COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
2020/PUB/jrv/0006

BETWEEN:

GUSTAVAS FERGUSON

Applicant

AND
BUILDINGS CONTROL OFFICER

Respondent

Before:	Mr. Justice Loren Klein
Appearances:	Mr. Dennis Williams for the Applicant Mr. Kingsley Smith with Ms. Sabrina Deleveaux for the Respondent
Hearing Dates:	5 October 2020

RULING

Klein, J.

Judicial review—Approval of architectural plans and building permit stayed pending engineering review and provision of structural details of building—Application for leave—Delay—Alternative Remedies—Statutory appeals process—Building Regulations Act—Building Regulations Rule—Building Code—Practice and Procedure—Summons to strike out application for leave pursuant to Order 18, r. 19.

INTRODUCTION AND BACKGROUND

Introduction

[1] This is an application by a licensed and registered architect seeking leave to judicially review the decision of the Buildings Control Officer ("the BCO") staying his application for building approval and a permit pending an engineering review and the provision of structural details by a licensed engineer in respect of the architectural drawings submitted for the construction of a townhouse. The issue arises mainly from the proposed use in the construction of a building system using an insulated concrete form ("ICF") known by the tradename "Nudura". The system is one of several unconventional building forms which have been given approval for use in The Bahamas by the BCO subject to conditions, which include the provision of an engineering review and structural details.

[2] The Applicant is resolutely of the view, based on an auto-interpretation of the statutory position, that the BCO's request is unlawful and irrational and that such conditions ought not to be superimposed onto a plan submitted by a licensed architect. He wishes to have the

decision quashed by *certiorari* and seeks mandamus to require the BCO to process the application.

The Application

[3] The applicant filed an application for leave to move for judicial review on 24 January 2020 challenging the decision of the BCO said to have been made on 23 July 2019 and communicated by letter dated 6 August 2019. The substance of that decision was that it required the applicant to have architectural plan #125665, which he submitted for approval on 17 May 2018, reviewed and certified by a structural engineer, and requested him to "*provide specific structural details on the building system based on engineering calculations on each building design*." More significantly, it indicated that the application was stayed and held in abeyance until those conditions were met.

[4] The applicant formulated multiple grounds in support of his claim (some 18 in all), which needless to say are repetitive and overlapping. The most important of these are that: (i) the decision is unlawful as being in breach of s. 3 of the Buildings Regulations Act ("BRA") and Chapter 3 of the Bahamas Building Code ("the Code"); (ii) the decision is unreasonable, in that no tribunal or body acting reasonably could have come to it (i.e., *Wednesbury* irrational); (iii) the BCO acted in excess of his jurisdiction; (iv) no reasons were given for the decision; and (v) generally that the decision was procedurally unfair.

[5] As a result, he seeks various orders and declarations, including: (i) *certiorari* quashing the decision; (ii) a declaration that the decision was unlawful and unreasonable, and therefore null and void; (iii) mandamus compelling the processing of the application according to law; and (iv) damages said to flow from the defendant's (respondent's) unlawful conduct and breach of statutory duty.

[6] An *ex parte* summons was filed 24 January 2020 seeking leave, along with the affidavit of the applicant in support of the application. The Office of the Attorney General vigorously resisted the application on behalf of the BCO. They filed a cross-summons seeking to have the application for leave dismissed on various grounds, namely: (i) that there was inordinate delay in moving for judicial review; (ii) that the applicant failed to exhaust alternative remedies; and (iii) that the application did not disclose any grounds with a reasonable prospect of success, although this was expressed in the language of Order 18, r. 19 of the Rules of the Supreme Court 1978 ("R.S.C. 1978") that the application "*discloses no reasonable cause of action*." The respondent's application was supported by the affidavits of Craig Delancy, the Acting BCO and respondent, and Edwin Yuklow, a structural engineer with the Ministry of Works, both filed 9 July 2020.

