BEFORE THE ENVIRONMENT AND LAND USE APPEAL TRIBUNAL

ELAT 382/13

In the matter of:

Roland Haus Co. Ltd

Appellant

v/s

Minister of Environment and Sustainable Development

Respondent

IPO:

1. **Globe Prism Ltd**
2. **The Permanent Secretary, Ministry of Housing and Lands**
3. **District Council of Riviere du Rempart**

Co-Respondents

RULING

1. The Tribunal is being called upon to rule on a point raised by the Counsel for co-respondent no.1. At the sitting of the 4th October 2017, Me. U. Boolell appearing for Co-respondent no.1 made the following motion:

   " In view of the clear provisions of the ***Environment and Land Use Tribunal Act 2012*** *and the length of the present proceedings which exceed the 90 day period provided for under* ***section 5(7) of the ELUAT Act*** *for judgment to be delivered after the beginning of*

proceedings except where there is a valid reason and with the consent of both parties, co-respondent no.1 states that there is neither a valid reason that has been put forward by the appellant nor has it ever formally consented to the protraction of this case. Co-respondent no.1 admits that it has given dates for continuation beyond the statutory period to suit the appellants and the Tribunal, but this cannot be interpreted as a formal consent that the matter should continue ad nauseam as is presently the case. Co-respondent no.1 accordingly moves that this Tribunal may not continue hearing this matter under the provisions of the law."

2. By way of background, Counsel for the appellant sought to call as its next witness one Mr. Saddul. A notice of tender of evidence containing the name of Mr. Saddul was forwarded to the Tribunal at an earlier stage of the proceedings but the appellants deemed it fit to forward the notice of tender of evidence two days prior to the hearing of the 4th October 2017 which again contained the name of Mr. Saddul. As soon as Me. Gopee, counsel appearing for the appellant called Mr. Saddul, Mrs Boolell sought to make a few comments in the absence of the witness, which infact took over 2 pages of proceedings to say that the matter is protracting and that it was now just totally outside the jurisdiction of the Tribunal and that she was bound to raise the issue of delay for fear of being taxed for complacency if the matter were to go before another jurisdiction. She stated *"But we are well outside the statutory timeframe and that there is no consent on the part of co-respondent no.1 that matters should continue protracting and in those circumstances, I stand directed by the Tribunal to know whether (there) are any powers by the Tribunal to extend a statutory time frame without the consent of parties because this is what the law says. This is the first point. And I would very much value the views of the Tribunal on this."*

3. We believe that this statement from counsel apparently seeking directions from the Tribunal was more in line with questioning the bench on how it intended to operate to the point that the Tribunal had to justify itself. We are of the view that no party can

question the Tribunal on the manner in which it seeks to operate or hear evidence. Although Mrs. Boolell stated that this is not a vote of no confidence on the bench, the fact that she "would very much value the views of the Tribunal" on how matters were getting protracted or that the Tribunal was acting beyond its jurisdiction cannot amount to simply seeking the views of the Tribunal but seeks to question the authority of the Tribunal in suggesting that the Tribunal is acting beyond its powers. It is in this spirit that this Tribunal deemed it fit to invite Counsel appearing for co-respondent no.1 to come with a well couched motion rather than "seek directions".

4. Now coming to the motion made by Mrs. Boolell of whether the Tribunal may continue to hear the present matter in view of the provisions of **section 5(7) of the Environment and Land Use Appeal Tribunal Act 2012 ["ELUAT Act"]**, we do not intend to overburden this ruling with the lengthy submissions of counsel save where we deem it fit to make any reference thereof. It suffices to say that we have duly considered the stand and submissions of all counsel. The matter was formally argued on the 6th October 2017. The respondent, co-respondent no.2 and co-respondent no.3 chose to abide by the decision of the Tribunal.

5. Any chronology of events made from the time the appeal was lodged, we believe is immaterial for the present purposes. The issue at hand is the interpretation of the provisions under **section 5(7) of the ELUAT Act**, which stipulates that "*The Tribunal shall make a determination not later than 90 days after the start of the hearing of the appeal, except where there is a valid reason, and with the consent of the parties.*"Learned Counsel for the co-respondent no.1 made extensive submissions on the mandatory nature of the word "shall" to say, from what we were given to understand, that the Tribunal was bound to make a final determination in the matter 90 days from the start of the hearing. We are of the view that **section 5(7)** cannot be interpreted as a provision which acts as an estoppel to the proceedings. If that was the case then it could have resulted in an undesirable state of affairs whereby each appeal lodged before the

Tribunal ran the risk of not ever being heard fully, hence not determined since if the matter were to extend beyond 90 days the Tribunal would be *functus officio*. A 'lazy' Tribunal would conveniently choose not to waive the provisions of **s.5 (7),** and use the legitimate excuse of being *functus officio* beyond 90 days from the start of the hearing to support its inefficiency. This simply cannot be the essence of that provision as it would emasculate the powers of the Tribunal to dispense justice. We agree with the submissions of Me. Gopee, Counsel for the appellant, that it could not have been the intention of Parliament to favour serenity to the detriment of the careful analysis of evidence put before the Tribunal.

