1-9-98

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 282 OF 1998

BETWEEN:	Cortina International Limited (Cortina Villas)	**PLAINTIFF**
AND:	The Chairman of the Planning Appeals Tribunal	**1ST DEFENDANT**
AND:	The Central Planning Authority	**2ND DEFENDANT**
AND:	Governor's Harbour Homeowners' Association	**3RD DEFENDANT**
AND:	D.G.O. Enterprises Ltd.	**4TH DEFENDANT**
AND:	Lead Balloon Holdings Ltd.	**5TH DEFENDANT**
AND:	Helen Day	**6TH DEFENDANT**
AND:	Lliam Day	**7TH DEFENDANT**
AND:	Neil Purton	**8TH DEFENDANT**
AND:	Michelle Key	**9TH DEFENDANT**

APPEARANCES:

For the Plaintiff: Mr. Stephen Hellman
For the 3rd to 9th Defendants: Pierre Lamontagne Q.C., instructed by Orren Merren & Co.
For the Central Planning Authority: Mr. Samuel Jackson

BEFORE HARRE CJ

JUDGMENT

This is an application for judicial review of a decision of the Chairman of the Planning Appeals Tribunal ("the Tribunal") ordering an adjournment to a date to be

fixed of the hearing of the planning appeal styled Cortina International Limited v. The Central Planning Authority relating to the proposed development known as Cortina Villas at West Bay Beach North, Block 11C Parcel 181, which had been listed for hearing on 12th and 13th May 1998.

On 18th April 1997 the Plaintiff filed an application for planning permission to build 65 apartment units on the land at West Bay Beach North, Block 11C Parcel 181. The proposed development was known as Cortina Villas. On 21st May 1997 revised plans were submitted.

The application was considered at the meeting of the Central Planning Authority on 21st May 1997. On 24th June 1997 the Plaintiff received written notification of refusal of planning permission and filed a Notice of Appeal.

After two adjournments a preliminary hearing duly took place on 24th February 1998. A provisional trial date was set for 21st and 22nd April 1998 with back-up dates of 12th and 13th May 1998. Both sets of dates were convenient to all parties. The May dates were ultimately agreed upon as the Plaintiff's expert witnesses were not available to complete their reports in time for the April hearing.

By a letter dated 23rd April 1998 to the Chairman of the Tribunal, which was copied to Quin & Hampson, Mr. Klein of Orren Merren & Co requested an adjournment of the 12th and 13th May 1998 hearing as their Counsel had a conflicting engagement in the Grand Court. The letter indicated that Crown Counsel did not object to the

request but that Quin & Hampson had indicated that they would have to take instructions on the matter. By a letter to Orren Merren dated Friday 24th April 1998, which was copied to the Chairman of the Tribunal, Quin & Hampson confirmed that they were taking instructions, and would look to revert to Orren Merren & Co early the following week. However, before this happened the Permanent Secretary to the Planning Ministry advised the respective attorneys as follows: "I write to advise that the Chairman has agreed to postpone the Cortina Villas appeal as per Mr. Klein's letter dated 23rd April 1998."

The Plaintiff seeks, among other relief a declaration that the decision of the Chairman of the Tribunal was unlawful and an order quashing the decision.

The Plaintiff submits, first, that the decision was illegal in that the Tribunal was inquorate and the Chairman therefore had no authority to adjourn the proceedings on his own and was acting in excess of jurisdiction when he purported to do so.

Its second submission is that the decision was procedurally improper in that it was made without giving the Plaintiff the opportunity to make representations on the application for an adjournment, notwithstanding that the application was a matter of considerable importance to the Plaintiff.

Thirdly, the Plaintiff submits that the decision was unreasonable in that no reasonable Tribunal, properly directing itself, could have arrived at such a decision on the merits. While acknowledging that a decision to adjourn a hearing on account of counsel's

convenience will not necessarily be unreasonable, it says that this particular decision was.

Section 41(2) of the Development and Planning Law provides that three members of the Appeal Tribunal shall form a quorum. Rule 3 of the Development and Planning (Appeals) Rules 1985 provides that a copy of a Notice of Appeal to the Tribunal shall be served by the appellant on the Executive Secretary of the Central Planning Authority and upon all parties who may have filed objections or been heard the hearing (sic) of the application to which the appeal relates. Rule 7(1) provides that on the hearing of the appeal the appellant and all persons to whom the Notice of Appeal had been addressed shall be entitled to be heard in person or be represented by an attorney-at-law.

