

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
B E T W E E N**

**2018
PUB/jrv/27**

THE QUEEN

AND

Dr. The Hon. HUBERT ALEXANDER MINNIS
(Prime Minister of the Commonwealth of The Bahamas)
First Respondent

And

Senator The Hon. DION ALEXANDER FOULKES
(Minister of Labour) **Second Respondent**

And

The Hon. DESMOND THOMAS BANNISTER
(Minister of Public Works) **Third Respondent**

And

Senator The Hon. CARL WILSHIRE BETHEL, Q.C.
(Attorney General of the Commonwealth of The Bahamas)
Fourth Respondent

And

BAHAMAS POWER AND LIGHT COMPANY LTD
Fifth Respondent

And

THE WATER AND SEWERAGE CORPORATION
Sixth Respondent

EX PARTE

RESPECT OUR HOMES LIMITED

AND

**LUMANE NONORD *ET AL* BEING 177 RESIDENTS AND/OR
OCCUPANTS OF SHANTY TOWNS IN THE BAHAMAS**

Applicants

**BEFORE: The Honourable Madam Justice Mrs. Cheryl Grant-
Thompson**

**APPEARANCES: Mr. Frederick Smith QC, along with Mr.
Martin Lundy II and Ms. Raven Rolle,
Counsel for Applicants**

**Mrs. Kayla Green-Smith, Assistant Director of Legal Affairs, along with Mr. Franklyn Williams, Deputy Director of Public Prosecutions, Mr. David Higgins, Deputy Director of Legal Affairs, Mr. Basil Cumberbatch, Chief Counsel, and Mr. Rasheed Edgecombe, all for Respondents
Mr. James R. Thompson for the Intended Applicants**

HEARING DATES: 25th March, 2021, 28th April, 2021, 30th April, 2021, 21st May, 2021, 7th June, 2021

RULING

**APPLICATION TO VARY INJUNCTION AND APPLICATION TO
EXTEND THE INJUNCTION**

Grant-Thompson, J

Ruling

1. This Ruling concerns two separate Applications made to the Court. Both Applications concern the Interim Injunction imposed by this Court on the 3rd August, 2018. On the 19th December, 2019, more than a year after the said Injunction was imposed, the Respondents filed a Summons to vary the Injunction in order to exclude the Applicants located in Abaco Island, The Bahamas. This Summons was supported by the Second Affidavit of Dion Alexander Foulkes filed on the 14th January, 2020.
2. The Application on behalf of the Applicants concern a Notice of Motion (filed 28th January, 2020) for the said Injunction to be extended to cover “all Shanty Town” land in The Bahamas, or in the alternative “all Shanty Town land” in Abaco, The Bahamas. In support of this Application the Applicants rely on the affidavit of Timothy Rolle (sworn and filed 24th January, 2020).

3. The parties had originally informed the Court that they would attempt to reach a mutually agreed position relative to both Applications. However, on the eve of the trial, the parties informed the Court that they could not reach an agreement, nor could the issues relative to the Applications be left to be determined at trial.
4. As the Court seeks to resolve these joint yet distinct applications, the Applicants claim there has been increased activity in the demolition of that which is commonly referred to as “the Shanty Town Communities” in the Abacos. I take judicial note of media reports which appear to confirm the allegations of the Applicants. The Applicants subsequently filed a Certificate of Urgency on the 10th March, 2021 to have the extant applications resolved by the Court. The content of the Certificate of Urgency stated as follows:

“I, MARTINA A. LUNDY II, of Counsel for the Applicants do hereby certify that the Applicants’ Notice of Motion filed herein on 28th January, 2020 (“the Applicants’ Application”) concerns a matter of urgency in that there is a real possibility that if the application is not heard the Government will take possession of, destroy or otherwise demolish the homes of the Applicants in Abaco before these proceedings are heard and finally determined.

I therefore ask the Court to urgently determine the Applicants’ Application.

TAKE NOTICE that the Applicants rely upon the Third Affidavit of Stephanie St. Fleur filed on 10th March, 2021.”

5. I find the alleged actions are indeed deemed urgent. I have reviewed the evidence presented to the Court by Counsel for both the Applicants and the Respondents respectively. The Court is of the view that the Injunction should not be varied to exclude the Abaco Applicants. It is incumbent that the Court does whatever it can in its power to preserve the status quo.
6. The Respondents have submitted that the Injunction should no longer apply to the Applicants in Abaco due to the disappearance of the very

substratum for the Injunction. The Court has been made aware that the homes of many of the residents of Abaco previously covered by the Injunction were unfortunately destroyed by the monstrous Hurricane Dorian. The Court is also mindful of the duty of the Government of the Commonwealth of The Bahamas in relation to removing and even in some instances destroying buildings which the government may view as hazardous to the citizens, inhabitants, public health or otherwise in breach of law. However, if there remains only one home standing where the rights of the resident or residents may ultimately be protected, if the injunction had continued to cover Abaco then the injunction will prevail until the completion of this matter.

