IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 137 OF 2006

BETWEEN: PARAKLETOS APPELLANT

AND: PLANNING APPEALS TRIBUNAL
FRANK HALL HOMES

RESPONDENTS

CORAM: HON. MME JUSTICE RAMSAY-HALE

Appearances:
Mr. Anthony Akiwumi of Stuarts for the Appellant
Ms. Vicki Ellis, Asst. Solicitor General for the 1st Respondent
Mr. Ramon Alberga QC instructed by Myers & Alberga for the 2nd Respondent

Dates of Hearing: 10th, 11th and 14th of August
Date of delivery: 29th September 2006

JUDGMENT

1. This is an appeal against a decision of the Planning Appeals Tribunal under s. 48 (4) of the Development and Planning Law (2005) Revision.

BACKGROUND

2. On the 17th November, 2005 the First Respondent, the Planning Appeals Tribunal (hereinafter the "PAT")heard an appeal brought by the Appellant in these proceedings against a decision of the Central Planning Authority granting planning permission the Second Respondent, Frank Hall Homes Ltd. (hereinafter referred to as "FHH").

3. The Appellant was particularly concerned that the grant of planning permission did not adequately address the environmental impact of the

proposed development, including the destruction of wildlife habitat and trees, nor the impact of the density of the proposed development on traffic patterns in an already congested area. The Appellant also challenged the grant of permission on the ground that the proposed building densities were greater than the law permitted for what was a low-density residential area.

4. The Appeal was by way of rehearing. On the 11th November, 2005, PAT issued judgment confirming the grant of planning permission to FHH with certain modifications **"to take into account any concern there may be about traffic and environmental impact of the planned development"**. They imposed two conditions in the following terms:

> **"(P)rior to the continuation of any site works such as filling, grading and road construction (1) the PWD must confirm in writing that there are no remaining traffic concerns as a result of the proposed development and (2) the Department of the Environment (DoE) must confirm it has no objection to the proposed development.**
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> **If either the PWD or the DoE indicates concerns in relation to the proposed development, the matter should be referred back to the CPA for the imposition of conditions designed to address those concerns."**

5. Shortly after the decision was handed down, the Appellant and his Attorney began to correspond with the Planning Department by e-mail alleging, *inter alia*, that the FHH were continuing site works in breach of the PAT's orders.

6. On the 19th December, 2005, the Planning Department advised FHH that comment had been received from the NRA and the DoE and that no further action was required by the CPA to address those comments and FHH could recommence site works and finalise the subdivision.

7. The Appellant received this confirmation by e-mail dated the 19th December in the following terms,

> "Mr. Gibbs:
>
> I can confirm that Mr. Hall has now complied with conditions 1a) and 1b) of the CPA decision and we have received comments from the NRA and the DoE, neither of which require further action by the CPA. Accordingly, Mr. Hall has been advised that he may recommence works on site in an effort to finalise the subdivision."

8. The Appellant did not appeal this decision but again submitted several written correspondence to the Planning Department, including a memorandum dated the 28th December, 2005. His Attorney circulated e-mails to all parties on the 5th, 6th, 12th, and 17th January which contended, *inter alia*, that the DoE had not confirmed that it had no objection to the proposed development and the NRA had not confirmed that there were no remaining traffic concerns as a result of the proposed development. The e-mails asserted that the Planning Department had acted in breach and in contempt of the PAT's decision and asked the PAT to confirm that conditions it imposed had not been complied with and order that all work on the site cease.

9. On the 17th March, 2006 the Secretary to the PAT advised the parties by e-mail that the PAT was of the view that that the conditions had been complied with and as there had been no fresh appeal, the Tribunal was now *functus officio* and no longer had jurisdiction to issue further order.

10. The defendant now appeals to the Grand Court on the following grounds:

1. That the refusal by the decision of the Respondent dated 17th March 2006 is wrong in law or alternatively unreasonable;

2. That the First Respondent's determination that the conditions that it imposed by its decision of the 11th November 2005 is unreasonable and or alternatively wrong in law;

3. That the First Respondent's determination in its decision of 11th November 2005 that Regulation 9(8) of the Development and Planning Law (2005 Revision) permits the construction of triplexes and that the Second Respondent's application thereunder for the construction of the same is wrong in law;

11. The Second Respondent made an application *in limine* for the proceedings to be struck out on the ground that they were hopelessly out of time. That the decision of the CPA which gave FHH the authority to continue the development had never been appealed nor had the Appellant at any time attempted to institute proceedings to enforce compliance with the conditions imposed by the PAT which it said had not been complied with.

