COMMONWEALTH OF THE BAHAMAS **2008**

IN THE SUPREME COURT **CLE/GEN/00337**

Common Law & Equity Division

B E T W E E N

TRIAL FARM INVESTMENTS LIMITED

Plaintiff

AND

PITTSTOWN POINT LANDINGS LIMITED

Defendant

Before The Hon. Mr. Justice Neil Brathwaite

Appearance: Mr. Dennis Bethel, Pro se

Date of Hearing: 28th July, 2021

D E C I S I O N

1. By Summons filed 22nd July 2021, the Plaintiff seeks the following relief:

1. ***An Order that Pittstown Point Landings Limited (Pittstown) the defendant herein be enjoined whether by itself, or its servants, agents officers or otherwise howsoever from entering, crossing over, encroaching upon or otherwise interfering with the use of the property belonging to the Plaintiff being lot 68 situate at Seahorse Shores subdivision Crooked Island, The Bahamas***

2. ***An order that the defendant be precluded from entering any application response until proof of settlement with the Plaintiff for Pittstown's breach of the indemnity clause 2g of the proposed Lease Agreement signed between the parties in June and October 2001.***

3. ***An order to subpoena the following to appear and produce the Pittstown Point landings limited file and to testify and give evidence therein.***

   a. ***the Director General of Civil Aviation***
   b. ***Mr. Lamont Thompson the Director of Aerodromes***
   c. ***The Director Mrs. Candia Ferguson and Mr. David Davis, Secretary of The Investment Board; and***
   d. ***The Director of Physical Planning;***

4. ***An order that the Chairman of the Bahamas Investment Authority revoke and rescind any approvals granted Pittstown after 4th October 2003 for the development or the extension of the runway and airstrip at Crooked Island.***

5. ***An order that the secretary to the board Mr. David Davis revoke and rescind any permit or approvals or any certificate of registration***

granted to Pittstown for the development expansion and improvement of the runway and airstrip after 4th October 2003.

6. ***An order setting aside any injunctive measures granted by former Justice Keith Thompson relative to the unapproved and unauthorized extension of the runway that traverses any of the fourteen (14) properties being lot 63 through 76.***

7. ***An order that the proposed lease agreement signed between the plaintiff and the defendant be declared null and void.***

8. ***An order for meins profits costs together with costs occasioned by this application be paid by the defendant to the plaintiff***

2. The Summons is supported by the affidavit of Dennis C. Bethel, Director of the Plaintiff Company, filed 30th June 2021. In that affidavit, Mr. Bethel traverses the history of this matter, starting in 2001, when the Plaintiff entered into a Lease Agreement with the Defendant concerning properties in Crooked Island.

3. At the outset, it must be stated that the Plaintiff is a company, of which Mr. Bethel is a Director. He is the holder of a general Power of Attorney, which he contends gives him power to act for the company, and to represent the company in this action. It is in this capacity that Mr. Bethel has sworn the affidavit, and commenced these proceedings. What is of some concern is that, on the Summons, Mr. Bethel has signed as Dennis C. Bethel c/o Martin, Martin & Co. The affidavit is likewise endorsed on the backing sheet, although below the signature of the Notary Public, the document states that "This Summons was taken out by Dennis C. Bethel, c/o Priderock Law Chambers.

4. The court is aware that Trial Farms had previously been represented by Martin, Martin & Co, as well as Priderock Law Chambers. The Plaintiff is not currently represented by either firm, and indeed Mr. Bethel accepted during the hearing that Martin, Martin & Co. no longer represented the Plaintiff. The documents therefore clearly contain mis-statements.

5. The court also notes that the jurat in the affidavit is not complete, as it does not indicate when the affidavit was sworn. Order 41 Rule 1(8) of the Rules of the Supreme Court provides as follows: ***"Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn."***

6. Order 41 Rule 8(2) provides as follows: ***"(2) Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court."*** Again, this underscores the technical defect in the affidavit.

7. Notwithstanding these technical defects, Order 41 Rule 4 provides that a defective affidavit may, with leave of the court, be filed and used in evidence. No leave has been sought.

8. While a refusal to permit the use of the affidavit would be dispositive of this application, as there would be no evidence before the Court, there are other matters which must be addressed. The applicant in this matter has had several matters before the court concerning this dispute. Most recently, there was a matter before Her Ladyship Justice Diane Stewart in which the following relief was sought:

The Plaintiffs by summons filed on 26 July 2018 (the Plaintiffs' summons) seek an order that:

(i.) ***Pursuant to order 18 rule 19 [1] [a], [b] and [d] of the Rules of the Supreme Court, 1978 and/or under the inherent jurisdiction of the court, that the Defendants Defence filed on 4 May 2017 be struck out as not disclosing any reasonable cause of action or defence, and also as being scandalous, frivolous, vexatious and/or an abuse of the process of the court and that the summons to strike out the writ of Summons be dismissed, on the grounds that the Defendant has no locus standi, and***

a. ***The Defendant's current claims based on all of the lease and land exchange agreements between the parties in this action are, pursuant to section 3(1) of the International Persons Landholdings Act are INVALID and:-***

b. ***As promulgated by the Act, the agreements are 'Null and Void, and without effect for all purposes of law'.***

c. ***Pursuant to section 3(4) of the said Act, the Defendant failed to subsequently apply for, and thereby never obtained a deferred Permit from the Investment Board to validate the agreement; by which to make same valid.***