7. The properties on the Island of Abaco to which the said Injunction extends, were occupied predominantly by immigrants allegedly without the requisite and proper status to reside. Notwithstanding, the Court remains mindful of the human element involved. These individuals have fundamental rights which do not only extend to citizens of the Commonwealth of The Bahamas, but are universal. It is important that the Commonwealth of The Bahamas continues to display mutual value and respect for the lives of everyone within our country regardless of who they are or where they originated from.
8. The Applicants requested that the Injunction be extended to cover all “Shanty Town Land” in The Bahamas. The Applicants have however in my view failed to provide sufficient evidence to support their request that “Shanty Towns” throughout the entirety of The Bahamas should be covered by the Injunction. The Injunction was originally imposed by the Court to protect the rights of individuals whom the Applicants alleged were affected by the apparent policy of the Government to eliminate “Shanty Towns” in its entirety in New Providence and the Abacos’. Further, there has been no evidence adduced by the Applicants “Respect our Homes Limited” of “Shanty Towns” elsewhere in the Commonwealth of The Bahamas separate from the Islands of New Providence and Abaco where the occupants are being adversely affected by the alleged actions of the Government. The request of the Applicants to have the said Injunction extended to the entire Bahamas is hereby denied at this time.

9. The Applicants in the alternative, requested the Court to extend the said Injunction to cover the Island of Abaco in its entirety. In support of this request the Applicant submitted as follows:
- i. *“The government has cleared all of the Mudd, Pigeon Peas and Sand Banks without authority and without regard to the state of any structures there or the rights of occupiers. Plainly it is on the course to do so with other Shanty Towns; and*
 - ii. *There are people still living in other Shanty Towns not yet demolished, Farm Road and the Farm in particular.”*
10. The Respondents aver in objection to the request of the Applicants, that the Government has the authority by law namely by virtue of the **Disaster Reconstruction Authority Act, 2019** to clear down buildings on the Island of Abaco.
11. I am of the view that the Judicial Review application before the Court ultimately affects every “Shanty Town” in Abaco and as such should be extended to cover all of them.
12. It is necessary to make this point unequivocal. The Court is not saying the Government of the Commonwealth of The Bahamas does not have a right to demolish and clear down homes that are in breach or violation of the **Disaster Reconstruction Authority Act, 2019** or any other reason that may require such measures. However, if the government avers that certain structures should be demolished because of a health hazard, violation of the law, or otherwise, evidence of this should be presented to the Court prior to this action taking place. The purpose of this decision is solely to ensure that the status quo is preserved. The preservation of the status quo also obviously means that no new buildings or renovations to buildings which may have been damaged in these areas are also expressly prohibited from taking place. The parties that the Applicants represent also have a duty, a breach on their part would also be a violation of this Court Order.

HELD: The decision of the Court therefore is to deny the Application of the Respondents to vary the Injunction to exclude the

Island of Abaco. The Application of the Applicants to extend the injunction to the entire Bahamas is also denied. The alternative request of the Applicants to extend the Injunction to cover the Island of Abaco in its entirety is granted.

13. In making this decision, it is important to note that based on the state of the substantive proceedings which are in its final stages, the Court does not anticipate that this extension will be in existence for more than three (3) months. The reasoning for the decision of the Court is laid out below.

BACKGROUND

14. The original injunction (granted on 4th August, 2018, filed on 7th August, 2019) (the “**Injunction**”) relevantly provides at paragraph 1 as follows:

“Pending the determination of this action or until further order the Respondents be and are hereby restrained directly or through their agents, appointees or employees from taking possession of, demolishing any building on, or otherwise interfering with the 177 Applicants’ and other resident’s and occupiers’ enjoyment of Land in Shanty Towns in New Providence, including by disconnecting any utilities other than pursuant to the relevant enabling legislation.”

It was varied materially to add as at paragraph 2 as follows:

“Further, pending the determination of this action or until such further order, the 177 Applicants and or other residents and occupiers of the Land in Shanty Towns in New Providence shall take no action to construct, erect and or alter any further buildings or structures otherwise than in accordance with the relevant legislation.”

And by Consent that:

“Further, pending the determination of this action or until such further order, the 177 Applicants and or other residents and occupiers of the Land in Shanty Towns in New

Providence or elsewhere in The Bahamas shall take no action to construct, erect and or alter any further buildings or structures otherwise than in accordance with the relevant legislation.

15. The Applicants sought in relation to “the Abaco Applicants”, to clarify that the injunction is effective to restrain the Respondents from taking possession of, demolishing any building on, or otherwise interfering with the particular land occupied by the Abaco Applicants. The Applicants also sought in the alternative to apply under the Slip Rule to correct the Order, as that was undoubtedly the intention behind the Order if necessary. It was intended they say by the Order to so restrain the Respondents.