12. That the question of the proper interpretation of s 9(8) of the Development and Planning Regulations (2005 Revision) raised by ground 3 was a matter which that could only have been resolved on appeal from the

decision of the PAT rendered on the 11th November and is now academic as the subject matter of the Second Respondent's application has been virtually completed. In the result, the deadly of which the Appellant is guilty would cause the severe prejudice to the Second Respondent if he were granted leave to appeal out of time.

13. The final complaint is that the appeal is bad as the Appellant fails to specify what remedy it seeks. Mr. Alberga QC submitted that the Appellant was not entitled to a declaration firstly, because it was not one of the remedies available under s10b) of the Appeal Rules, and in the secondly, a declaration was a remedy that was available only where some right to relief which the Court could grant was established and there was a genuine, justiciable issue for resolution. It was not available where, as here, the matter was hypothetical or academic.

14. The Asst. Solicitor General submitted that the Tribunal having heard and determined the appeal by the Appellant against the grant of approval for the subdivision and having decided that the matter should be referred back to the CPA for the imposition of further conditions designed to address the concerns of the NRA and the DoE, if any, it was *functus officio*. Once the CPA had received representations from the NRA and DoE and determined whether further conditions were necessary, it had complied with the conditions imposed by the PAT. When the CPA concluded that no further action was required on their part the grant of planning permission that had been made to the Second Respondent was perfected.

15. If it were unreasonable for the CPA to have come to that conclusion given the substance of the reports from the NRA and the DoE, the Appellants should have appealed that decision.

16. As the Tribunal was *functus officio*, the letter of the 17th merely expressed the opinion of the PAT as to whether the conditions it had imposed were met. In the circumstances, it was not a decision susceptible to appeal.

17. On the first ground, usefully clarified by Counsel for the Appellant as being concerned with the grant of building permission, she submitted that the PAT is an Appellate body with no original jurisdiction and cannot grant building permission. It may review a grant of such permission but only in the context of an appeal and the question of the grant of building permission had never been in front of it, only the application for subdivision.

18. On the issue of whether the Court should grant the Appellant leave to appeal, Counsel for the PAT complained that there was no application for leave before he Court and no reasons had been given by the Appellant for the delay. She recommended for the Court's consideration the case of Regalbourne Ltd. v East Lindsey District Council (1993) C.O.D. 297 where it was held that, in the interests of good administration, absent good reasons for delay, the Courts should be slow to extend time for challenges to the decisions of Tribunals. The Court should be especially reluctant.

19. Counsel for the Appellant made it clear that he was not appealing the imposition of the conditions on the original grant of planning approval and indicated that the Appellant felt the conditions imposed protected its position. The appeal was against the finding by the PAT that the conditions had in fact been complied with by the CPA, a finding which he contended was unreasonable.

20. He submitted that the PAT was not *functus officio* as it had a supervisory remit and an enforcement jurisdiction and had the power to issue directions on the compliance with or enforcement of its order. He likened

the position to proceedings in the Grand Court and said that the parties had the same right to apply to the PAT for directions as they would have to the Grand Court on a "Liberty to Restore" provision. He submitted that any assertion that the PAT could not act absent a fresh appeal even where "it possessed information that the CPA or other party was acting in breach of its conditions was wrong and illogical and that the Appellant had a legitimate expectation that the PAT would enforce its decision and order a stay of site works, until it had determined in response to the whether the CPA had complied with the conditions.

21. He cited the authority of Barke Seetec Technology Centre Ltd [2005] ICR 1373 in support of his submission that the PAT was not *functus* but, like the UK Employment Tribunal in Barke, had the power to review certain of its own decisions. It was a power which he claimed the PAT had in fact been exercising up until it gave its decision of the 17th March. In support of this submission he relied on an e-mail from the Chairman of the PAT dated the 20th December, 2006 in which she stated that it was appropriate for the parties to seek clarification of the Tribunal's decision from her, the Tribunal's request for confirmation from the NRA that it had no concerns and the Tribunal's later invitation to Counsel for submissions on the issue of the CPA's compliance.