[7] I pause here to make a brief observation about the summons filed by the respondent. There seems to be a growing tendency by counsel representing public law respondents to apply to "strike out" an application for leave to move for judicial review pursuant to Order 18, r. 19 of the R.S.C. 1978. This is clearly an inappropriate procedure. Ord. 18, r. 19 applies to the striking out of "pleadings", which by its definition excludes a petition, summons or any

preliminary act. It is clear that the court may, on an *inter partes* hearing of a leave application, refuse leave on any of the normal discretionary grounds such as delay or alternative remedy, or if there is clearly no arguable case. It is beyond question that a respondent or interested party may apply to set aside or revoke leave granted *ex parte* pursuant to the inherent jurisdiction of the court to set aside an *ex parte* order (*Becker v Noel (Practice Note)* [1971] 1 W.L.R. 803), and/or under Ord. 32, r. 6. This may be on any of the general grounds for setting aside *ex parte* orders, and it is most frequently used where there has been a serious breach of the duty of candour (*R (Mohammed Khan) v Secretary of State for the Home Department* [2016] EWCA Civ. 416. But it is only logical that there can be no ability to strike out an application for leave, as this is only a preliminary act to filing the proceedings formally commencing the application for judicial review and, in any event, it would be counter-intuitive to the court's function to grant or refuse permission. Therefore, respondents who seek to oppose the grant of leave on an *inter partes* hearing need simply set out the relevant grounds on which they oppose leave in their summons or motion, or in the case where leave has been granted *ex parte*, the grounds for setting aside or revoking leave.

The relevant legal provisions and principles

[8] Applications for judicial review are governed by Ord. 53 of the R.S.C. 1978 and s. 19 of the Supreme Court Act. Section 19(3) and Ord. 53, r. 3(1) similarly provide that no application for judicial review shall be made unless the leave of the court is obtained. Rule 13(7) requires the applicant to have a "*sufficient interest in the matter to which the application relates*" as a condition precedent to the grant of leave. The governing principles for the grant of leave have been set out most definitively by the Privy Council in *Sharma v Brown Antoine* [2007] 1 WLR 780 (at 787), where the Board said:

> "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 not subject to a discretionary bar such as delay or alternative remedy…".

[9] It is accepted that the threshold for the grant of leave is not very high (see *AG of Trinidad & Tobago v Ayers-Ceasar* [2019] UKPC 44, Per Lord Sales at para. 2). The purpose for leave is to filter out challenges where the applicant either does not have the necessary interest to maintain the challenge, where the claim has no real prospect of success, or where it is subject to discretionary bars such as delay or alternative remedy.

Time limits in judicial review proceedings

[10] Ord. 53, r. 4(1) provides in relevant part as follows:

> "4. (1). An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application should be made."

[11] Thus, the overriding principle is that the application should first of all be made promptly. In this regard, an application might be made within the statutory period and yet not be made "promptly" for the purposes of this provision (see, for example, *R v Independent Television Commission, ex p. TV NI Ltd.* (1991) Times, 30 December CA). On the other hand, an application outside of the six-month period will be out of time, subject to the court's discretionary power to extend time.

The evidence

[12] In his supporting affidavit, the applicant sets out the facts relied on to ground his Application. He indicates that he is licensed professional architect, who on 17 May 2018 submitted a set of architectural plans for building approval in accordance with the BRA and the Code. It appears that at some point he was made aware that his application was being queried, although the date when he became aware is not disclosed in the documents. He therefore engaged a lawyer to write to the BCO seeking clarification and resolution of the matter. His lawyer wrote several letters between March and December 2019, and on 19 June 2019 the BCO acknowledged his letter and indicated that "*the contents of your letter will be reviewed and we will revert to you shortly*." He says on the 6 August 2019, he received another letter which indicated that his application was stayed pending "*review and certification*" of the drawings by an engineer. He indicates that he is only aware of one instance in the Building Code which provides for the submission of a drawing by an engineer, para. 302.5(b) (to which I shall return), but he was of the view that the present case did not come within that category. As it was his view that a professional architect could submit drawings without the need for engineering drawings, he eventually filed for judicial review.