INTERPRETATION OF THE CONSENT ORDER

16. I was tasked with interpreting and clarifying the Consent Order agreed by the parties herein. I requested Counsel on the 23rd February, 2021 to prepare a note on the scope of the Consent Order and same was duly received on the 12th March 2021. The Respondents note on the scope of the Injunction concluded that the Consent Order extended beyond the 177 Applicants and other residents and occupiers of land in Shanty Towns in New Providence to include the entire Bahamas. The Applicants note sought to contextualise the various meetings and correspondence which gave rise to the Consent Order. The background of the Applicant's note is helpful, thus I reproduce it as follows:

“4. The Applicants commenced these proceedings by Application for Leave to Apply for Judicial Review and for Interlocutory Relief filed herein on 31st July, 2018 (“the Application for Leave”).

5. In the Application for Leave, the Applicants sought, inter alia:

“an interim injunction pending the determination of this action or pending determination of this application or until further order – restraining the Respondents directly or through their agents, appointees or employees from taking possession of, demolishing any building on, or otherwise interfering with the Individual Applicants’ and other residents’ and occupiers’ enjoyment of land in Shanty Towns throughout The Bahamas...” (emphasis added) (“the Applicants’ Interim Injunction Application”)

6. *By the Applicants' Interim Injunction Application, the Applicants intended to obtain an order enjoining the Respondents from interfering with buildings in Shanty Towns throughout the entirety of The Bahamas.*

7. *However, at the hearing of the Applicants' Interim Injunction Application, the Applicants did not pursue the interim injunction in the terms set out in the Application for Leave. The reason for this was that, as at the date of the hearing, there was no imminent threat that the Respondents were taking steps against Shanty Towns in the family islands. As a result, the Applicants sought an interim injunction to enjoin the Respondents from taking steps against Shanty Towns in New Providence and because some of the 177 resident applicants are Abaconian residents, such order would also protect those residents.*

8. *Accordingly, on 4th August 2018, the Court made the following order.*

“Pending the determination of this action or until further order the Respondents be and are hereby restrained directly or through their agents, appointees or employees from taking possession of, demolishing any building on, or otherwise interfering with the 177 Applicants' and other residents' and occupiers' enjoyment of Land in Shanty Towns in New Providence, including by disconnecting any utilities other than pursuant to the relevant enabling legislation.”
(emphasis added) (“the Original Order”)

9. *Thereafter, Counsel for the Respondents canvassed Counsel for the Applicants for a consent position regarding an amendment to the Original Order. Initially, the Respondents proposed an amendment to add a second paragraph which read as follows:*

“Further, the 177 Applicants and or other residents and occupiers of the Land in Shanty Towns in New Providence shall take no action to construct, erect and or alter any further buildings or structures otherwise than in accordance with the relevant laws.”

10. *The proposed amendment then volleyed between counsel which resulted in the following language:*

“Further, pending the determination of this action or until such further order, the 177 Applicants and or other residents and occupiers of the Land in Shanty Towns in New Providence shall take no action to construct, erect and or alter any further buildings or structures otherwise than in accordance with the Buildings Regulation Act.

Reference should be made to the emails (and their attachments) dated 14th December, 2018 and 6th March, 2019 which are found exhibited to the Bain Affidavit at pages 7 and 12 respectively.

11. By Consent Order dated 17th December, 2018 and filed herein on 14th March, 2019, the Original Order was finally amended with the addition of the following paragraph 2:

“Further, pending the determination of this action or until such further order, the 177 Applicants and or other residents and occupiers of the Land in Shanty Towns in New Providence or elsewhere in The Bahamas shall take no action to construct, erect and or alter any further buildings or structures otherwise than in accordance with the Building Regulation Act.” (emphasis added) (“the Amendment by Consent”)

12. Shortly after the Amendment by Consent, Counsel for the Applicants indicated to Counsel for the Respondents that the inclusion of the language “or elsewhere in The Bahamas” was not agreed. In response, the Attorney General himself replied in the following terms by email dated 15th March, 2019:

“To be very clear, and to remind you, I called and specifically said that it was unacceptable to limit the proposed amendment to the injunction to New Providence only. I informed you that buildings not to code were being erected in the formerly burnt areas in the Mudd and other Shanty towns in Abaco.”

I specifically proposed the addition of the words “or elsewhere in The Bahamas”. You agreed to my suggestion” (emphasis added)

13. After some discussion, Counsel for the Applicants accepted the language used in the Amendment by Consent. See the email dated 7th April, 2019 from Mr. Smith, QC to the Attorney General at page 15 of the exhibit to the Bain Affidavit by which, Mr. Smith confirmed his acceptance to the amendment to the injunction as drawn in the Amendment by Consent.”