22. The upshot of this submission was that he could not have appealed against the decision of the CPA as the PAT was still seized of the matter and had been exercising its power of review relative to this issue of compliance.

23. The relevant time for appeal arose only when the PAT refused to enforce its order and found instead that its conditions had in fact been complied with. That in the circumstances, the appeal was only 4 days out of time, there was an arguable point of law and the matter was of such public interest that the Court should grant leave to appeal.

24. With respect to Count 3, Counsel accepted that the appeal was some 4 ½ months out of time but said that the matter was one of great public importance and that he should be granted an extension of time within which to appeal.

25. He submitted *inter alia*, that the method of calculating buildings per acre adopted by the CPA, and upheld by the PAT was flawed, as roadways and other reserved areas where no-one could build had been included in the relevant calculations;

26. That, FHH's application for subdivision showed it intended to subdivide the land into lots of a certain size on which it proposed to erect duplexes and triplexes. The drawings of the proposed buildings revealed that they were really single dwelling houses, each with its own parcel of land made to appear attached to each other by the use of trellises. He submitted that FHH was attempting to evade the statutory limits on lot sizes by this device, to increase the density per acre from 3 units to 15;

27. That, what FHH has built on the ground is entirely different to what was originally proposed by the developer, in that the development consists entirely of single dwelling houses each sitting on 6000+ sq ft. of land, completely at variance with the minimum lot size mandated at law for single dwelling houses in a low density residential area and completely at variance with the actual grant of planning permission by the CPA which expressly forbade the construction of single dwelling houses on the site.

28. The public importance, he submitted, arose from the fact that other similar developments are proposed and a declaration now would determine whether such an application for subdivision could succeed in the future.

29. I turn to the first ground of appeal. Counsel submitted that by its decision of the 17th March, the PAT refused to address the question of building permission which Counsel had raised with it in his e-mail of the 17th February, 2006 on the ground that it was *functus.*

30. In his written submissions to the Court, he put his submissions this way:

> At para 34, that " the contention by the First Respondent that it was *functus officio* is fatally flawed...the First Respondent made no decision in respect of the alleged grant of permission to build on the land...at no stage has the Appellant been given an opportunity to make representation on that issue", and at para 36 (ii), that "By reason of the First Respondent's scathing criticisms about the manner in which the CPA and Planning Department had previously handled all aspects of this application and by the fact of the First Respondent exercising its *de novo* jurisdiction, the issuance of building permission should have been a matter for the First Respondent."

31. Counsel for the Appellant urged the Court not dismiss the Appellant's motion by virtue only of procedural default in not applying for leave to appeal out of time, even if the Court took the view that it was unjustifiable, but to view the matter in the round. He asked the Court to adopt the liberal approach to applications for extension of time suggested in Finnegan v Parkside Health Authority [1998] 1 All ER 595.

32. He also cited the decision of Panton J in Frank Hall Homes v Planning Appeals Tribunal and Central Planning Authority March, 16th 2001 G.C., and in a particular the Judge's statement of the relevant principle at p.

> "3. In exercising its discretion, the Court will consider-
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> (i) the length of the delay;
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> (ii) the reasons for the delay;
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> (iii) whether there is an arguable case for an appeal; and
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> (iv) the degree of prejudice to the other parties is time is extended.

4. Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done,"

and submitted there was an arguable case for appeal and that time should be extended in the interests of justice.

DECISION

33. Because of the way in which the matter was argued it is convenient to start with Ground 2.

> **2. That the First Respondent's determination that the conditions that it imposed by its decision of the 11th November 2005 had been complied with is unreasonable and or alternatively wrong in law.**

34. The first issue to my mind is whether the e-mail of the 17th March issued by the PAT was a decision susceptible to appeal in any event. I am satisfied it is not. There is no provision in the governing statute for a decision of the PAT to be rendered by e-mail as to the legality of anything done by the CPA, consequent upon receiving submissions by e-mail correspondence and upon reviewing written submissions. The PAT may only issue judgment after hearing an appeal in accordance with the Development and Planning (Appeals) Rules.

35. Counsel for the Appellant submitted that an e-mail could amount to a reviewable decision and handed up to the Court an extract from Michael Fordham's *Judicial Review Handbook* pp.138-139. My first observation is that this is not an application for judicial review, but a statutory appeal.