[13] The main affidavit filed by the respondents in opposition to the application for leave is that of Craig Delancy. In it, he sets out the main functions of the BCO, which is to act as the minister's delegate in relation to carrying out the powers under the governing legislation. He says the primary objective of the BCO is to "*ensure the safety and welfare of the public by maintaining standards in all matters concerning the integrity of building design, the materials and methods of construction, maintenance and how buildings are used throughout the Commonwealth of The Bahamas*." He also set out the procedure for the issuance of building permits, which he states must be submitted to the BCO in the prescribed form, and must be accompanied by copies of all architectural plans, drawings, schematics, renderings, detail specifications with regards to materials and equipment (depending on scope) that will be used in the construction of the buildings, including structural calculations and credentials of any required licences held under the various Acts (Professional Architects Act, Ch. 202, Professional Engineers Act, Ch. 200A, and the Local Government Act, Ch. 37).

[14] Speaking to the details of the application in this case, he deposed as follows:

> "12. An Application was made […] on 17 May 2018, which received zoning approval by the Department of Physical Planning on the 19th June 2018, and approval from the Department of Environmental Health on 8th July 2018. Upon final stage review of the proposed building's structural integrity meeting the minimum code standards, it was noted that the structural design was to incorporate the materials and methods of an 'insulated

> concrete form' (ICF) building system designated as an approved product. The trade name "Nudura" is an ICF building system similar to "Polysteel" ICF building system. These approved building systems are given approval by the Buildings Control Division subject to the condition that a recognized structural engineer design and provides specific structural details on the building system based on engineer calculations on each building design to ensure the structural integrity and compliance with the manufacturer's specification."

[15] He also exhibits to the affidavit a sample letter setting out the conditions on which approval is granted for the ICF method in the case of "Polysteel", which are also said to apply to "Nudura". In material part, the building system is approved for use subject to the following conditions:

> "(a) Approved for use in the Bahamas for Type IV or V buildings, Group G or H, or not more than two storeys.
> (b) The structural elements of each building must be individually designed and must be individually designed and detailed to the Bahamas Building Code (2003 edition) by a local recognized engineer, who shall submit his calculations for approval under separate permits.
> (c) The ICF system shall be installed by locally trained personnel in accordance with the manufacturer specifications and the applicable codes.
> (d) […]
> (e) […]"

[16] Mr. Delancy then refers to the review of the application done by Mr. Edwin Yuk Low, a senior engineer with the Ministry of Works (see below), and he says that as a result of the "*deficiencies and inconsistencies found in the drawings and structural details submitted*" the application was queried on 23 July 2018 for its structural details to reviewed by an engineer. He points out that the applicant is not an engineer, and the BCO has powers under the Regulations and Code, when he is not satisfied about the structural integrity of a building, to request engineering calculations from a professional engineer either in respect of any portion of the structure, or any portion of the mechanical or electrical installations intended to be placed therein. Finally, he emphasizes that Mr. Ferguson is well acquainted with the processes for obtaining a valid building permit, and that this is not the first occasion on which the BCO has flagged issues with architectural drawings which he has submitted:

> "…Mr. Gustavas Ferguson is no stranger to the long-standing policies and procedures of the Buildings Control Division for obtaining a valid building permit. He has on more than one occasion submitted architectural drawings with structural details for building permit approval that did not satisfy the minimum standards and requirements outlined in The Bahamas Building Code. As result thereof, he was requested to provide structural drawings signed off by a structural engineer."