17. My initial approach to interpreting this Consent Order- was a legislative drafting principle- the common starting point of which is to give the words used their natural and ordinary meaning, considering the background (which I have laid out above), the syntax, and the context in which the words were used. What the parties intended is also an important consideration. In this case it was in my view clear. It was definitively intended to include New

Providence and the Abacos but not the entire Bahamas. So in giving effect to the intent of the parties, I accept the common ground which they accepted. (See Francis Bennion, *Statutory Interpretation*, Third Edition, Pages 344-361)

18. In relation to the Island of Abaco, I accept the submission of the Applicants that the Attorney General in his email dated March 15th, 2019 was clear about the intention behind the use of the words “or elsewhere in The Bahamas.” These words were necessary only because as expressed by the Attorney General, “...buildings not to code were being erected in the formerly burnt areas in the Mudd and other Shanty Towns in Abaco.” I am satisfied that the scope of the Consent Order agreed to by the parties to amend the Interim Injunction implemented by the Court was not intended to bind or otherwise apply to the whole of The Bahamas. The explanation that the concerns extended to the buildings to code in the Mudd and other “Shanty Towns” in Abaco evidences the clear intention to include Abaco.
19. The case of **R v Evans, (2004) EWCA 3102**, provides support for the proposition that the proper approach for a Court to take in the interpretation of a Court Order is to broadly apply the principles of statutory interpretation. Under the heading “Interpretation of the Order” in **Feld v Secretary of State for Business, Innovation and Skills [2014] EWHC 1383**, Edward Murray, sitting as the Deputy Judge on the Chancery Division said this:

“There appears to be little direct authority on the proper approach to interpretation of a Court Order, but the Court of Appeal dictum in R v Evans (cited above and distinguishing the directions given in the Court below-same case), the Court of Appeal concluded the proper approach was statutory interpretation. In Woods v Ross (2007_EWCA 1511 (FAM.) [2007] 2 FCR, 728 which concerned the proper approach to interpretation of a consent order, it was confirmed that “when construing a consent order, one should have regard to the “surrounding circumstances” or the “relevant background”.”

20. The case at hand noted that notwithstanding Mr. Felds objections, his Counsel conceded that:

“the terms of the Order were drafted by Mr. Feld and his co-Applicants and that the order was made by District Judge Parker essentially as requested, bringing this case closer to the position of a consent order than would be the case in relation to other Court Orders where the parties to whom the Order relates to has not been involved in the drafting of it.”

21. In this regard, the factual matrix is on all fours with the case here. In this matter, the negotiations for the Consent Order involved the deliberations of two (2) experienced Queens Counsel, one of whom is the Honourable Attorney General of the Commonwealth of The Bahamas and all experienced litigators who agreed these words. I accepted that the Consent Order properly manifested the intent of the parties. It was an area that was important and material. The parties spoke with one voice and that they met on common ground. This was their doing, this was their arrangement. Support for this conclusion can be gleaned from Lord Reid in **Cozens v Brutus**, that in the context of statutory interpretation, when considering a Court Order, the importance of interpreting the natural and ordinary meaning of the words used must be recognised.

INTERVENING FACTORS AFFECTING THE COURT ORDERS

22. Hurricane Dorian hit The Bahamas on the 1st September, 2019 and caused widespread devastation on the Islands of Abaco and Grand Bahama who sustained the brunt of the impact.

23. Thereafter, large amounts of "Shanty Town land" on Abaco were damaged or destroyed. I am informed by Counsel via their Affidavits that not all of the Abaco Applicants' properties were affected nor was the damage in all cases irreparable. I note that the (CDEMA) report exhibited by the Respondents refers only to:

(i) Paragraph 2.5 "Housing" expressly states:

“The Ministry of Public Works is currently conducting a Building Damage Assessment (BDA) in Grand Bahama and Abaco with the support of UNDP,

however, data was not yet available for this report. The estimates of damages to Abaco island-wide housing units are consequently based on preliminary satellite imagery available at the time, complemented with field visits to the North part of the Island and the Marsh Harbour and surrounding area to understand the extent of the damages”.

And further the report also states at p.71:

“There was nearly a 100% damage to houses in areas such as The Mudd, Pigeon Peas, Sand Banks, The Farm Road, Leisure Lee Community. In contrast, houses in the Southern part of the Island with only minor damages or no damages.”

24. Subsequently, the government is alleged to have announced its intention to “clear” debris from “the Mudd and Pigeon Peas”. The clean-up, the Applicants aver, was not merely of debris but resulted, they say, in the enforced removal and an entire clearance of the land thereby both removing peoples and structures, whether or not damaged. Timothy Rolle deposes at **paragraphs 47-49** that he returned to Abaco on 28th September, 2019 to check on the status of his home, but was denied access. His home of thirty (30) years was allegedly valued at One Hundred Thousand Dollars (\$100,000). The home was subsequently destroyed by government and in that he was not alone. The Applicants were not in a position to take statements from all people affected. However Mr. Rolle purports to give evidence, from his personal observation, of the position of other victims, specifically Luckson Monphete, Nelson Escarne, Destin Destine, Robert Theodoc and Wiltha Joseph. These homes were allegedly demolished, “eradicated” and cleared, including lands with structures on it. This portion of his Affidavit was subject to challenge.