36. From the learning to be gleaned from Fordham (at para 5.1.4), I am satisfied that the view the PAT expressed in that e-mail would not be a decision from which even judicial review would lie as the opinion rendered by the PAT did not create any rights or obligations in any party nor affect any party's rights or interests. The decision of the PAT of the 11th November was the relevant decision that created obligations and affected the rights and interests of both parties. In particular, it obliged the CPA to receive comment from the NRA and the DoE about any concerns they may have concerning FHH's proposed development and impose conditions to address those concerns, if any, and it protected the Appellant's interest, as we have been told by Counsel.

37. The decision of the CPA of the 19th December, that no further action was required, was the decision which gave FHH the authority to continue developing the site in accordance with the planning permission it was previously granted. Precisely the result the Appellant had hoped to avoid. It is this decision that the Appellant ought to have appealed

38. The futility of allowing the Appellant to argue this ground is easily demonstrated by asking the question, "What if the Court were to agree with the Appellant that the PAT's conclusion that the conditions imposed had been complied with was wrong?" The fact is that the decision of the CPA communicated to FHH on the 19th December, 2005 would still stand, and FHH would still be entitled on the strength of that decision letter to continue developing the land in accordance with the planning permission he was granted.

39. Although my finding is sufficient to dispose of ground 2, I make the following observations with respect to the other arguments advanced in the course of the hearing:

40. The Tribunal was in fact *functus officio* and could not order a stay of continuing site works authorised by the CPA or review the decision of the CPA or reverse it absent a fresh appeal.

41. As to Barke, on which Counsel for the Appellant relied, the Chairman of the Tribunal readily concurred, as do I, that the PAT has the power to clarify its decisions. I am also of the view that the Tribunal would have the power to correct errors and omissions in the record necessary to make sense of the decision and would not be *functus* for those purposes.

42. I cannot, however, accept the assertion by Counsel that the PAT has any power to review its own decisions. The power which the Court in Barke said the UK Employment Tribunal possessed in that case was a power it had under Statute. The statutory framework here makes no provision for any such review by the PAT. In any event, the Appellant wasn't inviting the PAT by way of this correspondence to review its own decision of the 11th November. The Appellant was in fact content with that decision. What the Appellant was asking the PAT to do was review the decision made by the CPA on the 19th December which I say again, at the risk of sounding repetitive, it could only do if the matter were brought before it by way of an appeal.

43. As to the assertion that some provision analogous to the 'Liberty to Restore' provision in Grand Court proceedings is to be implied in the decisions of the PAT, I say there is absolutely no legal basis for such a proposition. Further, I can say with certainty that, inasmuch as no Court could be moved to issue any decision or process to enforce any order in response to an e-mail complaint that its order had been breached, the e-mails by which the Appellant communicated with the PAT would have been insufficient to invoke any such provision had it existed.

44. The Appellant, for whatever reason, eschewed the formalities and cannot say that he failed to file his appeal because he thought the PAT, on the strength of his fervid assertions by e-mail that its conditions had not been complied with, would have enforced its decision consistent with some supervisory remit that he asserts it had and was exercising.

45. I regret that The PAT allowed itself to be drawn into what the Chairman had originally regarded, quite properly, as a dispute between the Appellant and the Planning Department. In her e-mail of the 20th December, she wrote *inter alia*, "I believe it is appropriate to seek clarification of judgments of the PAT from me or the Deputy Chair...However, copying me on correspondence relating to the dispute between the Department and some of the parties to the judgment puts me in a difficult and embarrassing position and I would point out that it is not necessary or appropriate to do so."

46. Despite the view she expressed, the PAT ill-advisedly allowed itself not only to be drawn into correspondence with the Counsel for the Appellant, but to capitulate to the insistent urgings of Counsel for its opinion as to whether the conditions had complied with.

47. The PAT should have invited the Appellant to appeal the decision of the CPA if he were aggrieved by it. By remaining engaged, the PAT ran the risk of engendering in the mind of the Appellant the possibility that it was capable of granting him some relief.

48. The conduct of the PAT could not however give rise to any legitimate expectation that it would have enforced its decision against the CPA, or stopped the site works from proceeding or reversed the decision of the PAT or done anything else as the PAT did not have the power to act

absent a fresh appeal. There can be no legitimate expectation of the exercise of an ultra vires power.