Although they are by now well known in these Islands it is convenient to repeat the classic definition of the grounds upon which administrative action is subject to control by judicial review which Lord Diplock provided in his speech in Council of Civil Service Unions v. Minister for the Civil Service (1985) AC 344 at 310. It was this -

> "By illegality .... I mean that the decision-maker must understand correctly the law that regulates his decision-making power and give effect to it .... By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness' ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ... I have described the third head as 'procedural impropriety' rather than the failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that

> are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

Standards of fairness are to be applied to great things and small. The matter of this adjournment, which in any event would be a short one, is at the low end of the scale, but that is no reason to treat it lightly. Principle is involved. The following passage from the speech of Lord Templeman in Doody v. Secretary of State for the Home Department (1993) 3 All ER 92 concerned a much heavier matter - the rights of prisoners under life sentence - but it is of great importance in the present case -

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following . (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

Of these, I shall refer at this stage only to one which sets out what I regard as the fundamental principle in R v. Panel on Take-overs and Mergers, ex parte Guinness (1989) 1 All ER 510. Mr. Lamontagne, with his usual industry, has brought several

authorities to me. For present purposes I can take the decision of the Court of Appeal on the relevant aspect of this well-known case from the headnote -

> "The test of whether particular acts or decisions of a body, such as the Panel on Take-overs and Mergers, whose constitution, functions and powers were sui generis should be subject to judicial review was whether, considering the matter in the round, something had gone wrong with the body's procedure such as to cause real injustice and require the intervention of the court. However, a decision whether to adjourn a hearing was essentially a matter for the exercise of judicial discretion by the court or tribunal seised of the matter and, furthermore, where a right of appeal from the decision-making body existed but was not exercised, the court would only grant relief by way of judicial review in exceptional circumstances. Accordingly, although the panel's decision to refuse to adjourn the hearing of the concert party issue even for a short period was open to criticism, the panel's conduct of the investigation as a whole had been fair and had not caused injustice to G. It followed that the court would not intervene and that G's appeal would therefore be dismissed."

I have taken particular note of the passage in the judgment of Lord Donaldson MR at page 526 of the report in which he reminds himself of the extent and nature of the judicial review jurisdiction and its relationship to the right of appeal. Having referred to it, I will not set it out in full. I shall do that, however, with the following brief passages from the judgment of Lloyd LJ -

> "It was said that the concept of fairness is flexible; and so in a sense it is. I would accept that what is required of a tribunal, if it is to be fair, must depend on the nature of the task in hand and the circumstances prevailing at the time in question. But it is certainly not flexible in the sense that, once what is fair has been ascertained, the tribunal can be allowed to fall short of that standard by so much as an iota."

That is the approach which I adopt in this case.

I have already referred to rules 3 and 7(1) of the Development and Planning (Appeals) Rules 1985. All who may have filed objections or been heard at the hearing of the

application are entitled to receive notice of and be heard in person or be represented by an attorney on the hearing of the appeal. Whether or not the matter could be determined with the benefit of full argument even if no objectors took part in the appeal is not the issue. They are entitled to take part. I shall not go now into the arguments as to how many objectors are properly represented by Orren Merren & Co., though this is relevant to the matter of costs. There are undoubtedly some. Other arguments went to the reasonableness of the matter going ahead without leading counsel, or with another; the difficulty of finding another convenient date; and the cost to the plaintiff of further delay over and above that which has already been described as unacceptable in another case.

Ostreicher v. Secretary of State(1978) 3 All ER 82 was a case which concerned the refusal of an adjournment by an inspector who, the court found, had ample power to allow an adjournment as and when reasonably required. There was no procedural issue about that.

Lord Denning MR, having restated the elementary principle of natural justice that everything should be done fairly and that any party or objector should be given a fair opportunity of being heard, said this -

> "In every case it is simply a matter of being fair to those concerned. Sometimes a refusal of an adjournment is unfair, but quite often it is fair. It depends on the circumstances of each particular case. But I would only say this: there is a distinction between an administrative inquiry and judicial proceedings before a court. An administrative inquiry has to be arranged long beforehand. There are many objectors to consider as well as the proponents of the plan. It is a serious matter to put all the arrangements aside on the

> application of one objector out of many. The proper way to deal with it, if called on to do so, is to continue with the inquiry and hear all the representatives present; and then, if one objector is unavoidably absent, to hear his objections on a later day when he can be there"

Conditions in the Cayman Islands, and the facts of this case, are not the same. Leaving procedural issues aside, one may agree or disagree with the decision of the Chairman. But the arguments against it fall far short of showing irrationality of the kind needed to satisfy the test of irrationality propounded in Council of Civil Service Unions v. Minister for the Civil Service (supra). Nevertheless, the Plaintiff is entitled to succeed on the other grounds which it advanced.

From all this I reach the following conclusions -

1. While, as a matter of purposive construction and common sense it would be open to the Chairman to take a purely administrative decision (including, for example, an adjournment by consent) without calling a meeting of the Tribunal, this was illegal and procedurally improper in the present case where the plaintiff had made clear that it might wish to be heard. It should not have been deprived of its right to be heard, and be heard by a quorate tribunal. There was reviewable procedural irregularity.

2. The decision was not, however unreasonable in that no reasonable Tribunal, properly directing itself could have arrived at the decision to adjourn on the merits.

3. The issues in this application are those which are particularly amenable to judicial review. To argue the matter as part of the appeal would render it nugatory. These are exceptional circumstances which make the judicial review process the right one.

4. I make the declaration that the decision by the Chairman was unlawful, and an order quashing the decision. There remains the question of the parties on whom costs should fall.

No order for costs.

1st September 1998

G.E. Harre
Judge

GRAND COURT CAYMAN ISLANDS