25. The Prime Minister Dr. The Most Honourable Hubert Minnis is alleged to have announced that he had ordered the Honourable Attorney-General to compulsorily acquire the land on which “the Shanty Towns” once stood (2nd October, 2019). By 25th October, 2019, Pigeon Peas had allegedly been virtually cleared, Sandbanks has also allegedly been

cleared and 85% of the Mudd allegedly had likewise been cleared by 18th December, 2019.

26. The Respondents justify the purported actions taken by the Government in relation to the demolishing of structures on the Island of Abaco by virtue of their power to do so under the **Disaster Reconstruction Authority Act**. The Disaster Reconstruction Authority Act came into force on the 1st December, 2019 with the long title of the legislation providing the following:

“An Act to provide for the establishment of a body corporate to be known as the Disaster Reconstruction Authority; for the functions and powers relating to that authority, for the designation of a disaster zone and special economic recovery zone and for connected matters.”

Section 19 of the Act provides the following in relation to Designation of a Disaster zone:

“The Prime Minister shall, immediately after a disaster, and after consultation with the relevant authorities, designate an impacted area as a Disaster Zone.”

Further, Section 21 makes provision for the following in relation to Reconstruction in a Disaster Zone:

“(1) No person shall carry out any building or reconstruction in a Disaster Zone unless that zone or any part thereof has been approved for reconstruction by the Minister responsible for the Environment by Order published in the Gazette.

(2) Notwithstanding the provisions of the Planning and Subdivision Act (No. 4 of 2010) and where no Land use Plan is in effect in respect of a Disaster Zone an order made pursuant to subsection (1) may specify-

(a) the size, height, character or other design of a structure permitted to be constructed; or

(b) any such other requirements or prohibition that the Minister responsible for environment deems necessary in the interest of public health, public safety or national security.”

27. The Respondents submitted that by the **Disaster Reconstruction Authority (Designation of Disaster Zone) Order 2020** the Prime Minister in exercise of his powers conferred by virtue of Section 19 of the Act designated a number of places affected by Hurricane Dorian Disaster zones inter alia the entire Island of Abaco. It was further submitted by the Respondents that the Minister of Environment in exercise of the powers conferred by section 21 of the Act made the following Order in relation to Reconstruction in a Disaster Zone:

“The disaster zones listed in the Part A of the Schedule pursuant to the Disaster Reconstruction Authority (Designation of Disaster Zone) Order, 2020 are hereby approved for reconstruction with the exception of the parts thereof listed in Part B of the schedule

SCHEDULE (Part A)

Areas designated as Disaster Zone under the Disaster Reconstruction Authority (Designation of Disaster one) Order 2020

i) Abaco, ii) Abaco Cays, iii) Grand Bahama Island, iv) Sweetings Cay, v) Deep Water Cay, vi) Water Cay

(Part B)

i) Sand Banks, ii) The Farm, iii) Pigeon Pea, iv) Crown Land in the vicinity of Treasure Cay, and v) The Mudd.”

28. It would appear that the position of the Respondents is that due to the declaration of the Most Honourable Prime Minister that the Abacos and the Abaco Cays are a "Disaster Zone", the Applicants cannot petition this Honourable Court to so restrain the Respondents from taking

possession, demolishing any building or otherwise interfering with the occupier's enjoyment of land in "Shanty Towns" in Abaco. The Respondents further submitted in these premises that where the Minister responsible for the Environment has made an Order prohibiting reconstruction in areas the Sand Banks, The Farm, Pigeon pea, Crown land the vicinity of Treasure Cay and the Mudd, the Applicants cannot then ask this Honourable Court to restrain the Respondents from taking possession, demolishing any building or otherwise interfering with the occupier's enjoyment of land in these areas.

29. The Applicants submitted that at no time did the government seek to obtain a variation to the injunction before it embarked on the wholesale clearing of these parts of Abaco, nor did the government rely on any other authority to do so – it just did it. This is plainly wrong and not in the spirit of the respectful negotiations which had been ongoing between these parties from the commencement of this matter. Hurricane Dorian appeared to have provided the impetus to eradicate structures without undue concern for the nature of the claim, if any, by the Applicants and with no apparent or real consideration for whether the land belonged to Bahamians, persons with legal rights to the land, persons in adverse possession, or persons with rights arising under the Constitution. Dorian in the view of the Court was used as a shield to remove structures with no reference to the Court. From the papers before me, there appears to be a tension between those who live in "Shanty Towns" and those who do not, these alleged unregulated communities of people did not appear overnight. Conventional norms must be observed and the status quo preserved until this matter is lawfully resolved.

30. It is important to note that the Injunction Ordered by this Court was in place prior to both Hurricane Dorian and the enactment of the **Disaster Reconstruction Authority Act (2019)**. Prior to any demolition on the Island of Abaco directly related to the **Disaster Reconstruction Authority Act** in the areas commonly referred to as "Shanty Towns", the Court should have been included to ensure the actions taken were not in violation of the Injunction. The inclusion of the Court would have also ensured that if allegations against the Government of "playing unfair" or "discrimination" are made, the record would reflect that their actions were supported by the Court after review of evidence and prior

to demolitions taking place. This would essentially protect the position of all parties. Demolition before to a decision on the variation of the Injunction creates the appearance of an of "act first", "ask questions later" policy.