[17] Edwin Yuklow is the senior structural engineering ("SSE") in the Ministry of Works, where he has worked for the past 14 years. In this capacity, he is primarily responsible for reviewing building applications to ensure that they comply with the Building Code, subject to the general supervision and directions of the BCO. On 18 July 2018, he was assigned Permit # 125665 to review the full set of drawings for approval. His review identified a number of shortcomings, which he said were as follows:

"1. There was no detail of the 12" thickness slab nor the wall shown.
2. The footing and post at the porch was not identified on the foundation plan.
3. The sections 3/A-2 and A/A-4 gave conflicting information of the porch footing.
4. The reinforcement shown on the footing details 1,2 & 3/A-2 is inconsistent with that shown on details B &C/A-4
5. The details for the Nudura walls were incomplete as the reinforcements were not identified.
6. Clarification is needed as to which walls are timber or light gauge steel.
7. The floor design at the stair well requires clarification.
8. The connection details for the porch posts were not identified.
9. The drawings were not certified by a Recognized or Registered Engineer."

[18] Based on these issues, he indicated that he "queried" the application on 23 July 2018. The decision letter of 6 August 2019 (which was addressed to the applicant's attorney) was obviously based on these findings, and it provided reasons as follows:

> "As a result of the glaring deficiencies and inconsistencies found in the architectural drawings and structural details submitted by Mr. Ferguson, the application was queried on 23rd July 2019 for its structural details to be reviewed and certified by a recognized engineer. Hence the building application is held in abeyance until adequate structural details are submitted in compliance with the conditions approved for use of the specific approved product."

The relevant statutory context

[19] Whether or not the applicant has adduced arguable grounds for judicial review will depend largely on an interpretation of the relevant legislation governing the process. The governing legislation are compendiously the Buildings Regulations Act ("the BRA or Act") (Ch. 200), the Building Regulations (General) Rules ("the Rules"), and the Bahamas Building Code, 3rd Ed. 2003 ("the Code"). The material parts of the governing legislation, which are relied on by the respondents, are set out below. But firstly, s. 3 of the BRA establishes the post of BCO as a public officer, and grants him various duties under the Act, under the supervision of the Minister. Perhaps the most important of these is to review and approve plans and grant permits for building operations.

[20] The conditions pursuant to which a building permit are granted are set out at s. 6 as follows:

> "(a) that the methods of construction adopted and the materials used in the building operation shall in all respects comply with the particulars of such construction and materials, including those contained in the plans, drawings, specifications and calculations, furnished by the holder of the permit to the Buildings Control Officer upon application therefor, except in so far as the Buildings Control Officer may in writing at any time authorize any variation in or departure from such particulars.
> (b) that all work carried out under the authority of the building permit shall comply in all respects with the provisions of this Act, the rules and the Building Code;
> (c) that the building operation shall be commenced within the time specified in the permit, and to such further conditions as may be prescribed by the rules or as the Buildings Control Officer may in any case impose."

[21] Section 3 of the Rules provides as follows:

> "(3) The Buildings Control Officer may, if he thinks fit, require engineering calculations to be supplied by the applicant in respect of –
> (a) any portion of the structure; or
> (b) any portion of the mechanical or electrical installations intended to be placed therein, and in any case every such calculations shall bear the name, address and qualifications or professional seal of the person who prepared the same.
>
> (4) Where calculations are required under paragraph (3)(a) they shall be prepared by a qualified architect, engineer or technician recognized by the Minister, however, where the preparation has not been done by a person recognized by the Minister as an engineer for the preparation of structural design and the calculations involve computations based on structural stresses, the Buildings Control Officer may require that the preparation be done by a person recognized as such. [Underling suppliled.]
>
> (5) Where calculations are required under (3)(b) they shall be prepared as the case may require, by a qualified mechanical or electrical engineer or master or licensed plumber recognized by the Minister."

[22] Section 6 of the Rules provides in material part as follows:

> (1) Every application for a permit properly submitted in accordance with the provisions of the Act and these Rules, shall be considered by the Buildings Control Officer in conjunction with other responsible Ministries and Authorities and the Buildings Control Officer shall—
> (a) pass the plan with or without modification or the imposition of conditions as to the method of execution of the works and approve the issue of a permit; or
> (b) request revision of the plans, in any case where he considers them to be defective or in contravention of any requirement of the Code;
> (c) reject the plans and refuse the application.
>
> (2) Notice of the approval or refusal of an application may be given by the Buildings Control Officer to the applicant in writing by post or personally to the applicant. […]
>
> (4) Where an application is refused the notice of refusal shall specify the reasons for rejection of the plans."