3. **That the first Respondent's determination in its decision of the 11th November 2005 that Regulation 9(8) of the Development and Planning Law (2005 Revision) permits the construction of triplexes and that the Second Respondent's application thereunder for the construction of the same is wrong in law:**

49. Though this ground of appeal on the face of it challenges the finding of the PAT that the law permits the construction of triplexes. There can be no doubt that such buildings are in fact permitted. The law defines apartments as a building to be used as a home or residence for more than two families living in separate quarters. It appears that triplex is merely a convenient ay of defining a building that would house three families in separate quarters. Although the language adopted by the PAT was not forensic, there can be no doubt that such buildings are in fact permitted.

50. The real challenge made by Counsel in his submissions was to the assertion made by FHH that it intended to build triplexes or apartments at all, as the drawings showed that the buildings proposed would not share a common wall or a common parcel of land. Rather, FHH proposed to build houses, each with its own parcel of land, which fall outside the definition of apartments altogether, and intending by 'attaching' them with trellises to bring the proposed building units within the ambit of the law. That, in the result, the PAT was wrong in finding that the law permitted construction of these triplexes.

51. Although the application by FHH barely concealed its intention to build single dwelling units in excess of the number allowed in a low density residential area by defining the proposed buildings as duplexes and triplexes (apartments), there can be no appeal against the finding either that triplexes are permitted or that FHH intended to build triplexes.

52. As a result of the Appellants' delay in filing an appeal against either the finding of the PAT, or the later decision of the CPA of the 19th December giving FHH the green light to go ahead with the development, FHH has continued to develop the site. It had no indication at any time that the PAT's finding was being challenged, not even in the e-mail correspondence in which the Appellant engaged the PAT thereafter.

53. By the time of the hearing of this matter, FHH had constructed over 40 dwellings, and had sold all the other dwelling houses it proposed to construct on the site. There would be significant and substantial prejudice to FHH if the Court were to extend time for this ground of appeal. In the absence of any reason for the delay in filing this appeal, and in light of the fact that allowing it would cause prejudice to FHH that could not be compensated by an award of costs, I refuse to extend time for appeal on that ground.

54. The Appellant had said the matter is of great public importance as other like developments are planned and seeks a declaration. I am of the view that a declaration is not a remedy available to the Appellant on an appeal under s 48 of the Law and that the Appellant is limited to the remedies set out in that section. Further, were this a matter where a declaration was an available remedy, it would not have been available to the Appellant on these facts as the question of whether the PAT was right or not would be as, Mr. Alberga submits, completely academic as the subject matter of the

Second Respondent's application for planning approval has been virtually completed.

55. As to the fact that the original grant of approval expressly forbade the construction single dwelling houses, I note that the Appellant would have been entitled to complain of that breach of planning permission to the Planning Department and ask the Department to enforce the original grant against the FHH, but again it did not.

> **1. That the refusal by the decision of the respondent dated the 17th March, 2006 is wrong in law or alternatively unreasonable.**

56. I now turn to the first ground of Appeal, which was usefully clarified by Counsel for the Appellant so that we understand the complaint to be that, it was unreasonable for the Tribunal to refuse to consider the issue of the grant of building permission raised with it by the Appellant in an e-mail dated the 17th of February, 2006.

57. It is undoubtedly true that the PAT made no decision on the issue of building permission; No question of building permission was ever before it on the original appeal. The submission that the issuing of building permission should have been a matter for the PAT because of its scathing criticism of the Planning Department is as incomprehensible as it is without merit.

58. The PAT is a creature of statute and has no jurisdiction other than that conferred upon it by the statute creating it. Its jurisdiction is appellate and not original. As it could not grant building permission it would have been pointless for the PAT to entertain the Appellant on that issue. There is

absolutely nothing in this ground and the Appellant is refused leave to appeal in respect of it.

59. I cannot leave this matter without expressing the view that the Appellant's pleadings did not comply with s. 10b) of the **Development and Planning (Appeals) Rules** and were to that extent procedurally defective.

60. The Appellant's Motion is dismissed.

61. The Second Respondent's Motion is granted.

62. Costs are awarded to the First and Second Respondent.

Hon. Mme Justice Ramsay-Hale
Acting Judge of the Grand Court