who would be entitled to apply under paragraph (a);
- c) anybody or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application;
- d) any statutory body where the subject matters fall within its statutory remit;
- e) anybody or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; or 291 Administrative Law (f) any other person or body who has a right to be heard under the terms of any relevant enactment or the Constitution.

## THE STANDARD TO BE ESTABLISHED FOR LEAVE

[25] The threshold for the grant of leave to apply for judicial review has been laid down in a number of cases. In the case of **Sharma v. Brown – Antoine** (2006) P C Appeal No. 75 of 2006, Lords Bingham and Walker at paragraph 787(4) stated that: -

*“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 it is not subject to a discretionary bar such as delay or an alternative remedy, - R v. Legal aid Board, ex parte Hughes (1992) 5 Admin L.R. 623 at 628, Fordham, Judicial Review Handbook (4th Edn, 2004), p. 42. 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 at 733.” (our emphasis)*

[26] In the case of **Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (Ret’d) et al**, unreported case bearing claim number 2010 HCV 00474, Mangatal J. explained the concept of arguable ground with a realistic prospect of success. She stated at 11 that:

*It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with real likelihood*

*of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success.*

- [27] McDonald Bishop, JA, in the case of ***Private Power Operators v Industrial Disputes Tribunal et al*** [2021] JMCA Civ. 18, gave guidance as to the approach to be adopted in applications for leave to apply for judicial reviews at paragraphs 70 where she stated that:

*It is well established that the review court is to fix its gaze on questions of lawfulness or unlawfulness of the decision, that is, matters primarily pertaining to jurisdiction and procedure, inclusive of fairness of the IDT's processes, reasonableness of its decision in the Wednesbury sense and its adherence to the rules of natural justice. This would, necessarily, involve an assessment of whether the IDT's decision was arrived at based on errors of Law.*

## **LEGITIMATE EXPECTATION**

- [28] Legitimate expectation was explained in Wade and Forsyth of Administrative Law 10<sup>th</sup> ed., 2009 at page 449 notes that:

*... It is not enough that an expectation should exist; it must be in addition to be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate for some countervailing consideration of policy or law. But some points are relatively clear. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.*

- [29] The principle of legitimate expectation was also expressed in Halsbury's Laws of England, Volume 61A, 2018 at paragraph 50 as :

*A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation or promise made by the authority, including an implied representation, or from consistent past practice, in all instance the expectation arises by reason of the conduct of the decision-maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.*

[30] The principle of legitimate expectation was applied in a number of cases including the case of ***Regina v Inland Revenue Commissioners Ex parte M.F.K. Underwriting Agents Ltd. And Others*** – [1990] 1WLR 1545 at paragraphs 1569H – 1570A where Bingham LJ stated that:

*The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizens...*

## ANALYSIS

[31] The first issue to be determined is whether the applicant had a legitimate expectation that the lease would have been granted to them? Counsel for the applicant submitted that the legitimate expectation was based on two factors, the resolution dated the 20<sup>th</sup> of October 2010 (the resolution) and the action of the other unit owners that had applied for leases. The resolution passed by the second respondent does speak to leases being assigned to owners of units. It states that: -

1. *That the Corporation be entitled to assign to the proprietor of each strata lot (where such proprietor has signified their acceptance in writing to same) by way of long term Lease (being not less than 20 years), in consideration of a nominal rental not to exceed One Thousand Dollars (\$1000) per annum, such part the common property as is indicated on the attached Plan prepared by Richard Hadadd, Commissioned Land Surveyor, which said. Plan shows the common property lands proposed to be attached to each strata lot using the same Strata Lot Number as on the Strata Plan prepared by him and dated the 12<sup>TH</sup> April, 2010 and to be lodged in the office of Titles Subject Always to: -*

1) *The right of access set out in By-law 1(a) of the First Schedule of the By-laws of the Proprietors, Strata Plan No. 2466, for repair;*

- 2) *The proprietor to whom the lands have been assigned by way of Lease, being solely responsible for the costs of the maintenance of the landscape works on the area assigned with full and free right to plant additional gardens and carry out additional landscaping provided that no permanent structures shall not erected without the prior written approval of the Corporation through its executive Committee. The proprietor leasing the lands shall not be exempt from any part of the maintenance charges fixed by the Corporation but shall them in full;*
- 3) *The standard of maintenance of the lands including any existing landscaping or garden to be of the highest quality and in keeping with the highest standard of maintenance by the Corporation in respect of other common property lands;*
- 4) *The proprietor enjoying exclusive use of the assigned lands in consideration of fulfilling his obligation under items 1, 2 and 3 and any failure by the proprietor to meet any of these obligations, in the sole opinion of the Executive Committee, may result in the Executive Committee and/or the Corporation terminating the Lease of the lands with the service of sixty days notice in writing and the proprietor shall not be entitled to recover any compensation from the Corporation or the Executive Committee.*