31. I am informed that that there are still a substantial amount of persons living in structures in the Abaco "Shanty Towns", particularly Farm Road and the Farm (200 persons) whose rights have yet to be determined.

RESPONDENTS APPLICATION TO VARY THE INJUNCTION

32. I considered the principles to be applied in determining whether to vary an injunction as enunciated by the Court of Appeal in *Mid Suffolk Council V John Edgar Clarke [2006] EWCA Civ 71, 2006 WL 50294*. The Court espoused at paragraph 15 that:

“15. In Kensington Housing Trust v. Oliver (1997) 30 HLR 608, this court held that the court has jurisdiction to discharge an undertaking given to the court even if it was given in an order made by consent. Butler-Sloss LJ said that the jurisdiction existed and could be exercised if the discharge would be just. I must quote some passages from her judgment taken from pages 611 to 614:

at 611:

“There are various mechanism which can usefully be employed in order to reflect the agreement of the parties and to enable litigation to be brought to an end. The settlement of differences may be achieved by an agreement outside the court capable of enforcement under the law of contract. The court may be involved and the agreement of the parties reduced to a court order and enforceable by recourse to the court procedures. Another method is by way of undertaking either independent of or as part of a general agreement of the parties which may be recorded by the court within an order. An undertaking freely given after proper explanation is a valuable additional part of the process of obtaining the agreement of the parties rather than the imposition of the decision-making process.”

also at 611, quoting from Buckley J in Re Hudson [1966] Ch 209:

“Where, on the other hand, no order for payment has been made but an undertaking has been given to the court to make a payment, the

court could at any time upon good cause being shown release or modify the obligation under the undertaking.”

at 612:

“In Russell v. Russell [1956] P 283 Jenkins LJ said at page 294:

“Any undertaking given to the court is capable of being discharged by the court whenever it appears to the court that circumstances have arisen which make that course a proper one in the interests of justice.”

and at page 297:

“it is always competent to the court to discharge an undertaking given to it, if in its discretion the court comes to the conclusion that that is the proper course in the interests of justice.”

at 613:

“One of the main reasons why the court has to retain control over undertakings given to it is the significance of the undertaking. It is a solemn promise made to the court and not to the other party to the proceedings. A breach of that promise is a matter which affects the court itself and may be enforced through committal proceedings for contempt of court. The issue is between the court and the contemnor. The finding that the giver of the undertaking is in contempt to the satisfaction of the court has, unlike civil proceedings, to be to the criminal standard of proof. Once proved it is a matter for the court whether to impose a penalty which includes the power to send to prison. The court must therefore have in the proper case the power to release the giver from the promise made to the court, where for instance, through no fault of the giver the undertaking cannot subsequently be complied with. The court ought not to allow the giver to remain in contempt in such circumstances even if the other party does not seek enforcement of the undertaking. It is not only a matter for the other party. It remains a matter for the court.

I am in no doubt, therefore, that an undertaking wherever recorded which is accepted by the court can be discharged by the court at any stage if it is just to do so. The fact that it is recorded in a consent order does not, in my judgment, change its nature from promise to order.”

33. At page 614, it was concluded by the Appellate Court that:

“It is nonetheless important to remember that this undertaking by the appellant formed part of a ‘package deal’ incorporated into a consent

order. Although, as I have set out, I am in no doubt that the Recorder had jurisdiction to release the appellant from its undertaking, as Jenkins L.J. said in Russell v. Russell (supra), the appellant must show that “circumstances have arisen which make that course a proper one in the interests of justice.””

34. This is the view of the Court here. These parties gave a sacred undertaking from which I do not now release them. The actions taken by the Respondents after Dorian, without more or further sanction appears unlawful and in breach of that undertaking. A variation of the Order should have been sought and granted on an urgent basis before the commencement of the demolition. The fact that the Respondents made an Application for variation of the Injunction in relation to the Island of Abaco in my view is indicative that they were aware of the necessity of getting the approval of the Court prior to their interaction with the Island. This process should not have been carried out until a decision had been made before any demolition was done. The Respondents further submitted in *Harrods Ltd V McNally [2013] EWHC 1479(QB), 2013 WL 2300009* the Court noted that *“The principles to be adopted when considering whether a variation should be ordered required an assessment of the significance of any change in circumstances and the balancing of competing rights of all parties”*.

35. The Applicants submitted that the court is not bound to discharge the injunction just because there has been a material change in circumstances. The Applicants further submitted that that question is dealt with under the normal *American Cyanamid* guidelines. If, for example, the balance of convenience has changed, then a variation of the injunction may be justified. But if the *American Cyanamid* criteria are satisfied then the injunction should obviously remain in force.