[23] As indicated, the applicant referred to paragraph 302.5 (b) of the Building Code, which he said is the only provision that allows for the submission of engineering calculations. Paragraph 302.5 is essentially a restatement of sections 3(3) (4) and (5) of the Rules (set out above), renumbered as 302.5 (a), (b) and (c), although it adds a further paragraph (d). However, as there are minor textual variations between the Rules and the Code, I set it out below:

> "302.5
>
> (a) The Buildings Control Officer may, if he thinks fit, require engineering calculations to be supplied by the applicant in respect of—
>
> (i) any portion of the structure; or

(ii) any portion of the mechanical or electrical installations intended to be placed therein, and in every case such calculations shall bear the name, address and qualifications or professional seal of the person who prepared the same.

(b) **Where calculations are required under Sub-section (a)(i) they shall be prepared by a licensed Architect or Architectural Technician or an Engineer recognized by the Minister, however, where the preparation has not been done by a person recognized by the Minister as an engineer for the preparation of structural design and the calculations involve structural stresses, the Buildings Control Officer may require that the preparation be done by a person recognized as an engineer.**

(c) Where calculations are required under Sub-section (a)(ii) they shall be prepared as the case may require, by a qualified mechanical engineer or electrical engineer or master or licensed plumber or licensed three phase electrical contractor recognised by the Minister.

(d) The person responsible for the preparation of the calculations, shall also sign, or seal, all drawings that are based upon those calculations." [Bold formatting appears in Code.]

ANALYSIS AND DISCUSSION

Discretionary bars to grant of leave

Delay

[24] The respondent's first line of attack on the application for leave is that the applicant is guilty of inordinate delay in filing his application. Mr. Smith contends that the effective date for the purposes of bringing proceedings is the 23 July 2018, when the application was "queried" by the senior engineer. He relied on several cases, in particular *R v Securities Commission of The Bahamas, ex parte Petroleum Products* (BHS J. No. 30 (No. 1440 of 1999), unreported), in support of the proposition that time begins to run from the date the decision is made, not when it came to the applicant's knowledge. In any event, he argued that the applicant clearly had knowledge of the issues with his application well before the 6 August 2019 date, as appears from the letters written to the BCO. On the other hand, Mr. Williams contends that the letter of the 6 August 2019 informing that the application was stayed and requesting that the structural details be reviewed by a certified and recognized engineer constitutes the operative decision from which time began to run for the purposes of delay. If the 6 August 2019 date is the date when grounds first arose and the limitation clock started to run, then the applicant would be in time; if it is the 2018 date, then the applicant would be out of time by nearly one year.

[25] The requirements for promptness in activating an application for judicial review gives rise to several practical and legal problems. Firstly, the requirement to act promptly does not mean that an applicant has the luxury of the statutory period to institute proceedings. There is only a rebuttable presumption that a claim, even if brought within the time period, is prompt: see,

for example, *Re Friends of the Earth Ltd.* [1988] JPL 93, where it has been held that a challenge brought one day within the time limit was not prompt. Secondly, even though the case law has held that time runs from the date when the grounds for the claim first arose, and not when the claimant had actual knowledge, subsequent cases emphasize that knowledge is an important factor. For example, in *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [20023] UKHL 36, the House of Lords stated that "…*notice of a decision is required before it can have the character of a determination with legal effect*." Thirdly, the question of whether a preliminary decision can be treated as grounds for the purposes of launching judicial review proceedings, where a later decision is challenged, can also be a factor in deciding whether an application is prompt (see *R (on the application of Burkett) v Hammersmith and Fulham LBC (No. 1)* (2002) 1 WLR 1593 [38]. Ultimately, the matter must depend on the facts and circumstances of the individual case.