2. *That the Corporation shall refund to Ebony Glades Limited any reasonable sum advanced by that Company to purchased tools and equipment for the maintenance.*

**[32]** Secondly the applicant based its legitimate expectation on the actions of other unit owners. The affidavit evidence presented was that the owners of two units, ie owners of 7 and 8, had fenced the common area adjoining their units prior to applying for and receiving a lease. The applicant's position is that they relied on

this practise and as such they had followed suit and fenced the common area adjacent to their unit.

**[33]** My starting position in approaching this issue was to consider the law related to Strata Titles, as laid down in the Registration (Strata Titles) Act (the Act). In the Act common property is defined as: -

*... in relation to any strata plan, so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan;*

**[34]** Section 10 of the Act indicates that common property is to be held by the proprietors as tenants in common. It states that: -

*(1) The common property shall be held by the proprietors as tenants in common in shares proportional to the unit entitlement of their respective strata lots.*

*(2) The Registrar of Titles shall, in making out a certificate of title for any strata lot, certify therein the proprietor's share in the common property.*

*(3) Save as is provided in this Act, no share in the common property shall be disposed of except as appurtenant to a strata lot and any assurance of a strata lot shall operate to assure the share of the disposing party in the common property without express reference thereto.*

**[35]** Section 11 (1) and (2) of the said Act dictates the approach to be adopted when transferring common property. It states that: -

*(1) The proprietors may by unanimous resolution direct the corporation to transfer or lease the common property or any part thereof.*

*(2) If the corporation is satisfied that the resolution was duly passed and that all persons having interests, of which the corporation has notice, in the parcel have consented in writing to the release of those interests in the land comprised in the proposed transfer or lease or, in the case of a lease, have approved in writing of the execution of the lease, the corporation shall execute the appropriate transfer or lease and such transfer or lease shall be valid and effective without execution by any person having an interest in the common property, and the receipt of the corporation for the purchase money, rent or other money payable to the corporation under the terms of the transfer or lease shall be a sufficient discharge and shall exonerate all persons taking under the transfer, or the lease, as the case may be, from any responsibility for the 'application of the moneys expressed to have been received.*

Since the land around the applicant's property is held by the other unit owners as tenant in common, the Act dictates that it can only be transferred or leased by means of a unanimous resolution of the proprietors. There was a resolution passed by the proprietors dated the 20<sup>th</sup> of October 2010. The question is whether that resolution allowed for a lease to be automatically granted to any applicant.

**[36]** Separate and apart from the resolution, the applicant has also sought to rely on the actions of two other unit owners, ie the owners of units 7 and 8. I have only referenced these unit owners as they are the ones who had previously applied for and were granted leases for the common area adjacent to their units. The applicant averred in their affidavits of fencing being erected around the common area adjacent to other units, where no lease had been applied for or granted to the owners. Since the owners of these units had not applied for any leases I will not be referencing them in this decision. The affidavit evidence of the representative of the applicant as well as by Mr Patrick Smith, the representative of the 2<sup>nd</sup>

respondent, showed the practise that had developed in applying for leases for the common areas, which were: -

- a. The owners of these units would erect fencing around the common area adjacent to the units prior to applying for a lease.
- b. The unit owners would apply for a lease of the common area pursuant to the resolution passed on the 20<sup>th</sup> of October 2010.
- c. The other unit owners would vote on whether to approve the lease.

**[37]** Subsequent to the applicant fencing the common area and applying for a lease an issue arose as to whether or not the lease should be granted. The applicant and the second respondent sought the assistance of the Strata Commission, who advised that the second respondent was to convene an Extraordinary General Meeting where the unit owners would vote on whether the applicant should be granted a lease. The applicant and the second respondent agreed to proceed in this manner. The parties had not settled on any rules or limitations to this vote. The simple agreement was for the issue to be settled by means of a vote. This agreement would negate the submission that the applicant had a legitimate expectation that they would have been automatically granted a lease based on the resolution.

