Grand Cause 363/04

FORM 86A

IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURUSANT TO ORDER GCR ORDER 53

AND

IN THE MATTER OF:

PARAKLETOS LTD

v

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

NOTICE OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

This form must be read together with Notes for Guidance obtainable from the Crown Office.

To the Honourable Attorney General of the Cayman Islands, Government Administration Building, Elgin Avenue, George Town, Grand Cayman Strand, Cayman Islands B.W.I.

Applicant: **PARAKLETOS LTD**

Respondent: **ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

Judgment, order, decision or other proceeding in respect of which relief is sought:

Decision dated 29th july 2004 of the Respondent's refusing to issue an order prohibiting land clearance and degradation of Block and Parcel 27D 14 pending the determination of the Applicant's appeal pursuant to Section 48 of the Development and Planning Law (2003 Revision).

Relief Sought:

Declaration. That by its decision of 29th July 2004, the Respondent has misdirected itself in law;

Certiorari of the Respondent's decision of 29th July 2004;

Mandamus compelling the Respondent to issue orders / notices preventing further works on Block and Parcel 27 D 14 until the determination of the Applicants appeal pursuant to Section 48 of the Development and Planning Law (2003 Revision)

Name and address of
Applicant's Attorneys,
or, if no Attorneys
acting, the address
for service of the
applicant:

Stuarts
4th Floor, Cayman Financial Centre
Dr. Roy's Drive
George Town
Grand Cayman
Cayman Islands

Signed: Stuarts

Dated: 5th August 2004

GROUNDS ON WHICH RELIEF IS SOUGHT

INTRODUCTION

1. The Applicant is the registered owner of Block and Parcel 31A 27 which is land adjacent to Block & Parcel 27D 14 along its eastern border. Together with ten other appellants, the Applicant is appealing the grant of planning permission on 19th May 2004 to Frank Hall Homes (Cayman) Ltd. (hereinafter referred to as the "Grantee") for the construction of seventy-seven (77) housing units on 27 D 14, a site measuring 18 acres. The appeal is pursuant to section 48 of the Development and Planning Law (2003 revision) and is based on the following, non-exhaustive, substantive grounds that include inter alia, concerns over drainage and flood risk, access, traffic density, infrastructure issues and building density.

2. Notice of the Applicant's appeal was lodged, within the period mandated by the Development and Planning Law (2003 Revision) in June 2004. No date has yet been set for the hearing of the appeals. Despite the fact of the pending appeal and notice (both by orally from the Respondent and in writing from the Applicant to the Grantee's agent) thereof to the Grantee, substantial, irreversible clearance work has been commenced on 27D 14 by the Grantee's agent. Although advised of the Appeal, the Grantee has determined to undertake the extensive land clearance and preparation work at what is reportedly described at "his own risk". It is important to underscore that at all material times, the Grantee was not the owner of 27 D 14 as it was not the beneficiary of a land transfer.

3. By letters dated 23rd and 24th July 2004 to the Respondent, the Applicant particularised the Grantee's action in respect of 27 D 14 and further invited the Respondent to issue preventative orders, including a stay of execution (sic) against the Grantee until determination by the Respondent's Planning Appeal Tribunal of the Applicant's appeal. The letters also adverted to the fact that the Grantee was clearing land, namely 27D 122 to 125 inclusive, for which the Grantee had no permission.

4. By a letter dated 29th July 2004, received by the Applicant on 30th July 2004, the Respondent indicated the following:

    (a) That the Respondent had been advised that that the filing by the Applicant of an appeal pursuant to Section 48 of the Development and Planning Law (2003 Revision) did not operate as a "stay on planning permission;"
    (b) That the Grantee had no planning permission in respect of 27D 122-125 inclusive and consequently the Respondent would

authorise action to be taken by its Code Enforcement Officers in respect of those properties.

5. In respect of 4(a) above, it is the Applicant's respectful contention that the Respondent has misdirected itself on the Law, with the effect that its denial of jurisdiction to issue a stay of permission pending the Applicants appeal and / or its failure to order the cessation of works by the Grantee on 17D 14 is: as aforesaid, in the following way:

   (a) Erroneous in law
   (b) Unreasonable
   (c) Contrary to the principles of natural justice
   (d) Contrary to the provisions of Article 6 of the European Convention of Human Rights, in that it fails to provide an adequate remedy in respect of the determination by a public authority of the civil rights and obligations of the Applicant without a proper hearing.