6. Although it may have been the intention of Parliament in seeking to insert such a provision, to have speedy disposal of cases, it stands to reason that cases differ in nature and in magnitude. The volume of proceedings and documents produced in the present case speaks for itself as regards the magnitude of the case. It is in view of the highly technical nature of the case and some intricacies involved that the Tribunal has had to rule upon the numerous motions of Counsel since the case started in April 2016, which the record bears evidence of. The record also bears evidence of the fact the Tribunal has always sought to give priority to dates convenient to Counsel for the continuation of the case and reason for which the bench had to be reconstituted.

7. Furthermore, the fact of the matter is that there is no 'sanction', or consequence, attached to this provision. In other words, the Act does not provide that failure to comply with this section of the law would amount to the proceedings being vitiated in any way. Infact the Act provides no guidance on what is to happen or the course of action beyond the 90 day period. This suggests that the case is to take its normal course and that the provisions of **s.5 (7)** can only be interpreted as discretionary and not mandatory. If this provision of this section were meant to be mandatory, the legislator would have drafted it in a manner that would impose a limitation on the margin of manoeuvre of the Tribunal such as "No determination shall be given by the Tribunal

later than 90 days except where there is a valid reason and with the consent of the parties". This is usually followed by a sanction or consequence, as stated above, which leads to any determination of the Tribunal being vitiated, for instance. However, there is no such consequence attached to the provision. We believe that the case law, local and international, submitted by learned Counsel appearing for the appellant, Me. Gopee, on the issue is very apt. The Supreme Court in our jurisdiction has in the case of **Quality Soaps Ltd & Anor v/s M.C.C.B Ltd [1999] SCJ 221** already decided that such a provision can only be taken to be discretionary and not mandatory. We are here dealing with an environmental law case, an appeal under the **Environment Protection Act 2002** for which the decision of the Minister of Environment is being challenged. This cannot be treated as a simple matter. The appellant, being aggrieved, has lodged a case before the Tribunal to context the decision of the Minister. It is the duty of the Tribunal to hear all the protagonists before determining whether the Minister's decision was right or not. The Tribunal's responsibility is to ensure the protection of the environment and its sustainable use within the bounds of the law. The legislator could not have intended that this provision operates as a guillotine so that even without hearing all the evidence the Tribunal is to make a determination or that matters remain undetermined.

8. We do not intend to go through the record to justify our stand because we are not parties to the case here. But it is clear that this Tribunal is meant to, and does operate, albeit with a certain level of informality in its proceedings, in the dispensation of justice and there is no cut-off time provided under **s. 5(7)** beyond which this Tribunal becomes *functus officio*.

9. Counsel for co-respondent no.1, in an attempt to demonstrate the case management powers of other Tribunals, suggested that the appeals could be withdrawn at the expiry of the 90 day period and re-lodged. The trouble is that is there can be no foundation to such contentions since an appellant has only 21 days from the date of notification of the decision to enter an appeal. After having submitted lengthily on how "consent" of a

party as set out in **s.5 (7)** is to be interpreted, and what amounts to consent, Counsel for co-respondent no.1 submitted that the onus was on the Tribunal and "nobody else" to take up the point and see whether all parties agreed. We fail to understand, again, the basis of this contention. The submissions and cases submitted as regards prescriptive period, in our view, do not find their application in the present context. Prescribed delay is meant to operate in relation to the challenge of a decision taken by a decision-making body as established by law, it cannot apply to a Court of Law or Tribunal that sits to hear and determine the challenged decision.

10. Now, true it is that the **section 5(7)** talks also of that requirement being waived only upon valid reason given and consent of the parties. We believe that there cannot be any more valid reason that the case is still ongoing and witnesses are still being heard. It is self evident from the record. The appellant has lodged the case and it has conduct of its case and as at the present date it is still calling its witnesses. If the co-respondent no.1 sought not to consent to the hearing of the case before the Tribunal extending beyond 90 days, it should have objected then.

11. For all the reasons set out above, the motion of Mrs. Boolell is accordingly set aside. This Tribunal is not *functus officio* and the case can proceed. It is on record that the appellant intends to call only 3 more witnesses and close its case. The respondent and co-respondent no.2 have intimated whom they will be calling as their witnesses. Co-respondent no.1 will have to inform the Tribunal at the next sitting how many witnesses it intends to call and who are those witnesses.

Ruling delivered on 28th November 2017 by

Mrs. J. RAMFUL-JHOWRY	**Dr. B.MOTAH**	**Mr. M.BUSAWON**
Vice Chairperson	**Assessor**	**Assessor**