**[38]** I note that this agreement was:

- a. in keeping with Section 11 (1) of the Registration (Strata Titles) Act.
- b. Is similar to the procedure adopted in granting the lease to units 7 and 8.

**[39]** The unit owners voted not to grant the lease to the applicant. This outcome cannot be the desired result envisioned by the applicant, however it cannot form the basis for an application for leave for judicial review. This cannot be deemed to be unfair, irrational or unreasonable as the applicant had agreed with this procedure and must have been aware that the unit owners had the option of voting to deny them the lease.

**[40]** Despite the agreement to have the grant of the lease being decided by a vote, the applicant has sought to argue that leave should be granted based on the principle of legitimate expectation. In any application for leave based on legitimate expectation the applicant must establish the practise or promise by the public body for which it is relying. As previously stated, the practise in applying for a lease was threefold, ie the fencing of the common area, the applying for the lease as per the resolution and the vote as to whether the lease should be granted. The applicant has sought to establish legitimate expectation from two of the three practises. In seeking to advance a case for legitimate expectation, the applicant cannot cherry pick the section of the practise that supports their position and then seek to distance themselves from the parts that don't. In addition, the practise in question would be against the 2<sup>nd</sup> respondent who the applicant would have establish is a public body. I find that the applicant has not established that they had a legitimate expectation that the lease should have been granted to them.

**[41]** I then turn to the issue of whether leave to apply for judicial review can be granted against the second respondent. Rule 56 (1) © and (d) of the CPR speaks to which entity or body an application for judicial review can be made against. It states that:-

*(c) for a declaration or an interim declaration in which a party is the State, a court, a tribunal or any other public body;*

*(d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.*

The second respondent would not fall under any category listed in Rule 56(1) as it is not a public body. The 2<sup>nd</sup> respondent is a Corporation registered under Section 4 of the registration (Strata Titles) Act made up of the proprietors of the units. I find that the 2<sup>nd</sup> respondent should not have been named as a respondent in this application and they cannot be the subject of an application for leave to apply for judicial review.

**[42]** The final issue raised was whether the appeal of the first respondent should be quashed as it failed to consider the issues of legitimate expectation and fairness.



The first respondent in its decision dated the 20<sup>th</sup> of October 2022, listed the issues that had been raised by the parties in the appeal which were: -

- a. Whether the resolution dated the 20<sup>th</sup> of October 2010 had already made a decision regarding leasing the common area that adjoined the units. The submission by the appellant was that based on this resolution, once the unit owner indicated that they had an interest to lease the land, the granting of the lease was automatic.
- b. In failing to grant the lease at the extraordinary general meeting, the majority of the owners of units failed to have regard to the earlier resolution that was binding.
- c. Before the Corporation could properly refuse the grant of the lease they would have to revoke the decision of the 20<sup>th</sup> of October 2010.
- d. The refusal of the lease amounted to unequal and unfair treatment of the owners.

[43] A perusal of the 1<sup>st</sup> respondent's decision as well as the submissions on behalf of the applicant at the time of the appeal, showed that legitimate expectation was never raised in the appeal. The issue of fairness was argued by the applicant before the 1<sup>st</sup> respondent and that issue was addressed in the decision of the 20<sup>th</sup> of October 2022. The 1<sup>st</sup> respondent was seized of all the issues raised before it, considered the relevant law and gave reasons for its decision. Based on the submission of the applicant, the question to be addressed is what is the role of the Court under these circumstances?

[44] In the considering the approach to be adopted I turn to the case of ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 233 where Lord Greene states at pages 233-234 where stated that:

*The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into*

*account or neglected to take into account matters which they ought to take into account. Once that question is answered in favor of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority... but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them.*

**[45]** I find that the 1<sup>st</sup> respondent's decision was not ultra vires. It certainly could not be described as irrational or unreasonable. Judicial review is concerned with the process and not the conclusion of the decision. I find that the applicant has failed to indicate any such failings on the part of the 1st respondent and as such has not established any basis for an order for Certiorari to be granted.

## **CONCLUSION**

**[46]** I do not find that the applicant has established an arguable case with a realistic prospect for success. I find, from the orders being sought, that the applicant is seeking to have another vote taken on whether the lease should be granted to them. From a perusal of the resolution dated the 20<sup>th</sup> of October 2010, there is no impediment to the applicant making another application for a lease to be granted for the common area adjacent to their unit.

## **[47] ORDER**

- a. The application for leave to apply for judicial review is dismissed.
- b. Cost to be agreed or taxed.