36. The Respondents relied on the second Affidavit of The Honourable Dion Foulkes. The relevant portions are helpful thus I reproduce it as follows:

“11. On the 27th September, 2019, CDEMA submitted a detailed damage Sector Assessment relative to Hurricane Dorian’s Impact on the Island of Abaco. A copy of the Report is hereto exhibited and marked “DAF 2”

12.It is critical to highlight some of the areas of this Report because it identified the Shanty Town Communities as one of the areas of concern, further it noted that these communities were nearly 100% destroyed. Additionally, the report made some critical recommendations.

13.In relation to housing, the report noted concerns relative to construction of buildings in inter alia Shanty Town Communities. It noted the following in this regard:

In general terms the analysis of the damages shown in Abaco caused by Dorian Hurricane are:

- Roof were torn from concrete and timber building alike.*
- Roofs were destroyed because of failure of the ridge connections.*
- Asphalt-shingled roofs lost their shingles.*
- Roofs also lost the bituminous felt used under the roof covering.*
- Roof structures were totally destroyed.*
- Timber houses were totally destroyed.*
- Timber houses were removed from their foundations.*
- Building were flooded.*

The type of damage described above are varied in nature. Some of the damage is due to faulty construction techniques and materials used and some because there are not compliant with the existing building codes...

The damage to housing units is categorized into four levels in Abaco. This is based on satellite images and validated through field visits to North part of the islands, Marsh Harbour and its surrounding areas. There are as follows:

Level 1: minor damages is habitable.

Level 2: some degree of damage to roof, windows, wall or doors but is habitable after repairs.

Level 3: between 40% to 60% of the roof damaged or missing and is inhabitable may have to be rebuild.

Level 4: several structural damages to roof, beams, columns, walls and or foundation or destroyed and must be rebuilt entirely.

Quantity of houses damaged or destroyed, disaggregated by level of damages.

It is important to mention that the level of damages is different in the diverse settlements, cays, subdivisions and shanty towns of the Island.

There was nearly a 100% damage to houses in areas such as the Mudd, Pigeon Peas, Sand Banks, The Farm Road, Leisure Lee Community. In contrast, houses in the Southern part of the Island with only minor damages or no damages.

The Commercial Area of Marsh Harbour shows more than 50% of damages Level IV and III. The populated sector such as Dundas Town, Murphy Town, Government Subdivisions had 50% of damages than fall between level IV and III. Other areas, such as Central Pines, Spring City subdivision shown less percentage of damages houses, even though nearly all of them will need some repairs or replacement of household furniture and assets.

Houses around Pelican Shores, East Bay Street and the exclusive luxury rental homes, winter residence located in the Cays owned mostly by persons from abroad are covered under the tourism assessment chapter of this report because they generate income related with activities and services in the tourism sector.

Based on the four levels of damages, the 1656 houses are fully damaged (Level 4), 1059 houses have between 40 to 60% of damage specially to roofs and are inhabitable and major repairs need to be undertaken (Level 3), 1059 houses with some degree of damage to roof, windows, doors and other elements (Level 2)

and 942 houses with minor damages or only wear and tears (Level1)

Emphasis provided. See pages 66 to 75 of the Report at “DAF2”

14. In relation to health the Report highlighted inter alia the sanitation facilities in Shanty towns as one of the areas of concern.

15. This Report highlights the severe impact of Hurricane Dorian on the Island of the Abaco. This has resulted in significant and continuous challenges in areas of health, education, debris and waste management, housing, recovery and reconstruction. Moreover, shanty town communities were nearly 100% destroyed.

16. In other words Hurricane Dorian by force majeure destroyed nearly 100% of the structures in the Shanty Town communities in Abaco. Consequently, the very substratum for the grant of the injunction in respect to Abaco has disappeared.”

37. The Respondents are ultimately of the view that due to reports that nearly One Hundred percent (100%) of the structures in “Abaco Shanty Town” communities being destroyed by force majeure, as a result of Hurricane Dorian, the injunction should no longer extend to the Island of Abaco. Further, that the very substratum for the grant of the Injunction in respect to Abaco had disappeared. The Applicants countered the averments of the Respondents by submitting that Hurricane Dorian did not in fact destroy One Hundred percent (100%) of the structures in “the Shanty Town” communities in Abaco. The Applicants relied on the evidence of Mr. Timothy Rolle to substantiate their position. According to the Applicants, the evidence makes clear that Mr. Rolle’s own home was still standing and able to be repaired after the hurricane, as were those of some other Abaco Applicants (namely Nelson Escarne and Wiltha Joseph). At that point they submitted, the substratum for the injunction remained.

38. In objecting to the request of the Respondents, the Applicants submitted that if the substratum of the injunction had indeed fallen away it has done so as a result of the wrongdoing of the Respondents and

subsequently they were not entitled to take advantage of the result. A position with which I agree.

39. In relation to the Respondents Application to vary the said Injunction to exclude the Applicants in Abaco, on one version of the evidence before the Court a majority of homes were devastated but not totally destroyed. However there still remained structures that were standing and able to be repaired. These are issues to be determined by the Court, not the Government.