6. It is in these circumstances that the Applicant craves the leave of this Honourable Court to move for judicial review.

BACKGROUND

THE LAW

LEGISLATIVE FRAMEWORK

1. The Development and Planning Law (2003 Revision) hereinafter referred to as the "Law" is the statutory yardstick by which the Respondent's actions shall be measured. Section 3(1) of the Law establishes the Respondent authority and states the following:

   > *"For the purpose of this Law there is established a body of persons to be called the Central Planning Authority, exercising such functions throughout the Islands as are hereinafter assigned to it."*

2. Section 5(1) of the Law defines the Respondent's duty under the Law as follows:

   > *"It is the duty of the Authority to secure consistency and continuity in the framing and execution of a comprehensive policy approved by the Executive Cabinet with respect to the use and development of the land in the Islands to which the Law applies in accordance with the development plan for the*

Islands prepared in accordance with Part II or otherwise in operation by reason thereof."

3. Section 6 (1) enumerates the Respondent's duties where it is considering an application to carry out a major development and states as follows:

> *"Where the Authority or Board receives an application for permission to carry out the developments specified in subsection (2), the Authority or Board, as the case may be shall –*
>
> *(a) consider the likely impact of the proposed development on the infrastructure of the Islands as well as the educational, social, medical and other aspects of life in the Islands;*
> *(b) consider whether there are issues of national importance which are relevant to the determination of the application for development and require evaluation;*
> *(c) consider whether there are technical or scientific aspects of the proposed development which are of so unfamiliar a character as to jeopardise a proper determination of the question unless there is a special enquiry for the purpose;*
> *(d) identify and investigate the considerations relevant to, or the proposed technical aspects of, the proposed development which, in its opinion, are relevant to the question whether the application should be approved; and*
> (e) *asses the importance to be attached to those considerations or aspects.*

4. Sub-section (2) defines developments to which sub-section (1) applies as including *"apartments with twenty-one or more units"*. Section (15(1) of the Law stipulates the requirements for an application for Planning Permission which may be granted with or without conditions and **Notice** of which application shall, pursuant to sub-section 4 be

> *"served not more than three working days prior to, no more than three working days after, the date upon which the application is made, for a period of twenty-one days, upon all adjacent owners and copies of such notices enclosed with the relevant application to the authority .... And the Authority shall not consider applications in the absence of evidence of service of such notices and (as the case may be) unless the Authority is satisfied that twenty-one days have elapsed since the publication of the last of such issues."*

5. Section 15(5) provides that subject to Section 48, the decision of the Authority on any application made to them under this section shall be final.

Section 17(1) provides the Authority with a mechanisms by which it may revoke or modify the grant f planning permission and states the following:

> *"Subject to this section, if it appears to the Authority that it is expedient, having regard to the development plan and to any other material considerations that any permission to develop land on an application made in that behalf under this Part should be revoked, it may by order, revoke or modify the permission to such an extent as appears to be expedient as aforesaid*
>
> *(2) The power conferred by this section to revoke or modify permission to develop land may be exercised where –*
>
> *(a) where the permission relates to the carrying out of building or other operations, at any time before those operations have been completed; or*
> *(b) Where the permission relates to a change of the use of any land, at any time before the change has taken place;*
>
> *Provided that the revocation or modification of permission for the carrying out of the building or other provisions shall not affect so much of those operations as has been previously carried out."*

6. Section 25 of the Law provides the Authority with a mechanism by which it can make orders for the preservation of trees and woodlands. Section 46 of the Law provides for the establishment of an Appeals Tribunal and finally Section **48** stipulates the entitlement of qualified persons, aggrieved by the decision of the Respondent Authority, to **appeal** to the Appeals Tribunal.