[26] I cannot say with any degree of comfort that in all the circumstances the applicant bestirred himself with the requisite degree of promptitude that a planning case such as this would have required in seeking to challenge the decision, either by invoking any alternative remedy (which I will come to) or by launching proceedings for judicial review. As indicated, there is regrettably no specific evidence before the court as to when the applicant first became aware that his application had been queried. It is tolerably clear, however, that he had knowledge of this well in advance of the 6 August 2019 letter, since his counsel had been writing letters from as early as March 2019 complaining about the issues raised concerning his application. In fact, the March 2019 letter pointed out that "*to date [the applicant] has not addressed the outstanding structural queries to receive a building permit*", from which it may clearly be inferred that he had prior notice.

[27] However, the respondent in its letter of 19 June 2019 promised that it would review the concerns in the applicant's letters and "revert", which suggests to my mind that they were still open to considering the matter. Thus, even if it might be said that the applicant could have challenged the query when he initially became of it (whenever that was), the 20 August 2019 letter would have constituted fresh grounds, as per the principles laid down in *Burkett.* On this basis alone, I therefore find that the applicant can properly treat the 20 August 2019 letter as the decision letter for the purposes of his judicial review application, and he is therefore within the statutory period.

Alternative remedies

[28] The next challenge to the application for leave, says the respondent, is that the applicant clearly had the alternative remedy of pursuing a statutory appeal to the Minister, which he should have pursued before making any recourse to the courts. For example, in *R v Epping Forest District Council, ex parte Green* (1992) 7 WLUK 177, the UK Court of Appeal refused a renewed application for leave to review the refusal of planning permission for a helicopter hangar, on the basis that:

> "…the applicant has his ordinary right of appeal under section 78 of the Town and Country Planning Act 1990. Normally we do not grant leave to apply for judicial review where

> there is another avenue of appeal open on the merits which is equally or more convenient. It only leads to unnecessary delay and expenditure. This is usually so in tax and planning matters, and perhaps in other fields. But there is no inflexible rule to that effect…".

[29] Notwithstanding the availability of alternative remedy, leave may still be granted where there are exceptional circumstances, or where the alternative remedy is not adequate, or where there are other reasons which make judicial review inappropriate (*R v Hallstrom, ex parte Waldron* [1986] 1 QB 824 at 852, per Glidewell LJ; and *Lacroix v Stipendiary & Circuit Magistrate Derrence Rolle-Davis and another* [2013] 3 BHS J. No. 68, per Winder, J.).

[30] It is also a well-established principle that judicial review would not normally be appropriate where there is a statutory right of appeal against the decision in question, especially in planning cases. This pertains whether or not the right was exercised within the applicable time limit (*R Carnell) v Regents Park College* [2008] ELR 268. Part of the rationale for this is because such applications invariably involve very technical considerations, and the statutory appeal process often allows for the decision to be reviewed by bodies who have technical expertise, or by a person who can be advised by such bodies. As I had occasion to point out in *R (on the application of Poincianna Recovery Centre Ltd.) v. Director of Physical Planning et. al.* (2021/PUB/jrv/00002) (unreported), in the context of an application for leave to review the failure to grant zoning permission under the Planning and Subdivision Act 2010:

> "40. It should be appreciated, also, that challenges to the refusal of planning permission under the Act are likely to require the court to resolve factual and technical issues which a court might not be well-equipped to undertake in judicial review, which is not a merits-based review."

[31] The above principles relating to alternative remedy are apposite this case. In this regard, s. 8 of the BRA provides as follows:

> "A person considering himself aggrieved by a decision of the Buildings Control Officer refusing to grant him a permit, or revoking, or suspending, or refusing to remove the suspension of, a building permit, may appeal in the prescribed manner and within the prescribed time to the Minister."

