

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2018 PUB/jrv/00027

B E T W E E N

RESPECT OUR HOMES LIMITED

AND

LUMANE NONORD ET AL BEING 177 RESIDENTS AND/OR

OCCUPANTS OF SHANTY TOWNS IN THE BAHAMAS

Applicants

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, K.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

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Frederick Smith KC with Raven Rolle and Ian Cargill Jr for the Applicants

Kayla Green-Smith with David Higgins, Nyanne Olander, Adele Mangra and Nevado Fraser for the Respondents

3 April 2023 and 13 April 2023

DECISION

WINDER, CJ

This is my decision on the Respondents' application seeking the enforcement of Injunction Orders made by Grant-Thompson J in this judicial review action.

Background

[1.] The judicial review application was commenced by the Applicants following the grant of leave on 3 August 2018. The first named Applicant is a non-profit company established to provide representation and advocacy on behalf of the occupiers in unregulated communities throughout The Bahamas (commonly referred to as "Shanty Towns"). The other Applicants claim to be 177 residents and/or occupants of Shanty Towns in The Bahamas.

[2.] At the same time the leave was granted, the Court ordered that the Respondents be restrained in the following terms:

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, or 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.

[3.] On 17 December 2018 the Interlocutory Injunction granted on the 3 August 2018 was varied, by the Consent of the parties, in the following terms:

"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.*"

[4.] Finally, on the 9 June, 2021 the following further Orders were made relative to the injunctive relief originally granted on 3 August, 2018:

1. The Injunction be and is hereby varied to extend to the Island of Abaco and paragraph 1 of the filed Injunction Order of 7th October, 2018 shall therefore be amended to read as follows:

1. 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 177 Applicants. And other residents' and occupiers' enjoyment of Land in Shanty Towns in New Providence and Abaco including by disconnecting any utilities other than pursuant to the relevant enabling legislation.

2. The Respondents be and are hereby ordered to cease and desist from any further interference with homes of the residents of the Island of Abaco in the relevant areas i.e. in Shanty Towns in New Providence and Abaco

until the conclusion of the substantive action or any further order of the court.

3. The Applicants be and hereby ordered to cease and desist from the construction or repair to any homes in the areas this injunction covers the in Shanty Towns in New Providence and Abaco until the conclusion of the substantive action or any further order of the court.

4. Prior to any further demolition in Shanty Towns in New Providence and/or Abaco the respondents shall submit for the approval of this Honourable Court, evidence that the homes selected for demolition are in breach of the law; and

[5.] On 10 February 2023 Grant-Thompson J dismissed the judicial review application and discharged the injunctions which had been granted.

[6.] The Respondents applied to the Court seeking to demolish structures which they say have been built in breach of this Court's Order. The Summons, which was filed prior to the dismissal of the Judicial Review application and the subsequent discharge of the injunctions, initially sought permission to demolish structures which were allegedly built following the grant of the injunctions, in accordance with the Buildings Regulation Act.

[7.] The application is supported by the Affidavits of BCO Craig Delancy (Delancy), which demonstrates that there has been an exponential increase in the amount of illegal structures. In summary he cites:

- (a) An increase from 60 structures on the North Side of SC Bootle Highway, Marsh Harbour identified on a walk-through on October 27, 2022 to 101 identified on a walk-through on January 4, 2023 (paras.13-14) (although note at para. 17 he goes on to state that only 79 structures can be identified from an aerial photograph taken on 12 January 2023, casting doubt on the accuracy of the data gathered on the January 4, 2023 walk-through);
- (b) An increase from 39 structures on the South Side of SC Bootle Highway, Marsh Harbour on October 27, 2022 to 131 on January 5 2023 (paras.13-14) (this

amounts to an increase of 92, contradicted at paragraph 18 where Mr Delancy gives evidence that 86 new structures can be seen from aerial photographs taken on January 12, 2023);

- (c) An increase from 40 structures in the Farm, near Treasure Cay, apparent from an aerial photograph taken on March 14, 2021 to 120 structures apparent from an aerial photograph taken on January 21, 2023 (para. 19);
- (d) An increase from 85 structures in All Saints Way, apparent from an aerial photograph taken in 2018, to 98 structures apparent from an aerial photograph taken on January 26, 2023 (para. 20);
- (e) An increase from 35 structures in Montgomery Road, apparent from an aerial photograph taken in 2018, to 45 structures apparent from an aerial photograph taken on January 31, 2023 (para. 21);
- (f) An increase from 33 structures in Butlers Way, apparent from an aerial photograph taken in 2018, to 60 structures apparent from an aerial photograph taken on January 31, 2023 (para. 22)

[8.] Following the dismissal of the judicial review application and the discharge of the injunctions, the Respondents amended their application seeking an Order for the demolition of the structures identified in the Affidavits of Delancy, rather than permission to do so, in accordance with the relevant statutory provisions.