JURISPUDENCE

7. The Applicant respectfully contends that the Respondent has misdirected itself on the Law. Furthermore the Applicant contends that the Respondent, in breach its statutory duty has failed to direct its attention to the other available statutory mechanisms by which it could achieve the Applicant's objective, namely the protection from destruction of the habitat within 27 D 14 prior to the exercise by the Applicant of its rights under Section 48 of the Law. The fact of the Respondent's misdirection, it is respectfully contended, is a matter for which the Grand Court of the Cayman Islands has the jurisdiction to review. Authorities for this submission can be found by reference to English Common Law and in particular the dicta of the House of Lords in **ANISMINIC LTD V FOREIGN COMPENSATION COMMISSION [1969] 2 AC 147, 174B** per Lord Reid who stated as follows:

"It was argued that the whole matter of construing the Order was something remitted to the commission for their decision. I cannot accept that argument. I find nothing in the Order to support it. The Order requires the commission to consider whether they are satisfied with regard to the prescribed matters. This is all they have to do. It cannot be for the commission to determine the limits of its powers. Of course if one party submits to a tribunal that its powers are wider than they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal ..... if they reach a wrong conclusion as to the width of their powers, the court must be able to correct 'that - not [merely] because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal."

See also per Lord Scarman: "Power can be abused in a number of ways: by a mistake of law in misconstruing the limits imposed by statute (or by common law in the case of a common law power) upon the scope of the power."

8. The House of Lords affirmed the Court's supervisory jurisdiction review errors of law in the seminal case of **O'REILLY V MACKMAN [1983] 2 AC 237**, where at 283E-F Lord Diplock stated the following:

"the full consequences of the ***Anisminic*** case, in introducing the concept that if a statutory decision-making authority asks itself the wrong question it acts without jurisdiction, have been virtually to abolish the distinction_ between errors within jurisdiction that rendered voidable a decision that remained valid until' quashed, and errors that went to jurisdiction and rendered a decision void ab initio provided that its validity was challenged timeously in the High Court by an appropriate procedure"); See also the dicta in **IN RE A COMPANY [1981] AC 374, 383C** (Lord Diplock: "The break-through made by Anisminic [1969] 2 AC 147 was that, as

respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was - for practical purposes abolished"); and **PALACEGATE PROPERTIES LTD V CAMDEN LONDON BOROUGH COUNCIL [2000] 1 PAR 59, 78B** (effect of ***Anisminic*** is: "Any distinction between errors of law within and without jurisdiction has been abolished for the purpose of ascertaining the limits of the legal powers enjoyed by public authorities, so that a decision of such an authority may fall to be quashed by judicial review for any error of law").

9. The principle so stated has been affirmed by various decisions of the Courts in England such as to become trite. See by way of example the dicta in the following cases:

R V CENTRAL ARBITRATION COMMITTEE, EX P BTP TIOXIDE LTD [1981] ICR 843, 856B-D (Forbes J: "At one stage in his argument I detected a suggestion from [counsel] that in considering the decision of a lay tribunal it could not be said to have misdirected itself in law unless the court came to the conclusion that no reasonable tribunal could so have misdirected itself, in accordance with the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* doctrine. I do not consider this is right ... A tribunal either misdirects itself in law or not according to whether it has got the law right or wrong, and that depends on what the law is and not what a lay tribunal might reasonably think it was. In this field there are no marks for trying hard but getting the answer wrong");

R V ELMBRIDGE BOROUGH COUNCIL, EX P HEALTH CARE CORPORATION LTD [1991] 3 PLR 63, 68G (Popplewell J: "A court will interfere with a decision of a local authority if they have misapplied the facts or misapplied the law. In order to decide whether they have misapplied the law the court itself has to come to the conclusion as to what the law is. It cannot duck the issue by saying the law is very difficult and there are conflicting views and therefore the local authority are not unreasonable in taking one view. The court has to decide what the law is; if the local authorities have applied that law they cannot be challenged. If they have not applied that law, however reasonable it may have been to take a contrary view, a court will interfere");

DAVIES V PRESBYTERIAN CHURCH OF WALES [1986] 1 WLR 323 (an appeal on a point of law) at **328F-G** (Lord Templeman: "The question to be determined is a question of law... If the industrial tribunal erred in deciding that question, the decision must be reversed and it matters not that other industrial tribunals might have reached a similar erroneous conclusion in the absence of an authoritative decision by a higher court."