Section 15 of the Regulations sets out the procedure for the appeals as follows:

> "15(1) Appeals to the Minister under section 8 of the Act from any decision of the Buildings Control Officer shall be made in writing, shall be signed by the person aggrieved, his agent or his counsel and attorney and shall specify briefly the grounds of appeal.
>
> (3) Any such appeal shall be lodged personally with or sent by prepared registered post to, the Permanent Secretary, Ministry of Works within seven days after the date of the notification of the decision appealed against, but the Minister may, if he thinks fit, consider an appeal which is lodged out of time."

[32] The applicant contends that he did appeal to the Minister, via a letter written 19 September 2019 and addressed to the Minister of Works. Mr. Smith for the respondents argues that the letter to the Minister did not constitute an appeal. In material part, it provided as follows:

> "I am making a final attempt to resolve this matter before a court action. In Mr. Delancey's last response to me rather than answer the direct question of whether the Bahamas Building Code…or any other law or regulations requires a licensed Architect to submit drawings by an Engineer (which for business purpose carries the cost) or as does the Code, all the licensed Architect to do the same which he requested Mr. Ferguson to do (*sic).* When the Code did not require it he went off on an irrelevant tyrant (*sic*) of unnecessary statements which made his action no more lawful.
>
> If this matter is not resolved satisfactorily, we will regrettably be forced to proceed with legal action within fourteen (14) days."

[33] This seems to me to have been an entirely unhelpful letter, and I must admit that it is somewhat difficult to follow its rationale. But I am inclined to agree, for several reasons, that even though it was directed to the Minister and raised the issue in contention with the BCO, it hardly amounts to an appeal. Firstly, it was written towards the end of September 2019, when the applicant had the decision which he says provided grounds for challenge from at least early August 2019 (if not sooner), and was therefore way outside the 7-day period (of course subject to the Minister's discretion to extend time). Obviously, as an experienced architect, it may be assumed that the applicant was aware of the prescribed time limit for the appeal if he wanted to invoke that process, and he was assisted by counsel. Secondly, the letter does not specify any ground of appeal, except to indicate rather obliquely that "*the Code did not require it*"—presumably meaning that it was the applicant's view that the request was *ultra vires*. Further, as opposed to requesting the Minister to review the decision, the letter threatened that legal action would be taken within 14 days of the letter, perhaps pre-empting any reasonable time for the Minister to consider the matter and respond. It is important to record, also, that in an earlier letter written 19 August 2019, the applicant's counsel indicated to the BCO that as he had not heard "*anything reasonable or satisfactory*" from them, he would be filing an application for judicial review without further notice. It appears, therefore, that the applicant was fixed on a legal recourse even before the 19 September 2019 letter was sent to the Minister.

[34] Thus, instead of utilizing the statutory appeal process to challenge the decision on its merits as soon as he became aware of it, the applicant through his counsel chose to engage in an acrimonious war of words (if the letter to the Minister is any indication) with the Department of Physical Planning and the BCO in particular. I therefore find that the applicant did not exhaust the statutory appeal process that was available to him before launching a judicial review claim. I also do not find that there are any exceptional circumstances on the facts of this case to justify the exercise of my discretion to grant leave notwithstanding the failure to employ the alternative remedy, which would have been (and still might be) available to the applicant.

[35] In my judgment, I think this alone is a sufficient and cogent reason to refuse leave. The applicant is an experienced architect who, as was noted by the respondent, is no stranger to the process and ought to have availed himself of the quick and inexpensive statutory appeal process provided for by Parliament. However, out of respect for the arguments

addressed to the statutory ability of the BCO to request the additional engineering details, I will briefly consider the main grounds on which the applicant's challenge is founded.

Arguability of claims

[36] In doing so, I bear in mind that this is an application for leave, and that the threshold only requires an arguable ground with a reasonable prospect of success. Furthermore, it is important to recall that judicial review is primarily concerned with procedural fairness, and not the merits of the decision being challenged. Despite the multitudinous grounds formulated, it seems to me that the essence of the challenge by the applicant is that the request for further structural information is *ultra vires* the powers of the BCO.