(ii.) ***An order to declare that all of the Indenture of Leases signed between Pittstown and the other landowners which are embodied in clause (D) of the land exchange agreements signed between the Defendant Pittstown and Plaintiffs Kirakis Investments Limited and Opulent Services Limited comprises the portions of contiguous parcels for the extension of the Runway from lots 63 to lot 76 are invalid and are also 'Null and void, and without effect for all purpose of law'.***

(iii.) An order directing the Director General of the Bahamas Civil Aviation Authority allow the Plaintiffs, their agents and associates, pursuant to section 37 of The Civil Aviation Act 2016, their rights under the law to inspect the Register and all the particulars contained therein for the Pittstown aerodrome at Crooked Island.

(iv.) An Order directing the Director General of the Bahamas Civil Aviation Authority to allow the Plaintiffs, pursuant to section 80 of the Civil Aviation Act 2016, their rights under the law to obtain a certified copy of the official of the February 2018 Inspection of all the parlars [sic] contained therein for the Pittstown airstrip at Crooked Island.

(v.) An Order that with immediate effect the Defendant, their agents, servants and associates are to vacate the properties belonging to the Plaintiffs and to cease and desist any works being carried out upon the Plaintiffs land forthwith, and to remove all equipment and machinery, tools, vehicles, airplanes or other materials or supplies thereupon at once.

(vi.) An Order that Defendant is to pay the Plaintiffs for any damages done to the physical landscape of the properties as a result of the activities carried out by the Defendant and their agents and associates over the past 17 years during their exercises of clearing, paving, digging, excavating and removing of soil material and all trees and natural vegetation destroyed or removed from the Plaintiffs' land.

(vii.) An Order that the Defendant is to pay the Plaintiffs for the disturbance and removal of all survey markers which were placed on the Plaintiffs' properties, and is also to pay for the replacement of the new survey markers.

(viii.) An Order that the Defendant is to pay the Plaintiffs for depriving their right of full access and control of their properties, and for the trespass upon said lands by the Defendant and their agents and associates, and for providing to the general public full and unfettered access to traverse upon and over the Plaintiffs' land as a result of constructing an unapproved roadway across the Plaintiffs' land without such lawful right to do so, and without the Plaintiffs' lawful consent.

(ix.) Costs.

9. In a reasoned decision delivered on 15th January 2020, Stuart J set out a history of proceedings relating to this matter, which I gratefully reproduce, commencing at paragraph 6:

> *6. Pittstown, a company incorporated under the laws of the Bahamas is the owner and operator of an oceanfront resort facility known as the "Crooked Island Lodge" (the "Resort)] located in the Sea Horse Shores subdivision near Land Rail Point Crooked Island in The Bahamas. Pittstown negotiated and entered into several agreements with various owners of neighbouring properties in order to extend and develop a private runway owned by Pittstown and in order to develop the Resort's amenities.*
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> *7. These agreements included the following written agreements with the Plaintiffs': 3 1. A Lease Agreement dated 15 October 2001 (the "Lot 68 Lease Agreement") between Trial Farm Investments Limited and Pittstown; 2. A Land Exchange Agreement dated 4 October 2002 between Kirakis Investments Limited and Pittstown in respect of lots 63 and 65 in the Sea Horse Shores subdivision ("Lots 63 and 65 Agreement") 3. The Land Exchange Agreement dated 4 October 2002*

between Opulent Services Limited and Pittstown in respect of Lot 4 in the Sea Horse Shores subdivision (The Lot 4 Agreement).

8. *Mr. Dennis Bethel is a director of each of the Plaintiffs, the sole owner of Trial Farms and Opulent and the owner of 33.3% of the shares in Kirakis.*

9. *Pittstown maintained that Kirakis and Opulent breached their obligations under both Exchange Agreements and refused to convey the lots to Pittstown.*

10. *Pittstown commenced an action in November 2005 ("the Senior Action") against Kirakis and Opulent seeking specific performance of the Exchange Agreements.*

11. *Kirakis and Opulent in their Re-Amended Defence in the Senior Action denied the breaches and claimed that the Lot 68 Lease Agreement was invalid.*

12. *Trial Farms commenced an action in 2008 against Pittstown (the Junior Action):- a) alleging that Pittstown had failed to comply with certain covenants contained in the Lot 68 Lease Agreement between Trial Farms and Pittstown and as a result thereof that lease was null and void. b) seeking:- (i) an injunction to restrain Pittstown from remaining on Lot 68 and continuing to construct a portion of the runway thereon, (ii) a declaration that the Lot 68 Lease Agreement was null and void; and (iii) Costs.*

13. *Pittstown filed a Defence and Counter-Claim in June 2008 denying the claims of Trial Farm in the Junior Action.*