Submissions

[9.] The Respondents say that the injunctions issued were clear and unequivocal that the Applicants and the residents and occupiers of land in Shanty Towns in New Providence and Abaco shall take no action to construct, erect and alter any further buildings or structures otherwise than in accordance with the Building Regulations Act. They submit that under section 7 of the Supreme Court Act, the Court has unlimited original jurisdiction in civil causes and matters. They also say that this include the jurisdiction to make an Order against a person found in breach of a Court Order and more specifically it includes the jurisdiction to make an Order to demolish structures that were built in violation of a Court Order. Further, they say that Order 52 of the Rules of the

Supreme Court (now Part 51 of the Supreme Court (Civil Procedure) Rules 2022) gives the Supreme Court jurisdiction to make a committal order against a person found in contempt of court.

[10.] It should be noted that the Respondents have not applied for a committal order.

[11.] The Respondents also assert that the court has jurisdiction to make an Order against persons who have breached an Order even in circumstances where the persons are unknown. They rely heavily on the decision in **Canada Goose UK Retail v Persons Unknown [2020] EWCA Civ 303** which they cite as authority for the proposition. That case applied the law as stated in the UK Supreme Court case of **Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6**.

[12.] In opposition to the Respondents' application, the Applicants say that any demolition by the Court would be unlawful as the jurisdiction to demolish buildings vests exclusively in the provisions of the Buildings Regulations Act (BRA) and any breach of Section 4(1) of the BRA triggers the powers of the Minister under Section 4(3). If those powers are triggered, the Minister "may" require the owner to demolish the work, and if he fails to do so within at least 28 days, the Minister may do so. They say that:

The court must bear in mind that it is only a contravention of s.4 of the BRA that engages the power in s.4(3), and it is only the power in s.4(3) that the Respondents are seeking permission to exercise (as opposed to the several other powers cited in the Respondents' Skeleton Submissions). ... Section 4(3) grants a regulatory discretion to the Minister. If his powers are engaged, he is not required to demolish the offending structures, but he may do so. ... That does not mean that the Minister has a completely unfettered discretion to demolish any structure if his powers are engaged. He must exercise his powers lawfully. He must not be unreasonable in the *Wednesbury* sense. He must not take into account irrelevant considerations and must take into account all relevant considerations. ... [T]he decision appears to have been taken in relation to multiple properties without reference to their

individual circumstances. That is itself a process that is Wednesbury unreasonable and one that fails to take into account all relevant circumstances.

[13.] On 3 April 2023, at the first hearing of the application, a number of persons attended Court in person, having been notified by the Respondents of the fixture, by posting notices on their structures. These persons (the Additional Occupants) were Rebert Pirus, Reginal Merzius, Rose St. Fleur, Aviole Francois-Burrows, Anel Marital, Elda Francois, Silficia Ceus, Leslie Smith, Johninian Godin, Anthony Jean-Pierre and Mediles Cineus. They were advised to contact the BCO Delancy to determine if their building was being challenged. At the resumed hearing Delancy filed a Sixth Affidavit exhibiting a report detailing his further findings, having met with the Additional Occupants. According to Delancy, seven of the persons who met with him admitted to being responsible for the construction of nine of the structures which were identified in his previous affidavits. Two of them claimed to each own two of the questioned structures. Four of the structures previously identified as being built within the injunction period were not in fact built within that period.

[14.] Rose St. Fleur and Aviole Francois-Burrows are two of the 177 Applicants, and are represented by Mr Smith KC. On the evidence of Delancy the structures or parts thereof, were constructed following the grant of the injunction.

[15.] The Applicants contend that they were not in breach of the injunction and that the persons and structures being complained of were not theirs. They nonetheless argued, after the issue had been raised by the Court, that the Respondents had to show that persons constructing the new structures were served with the injunction or were otherwise aware of the existence of the injunctions.

[16.] In response to the submission on Notice, the Respondents sought and obtained (over the objections of the Applicants) leave to submit additional evidence to support a

submission that adequate notice had been furnished. According to the additional evidence, which was contained in the 7th Affidavit of Delancy:

- (1) In March 2019 then Attorney-General Hon. Carl Bethel KC issued a press statement advising that the Order in the Shanty Town case was amended to prevent building anywhere in The Bahamas; and
- (2) In April 2021 large notices were outlined in English and in Creole and placed on land in the Shanty Towns on SC Bootle Highway and the Farm in Abaco.
- (3) On 12 April 2021, Hon. Desmond Bannister, then Minister of Public Works, made a communication to the House of Assembly on the operations conducted in Abaco Shanty Towns and referred to the injunction and the large signs posted prominently throughout the area in the Shanty Towns.