[37] The applicant appears to take umbrage mainly to the requirement for review and certification by an engineer, as he contends that as a qualified architect he is entitled to submit any architectural plan without the need for any "*review and certification*" by an engineer or any third party, subject to the one exception which he says exists at 302.5 (b).

[38] But accepting the 6 August 2019 letter as the decision letter, it is instructive to reiterate what it actually contains. It states that the Nudura building form was approved "*subject to the condition that a recognized structural engineer design and provide specific structural details on the building systems based on engineering calculations on each building design, to ensure the structural integrity and compliance with the manufacturer's specifications*". Further, it indicated that the application is held in abeyance "*until adequate structural details are submitted in compliance with the conditions approved for use of the approved product*."

[39] On a plain reading of s. 3 of the Rules and paragraph 302.5 of the Code, it seems clear that the BCO has a discretion to request engineering calculations on any portion of a structure that may involve "structural design" issues and computations based on structural stresses and, where requested, he may require that they be done by an engineer. Additionally, there is the general power under s. 6 of the Regulations to impose conditions and require revisions when considering building plans. Further, paragraph 302.5 (d) of the Code specifically provides that where such calculations are required, the person responsible for those calculations (e.g., the engineer) shall also sign, or seal all drawing that are based on those calculations.

[40] As I follow the documents before me, it seems that the BCO is simply doing what he is statutorily entitled to do. Curiously, the applicant concedes that the BCO may request such details pursuant to 302.5, and I see nothing in the arguments or the facts which the applicant has presented to the court to take this case outside of paragraph 302.5 of the Code and s. 3 of the Rules. The applicant fastens on a very narrow interpretation of the provisions to contend that the matter was not one involving "*calculations*" or "*computations based on structural stresses*", and therefore did not require the intervention of an engineer. But it is

clearly the BCO who has the discretion to "*require engineering calculations*" in the first place, and to form the view that the calculations "*involve structural stresses*" (302.5(b)), or "*involve computations based on structural stresses"* (s.3(4))—and the court does not think there is any material difference in these formulations—so as to require engineering submissions. Also, as mentioned, the use of the ICF building forms was approved subject to the submission of calculations by a local recognized engineer. Indeed, and for reasons already stated, it is precisely because such challenges often raise technical considerations that utilization of the statutory appeals process ought to be followed.

[41] I therefore do not find that there are any arguable grounds to be made out that the BCO is exceeding his statutory powers in requesting the additional engineering details. Likewise, if the BCO is statutorily empowered to request such information, there is no basis for the contention that the request is *Wednesbury* unreasonable. I also see no basis on which the ground of lack of reasons would succeed. The decision letter sets out the reasons why the building application was being held in abeyance, and the nature of the applicant's correspondence with the Department makes it clear that he was sufficiently aware of the reasons.

[42] As to the claims to denial of natural justice or procedural fairness, it is unfortunate that the applicant does not provide any clear details on the grounds on which he relies. It is readily apparent from the papers that he submitted numerous letters to the BCO providing his views, which based on the exchange of correspondence were considered, so it appears he was not denied a right to be heard. I therefore do not see on the papers any arguable grounds that are being raised with respect to denial of natural justice or procedural fairness. In this regard, it is significant to point out that the application received zoning approval on 19 June 2018 and environmental approval on 8 July 2018, and it was only at the final stage of review that the structural issues were raised. So, it cannot be said that the planning authorities were in anyway being recalcitrant or dragging their feet with the submitted drawings, and no suggestion is made in this regard. They apparently had legitimate concerns which were indicated to the applicant and which he apparently chose not to address, clinging to his own understanding of the legal position.

CONCLUSION & DISPOSITION

[43] For all the reasons given above, I would refuse the application for leave to move for judicial review, both on the grounds of failure to exhaust alternative remedies and that there does not appear to be any seriously arguable grounds with any reasonable prospect of success. Costs are those of the respondent to be taxed if not agreed.

27 January 2022

Loren Klein,
Justice