14. *In 2009, Justice Albury ordered that both the Senior and Junior actions be tried consecutively before the same judge with the Senior Action being tried first. Justice Stephen Isaacs gave further directions and set both actions down for trial before him. Evidence was led in both actions. Counsel for Pittstown in the Senior Action prepared a bundle of documents which was utilized in both actions. Counsel for Trial Farms in the Junior Action did not prepare any bundles for that action and relied on the bundles used in the Senior Action. 4*

15. *Both trials were completed before Justice Isaacs who delivered a conjoined judgment written in June 2011 in favour of Pittstown in both actions.*

16. *Justice Isaacs held at paragraph 48 through 52 of his judgment:- 48. "The real substance of this matter is disposed of in favour of Pittstown by the new evidence and the decision of the Court of Appeal in so far that CAD had clearly given approval for the extension of the runway, and the land exchange agreements are valid. The issue of the lease of lot 68 has also been decided in favour of Pittstown as seen above. 49. In the result specific performance of the land exchange agreements is ordered and a lien on Kirakis' and Opulent lots is a Sea Horse Subdivision is issued to cover any damages or costs in these actions. 50. The Counter Claim by Kirakis and Opulent is dismissed. 51. The Junior Action by Trial Farms is dismissed. 52. Costs of these actions are awarded to Pittstown to be taxed if not agreed."*

17. *The new evidence referred to in paragraph 48 of the Isaacs judgment was the affidavit of Randy Butler dated the 6th December 2010 which*

exhibited a letter from Patrick Rolle, Director of the Bahamas Department of Civil Aviation dated 20th September 2010.

18. *The Court of Appeal decision referred to was the Oceania Height Limited v Willard Clarke Estates Limited (CA).*

19. *By a Notice of Appeal filed in July 2011 the three Plaintiffs appealed the judgment of Justice Isaacs in favour of Pittstown. Trial Farms was subsequently removed from this appeal the (Kirakis and Opulent appeal) and commenced its own appeal. (Trial Farms Appeal.)*

20. *The Kirakis and Opulent appeal was dismissed by the Court of Appeal in June 2013 for failure to post the required bond. These Appellants then applied to have their appeal reinstated. This application for reinstatement was heard and dismissed on 29 October 2014.*

21. *The Appellants then sought leave to apply to the Privy Council which application was heard and dismissed. They then applied directly to the Privy Council for special leave to appeal which was dismissed in November 2016.*

22. *The Trial Farms Appeal was dismissed by the Court of Appeal in June of 2013 for failure to pay the required bond. Trial Farms attempted to have the appeal reinstated but the application was refused in 2015. It also attempted to obtain leave to appeal to the Privy Council which application was refused by the Court of Appeal. Trial Farms then applied to the Privy Council for special leave to appeal and this application too was dismissed by the Privy Council in November of 2016.*

10. Having considered the facts of the case, and the law applicable to the issues of abuse of process, Stuart J concluded as follows: ***70. For the reasons set forth above, I am satisfied that all of the issues pleaded by the Plaintiffs in this action have or could have been litigated before Justice Isaacs and an attempt to do so now is to mount a collateral attack on issues which have been tried and determined and to make a collateral attack on the Isaacs decision which has been upheld through all the courts. Accordingly, I rule that this action be struck out as prayed in the Defendant's Summons with costs to be awarded to the Defendant to be taxed and paid by the Plaintiffs. I thank counsel for the Defendant for their assistance and diligence in providing authorities helpful to the issues to be determined."***

11. In disposing of the applications, Stuart J carefully considered the law in relation to abuse of process, in particular the case of Hunter v Chief Constable (1982) AC 529 and 536, and notes that it has been judicially determined that an example of an abuse of process is where a party attacks a final previous decision by way of a new action when the Plaintiff was a party to the same and had the opportunity to raise and contest the issue in the previous decision. Stuart J also carefully considered the law in relation to res judicata, and the public interest in finality to litigation, and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue.

12. It is clear that the present action relates to the same subject matter as the actions on which Isaacs J ruled, and in respect of which Stuart J concluded that the 2018 action was in effect a collateral attack, resulting in the action being struck out. Having read the Stuart decision, and the authorities referred to therein, and having regard to the relief being sought in this matter, and the affidavit filed in support of the Summons, I find that the Plaintiff is again attempting to mount a collateral attack on the

decision of Isaacs J, and indeed the subsequent decision of Stuart J. These matters have all been considered by Isaacs, or could have been considered in that matter if pursued with due diligence by the Plaintiff. I therefore find that this application is an abuse of process, and that the plaintiff is again seeking to launch litigation in relation to the same issues which have been before the court on several occasions, and upon which courts of competent jurisdiction have already adjudicated.

13. The plaintiff also seeks an injunction. However, in order to grant an injunction, the court must be satisfied that the claim is not frivolous or vexatious. Again, given the findings of Stuart J, with which I entirely agree, and the nature of the applications before Isaacs J, it is clear that this application is vexatious, and there are no prospects of success. The application is therefore dismissed in its entirety.

Dated this 29th day of September, A.D., 2021

Neil Brathwaite

Justice