40. I concur with the statement of the appellate Court in **Harrods Ltd** and I am of the view that the competing rights of all parties outweigh the change in circumstances and as such my decision is to deny the request of the Respondents. The Court must do everything in its power to protect the rights of the individuals who may be adversely affected and I therefore deny the request of the Respondents to vary the Injunction to no longer extend to the Applicants on the Island of Abaco.

APPLICANTS APPLICATION TO EXTEND INJUNCTION

41. The Injunction does not apply to the whole of The Bahamas. It is clear the Injunction applies to New Providence and (to the extent that some of the 177 Applicants are residents of Abaco), to Abaco as well. When the Injunction was initially sought there was no evidence that the Government was allegedly interfering with the rights of individuals on Islands other than New Providence and Abaco.

42. In determining whether the Application should be granted to extend the Injunction to cover the entire Bahamas or in the alternative to the entire Abacos, I first considered if this request would have been granted when the Injunction was initially sought. The House of Lords decision of **American Cyanamid Co v Ethicon Ltd**. [1975] 2 WLR 316 is highly instructive as it relates to the granting of Injunctions. Lord Diplock at pg. 321 stated the following:

“My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon

contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesis the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."

43. The Applicants presently seek to have the Court extend the injunction to cover the entirety of The Bahamas. However after reviewing the papers before me I am of the view that sufficient evidence has not been adduced to show the need for the Court to extend the Injunction in this regard. Therefore, I reject the request of the Applicants to have the Injunction extended to the entire Bahamas.
44. In relation to the request by the Applicants to have the Injunction extended to the entire Abacos, I am of the view that this request must be granted both because that was the intention of the Parties by Consent

and as it is required in order to ensure that the status quo in relation to Abaco is preserved until a final decision has been made. This means that the Government of the Commonwealth of The Bahamas **must cease and desist** from any further interference with the homes of the residents of the Island of Abaco in the relevant areas.

45. The position of the Court was stated in the introductory paragraphs of this Ruling. Obviously, the Government of the Commonwealth of The Bahamas does have a right to demolish and clear down homes that are in breach or violation of the **Disaster Reconstruction Authority Act, 2019**, or any other law that may require such action. Authority for the importance of Court not restraining the enforcement of the law notwithstanding ongoing legal proceedings can be gleaned from the decision of **Paradise Games Limited v. The Attorney General of the Bahamas and Others** [2013] 1 BHS J. No. 48. Sir Michael Barnett Chief Justice (as he then was) stated as follow:

“47. In my judgment, even if this action were to raise issues as the validity of the Lotteries and Gaming Act, it would not be a proper exercise of my judicial discretion to restrain the police for enforcing the law whilst the validity of the challenged law is being tested. Laws are presumed to be valid and must be obeyed unless and until they have been adjudicated as being invalid. The police must be allowed to enforce the law unless and until the law has been declared to be invalid.

48. I accept that if the constitutionality of the relevant provisions of the Act is challenged in any criminal proceedings in the Magistrates Court, those criminal proceedings may be stayed pending the determination of the constitutional issue in the Supreme Court. Be that as it may, it is no justification for not enforcing the law in the meantime

49. As to the claim based upon a legitimate expectation, it is again difficult to understand the basis of that claim. I

apprehend that the claim is based upon the fact that the Plaintiffs gave information to the executive on the basis of certain representations that the executive would grant to the Plaintiffs such licences as may be required to permit the Plaintiffs to carry on their business without being in breach of the provisions of the Lotteries and Gaming Act.

50. This is a serious issue which the Plaintiffs are entitled to have adjudicated upon by the court. If successful, the Courts may well grant relief which may require the Executive to grant the requisite licences. However, I am far from persuaded that the balance of convenience lies in restraining the police from enforcing the law whilst the claim based upon legitimate expectation is being adjudicated.”

46. As it relates to the purported actions of the government in demolishing homes of residents on the Island of Abaco, the Respondents claim that these acts are only being done to structures that are in violation of the law. The Applicants aver that many of the structures were capable of being repaired since the passage of Hurricane Dorian and were not in breach or violation of any law yet they were also demolished during these exercises by the government. In my view the only way the Court can ensure fair play until the conclusion of this matter is to have oversight of any action that is proposed to be done in relation to further destruction of homes of the Island of Abaco. The Injunction now fully covers Abaco. This simply means that prior to any further demolition taking place on the Island of Abaco, evidence that the homes selected for demolition are in fact in breach of the law should first be presented to and approved by the Court.

47. The Order for the government to **cease and desist** demolitions until the conclusion of the substantive action which is in its final stages is not an invitation for the Applicants to either construct new homes or even repair homes that are located in the areas which the Injunction covers. The failure to adhere to this Court Order on the part of the Applicants would also be a breach. The Applicants thereby must also **cease and**

desist from the construction or repair to any homes in the areas this Injunction covers.

48. This Order of the Court is to take immediate effect. Costs for these applications are in the cause.

Dated this 9th day of June A.D. 2021

Cheryl Grant-Thompson
Justice