10. The Applicant further respectfully contends that questions of Law and misdirections thereof are uniquely within the remit of the Grand Court in the exercise of its supervisory jurisdiction. As has been stated, the issue is one which may be described as par excellence for the determination of the supervising superior Court:

> **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1985] AC 374, 410F** per Lord Diplock:
>
> > "By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable"

11. The Applicant fully recognises that the remedies sought are subject to the discretion of the Grand Court the exercise of which may be the subject of restraint in circumstances where it may be argued that there is either an alternative remedy or that the Applicant has failed to exhaust all remedies available to it. However, general principle notwithstanding, the Applicant respectfully invited the Grand Court to exercise it s discretion and in so submitting the Applicant relies on the dicta of the English Courts in respect of this aspect of judicial review. Put pithily, the Applicant contends that the mere existence of an alternative remedy should not preclude judicial review. The authority for this submission can be found in **LEECH V DEPUTY GOVERNOR OF PARKHURST PRISON (1988] AC 533** per Lord Oliver at 580C-D:

> "An alternative remedy for abuse or excess, whether effective or not, may be a factor, and a very weighty factor, in the assessment of whether the discretion which the court undoubtedly has to grant or refuse judicial review should be exercised. But it cannot, as I

> see it, bear on the question of the existence of the jurisdiction") and 581D-E ("It has never previously, so far as I am aware, been suggested that the mere existence of an alternative remedy, of itself and by itself, ousts the jurisdiction of the court, though it may be a powerful factor when it comes to the question of whether the discretion to review should be exercised. I can see, of course, that if the existence of the separate and self-contained remedy is a conclusive factor against the exercise of discretion in every case, so that the discretion could never be exercised in favour of judicial review, that is tantamount to saying that, for practical purposes, the jurisdiction does not exist. But I find it quite impossible to attribute such a result to the statutory framework governing prison administration."

12. The Grand Court has had occasion to consider the issue of whether the availability of an alternative remedy should operate as a bar to the grant of relief on an application for judicial review. In **STRATA PLAN No. 103 v D.A.B. (2000) CILR 489** at **496**, Mr. Justice Henderson reviewed the municipal authorities on this aspect and concluded the following:

> "Judicial review is not normally available where there is an alternative remedy by way of appeal. However an application for judicial review may be entertained 'where the alternative is "nowhere near so convenient, beneficial and effectual' or 'where there is no other equally and effective remedy'": see **KIRK FREEPORT PLAZA LTD V IMMIGRATION BOARD** quoting **HALSBURY'S LAWS OF ENGLAND 4TH EDITION REISSUE**. Even where there is an alternative remedy the court retains some discretion to decide which remedy is appropriate."

13. In the light of the forgoing the applicant respectfully invites the Grand Court to issue a declaration that the Respondent's decision not to intervene on the Applicant's behalf is wrong in law. The Applicant respectfully contends that the are good, arguable grounds for the granting of this relief particularly having regard to the following:

    (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
    (b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case, it would be just and convenient for the declaration to be made.

14. Furthermore the Applicant respectful invites the Grand Court to issue an Order of Mandamus against the Respondent requiring it to perform its statutory duty in accordance with the Law. The Applicant relies on English Authorities on this aspect including but not limited to the following **WANG v COMMR OF INLAND REVENUE [1994] 1 W.L.R. 1286** where the Court determined that the commissioner could be compelled to a certain act by an order of mandamus; and **R (ON THE APPLICATION OF KHAN) V LONDON BOROUGH OF NEWHAM 92001] EWHC ADMIN 589 13TH JUNE 2001 UNREP.** Where the Court made a mandatory order to require discharge of a housing duty notwithstanding the council's lack of resources.

15. The Court is further respectfully invited to quash the Respondent's decision of 29th July 2004 on the grounds of unlawfulness. Additionally to the submissions made on the Applicant's behalf, the Grand Court is invited to consider Article 6 of the Convention on Human Rights (ECHR), which the Applicant respectfully contends is applicable in the circumstances of statutory ambiguity. The Applicant relies on the persuasive dicta in **GRANT v EDUCATION BOARD** and **STREETER V IMMIGRATION BOARD** and the **BANGALORE PRINCIPLES** For all these reasons the Applicant respectfully invites the Court to grant the relief requested.

Stuarts

STUARTS

(Anthony Akiwumi)
5th July 2004