Law Analysis and Disposition

[17.] The evidence before me is unequivocal that there has been massive expansion of these unregulated communities by some of the residents and occupiers notwithstanding the Order made by Grant-Thompson J. The first question to ask is whether there has been a breach. A breach can only occur when someone who is the subject to the Order has acted contrary to it. The Respondents complain that the evidence laid out by Delancy makes it abundantly clear that the Applicants have completely disregarded the Orders of this Honourable Court, and have not only completed the building of structures but continue in this said defiance to construct, erect and alter buildings and structures in the areas that are covered by the injunction.

[18.] It is a trite proposition that only parties with notice of the existence of a Court Order, and which is directed to them, whether constructively or otherwise can be in willful breach of that Order. I accept that the terms of the Order were very wide and was intended to impact persons not named in or parties to the action. The Order read:

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.*"

(Emphasis added)

[19.] Notwithstanding the wide breadth of the Injunction Orders, it has to actually or otherwise lawfully come to the attention of the person alleged to be in breach, to be actionable against them. In **Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6**, relied on by the Respondents, *Lord Sumption*, identified the critical question as to the basis of the court's jurisdiction over parties, and in what (if any) circumstances can jurisdiction be exercised on that basis against persons who cannot be named. At paragraphs [13] and [15] of the judgment, *Lord Sumption* states:

[13] In approaching this question, it is necessary to distinguish between two kinds of case in which the defendant cannot be named, to which different considerations apply. The first category comprises anonymous defendants who are identifiable but whose names are unknown. Squatters occupying a property are, for example, identifiable by their location, although they cannot be named. The second category comprises defendants, such as most hit and run drivers, who are not only anonymous but cannot even be identified. The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not. ...

[15.] An identifiable but anonymous defendant can be served with the claim form or other originating process, if necessary by alternative service under CPR 6.15. This is because it is possible to locate or communicate with the defendant and to identify him as the person described in the claim form. Thus, in proceedings against anonymous trespassers under CPR 55.3(4), service must be effected in accordance with CPR 55.6 by attaching copies of the documents to the main door or placing them in some other prominent place on the land where the trespassers are to be found, and posting them if practical through the letter box. In *Brett Wilson LLP v Persons Unknown*, supra, alternative service was effected by email to a website which had published defamatory matter, Warby J observing (para 11) that the relevant procedural safeguards must of course be applied. In *Smith v Unknown Defendant Pseudonym "Likeicare"*, supra, Green J made the same observation

(para 11) in another case of internet defamation where service was effected in the same way. Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell* [2006] 1 WLR 658, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis.

Persons who would have engaged in construction in these unregulated communities would fall to be considered in the first category, which comprises anonymous defendants who are identifiable but whose names are unknown. It was therefore open to the Respondents, rather than sitting and watching the expansion of the Shanty Town, to have moved the court to: (1) substitute service on these identifiable persons; and (2) to move the court in the manner which they now do.

[20.] Ms Stephanie St. Fleur, the President of Respect Our Homes Limited and the President of Human Rights Bahamas, gave evidence by affidavit that these organizations visited the Shanty Towns in 2021 to advise residents of the terms of the injunctions. Specific individuals were not identified. Notwithstanding this, I do not find that there is adequate evidence that anyone other than the parties to this action could be said to have properly had notice of the injunction. The Respondents took no steps, in accordance with the rules, to substitute service of the injunction on persons who they say are/were unknown to them. A simple Order for the posting of the Orders on the doors of the residents, as was done to cause the Additional Occupants to attend Court in this

application, could have been obtained. Further, while there may have been press statements and notices placed in certain communities this was not done with the authority of an Order for substituted service.

[21.] While orders can be made against persons unknown, the offenders in this case are actually identifiable. It is only persons who can be fixed with notice of the Order could be said to have been in breach. The broadcasting of the information or its general distribution could not properly suffice.

[22.] I accept however that Rose St. Fleur and Aviole Francois-Burrows were aware of the existence of the Order, having consented to it. There has been no evidential response to the allegations of breach by Rose St. Fleur and Aviole Francois-Burrows or a request to do so. I am satisfied that the breach is willful.

[23.] The Applicants say that there is no power in the Court to Order a demolition of the buildings and that the enforcement of any contempt is by way of Committal Proceedings.

[24.] I accept that the power under the Buildings Regulations Act to demolish buildings for failing to comply with the Building Code or for failing to obtain a building permit resides in the Minister. In fact, as I understand it from the Respondents' Counsel that process has already been engaged by the Minister and is advancing. Respectfully however, the Minister's power is a different power from the power of the Court to enforce an order not to construct, by causing the construction done in defiance of the Court Order to be removed. In the case of **Clarke and others v. Chadburn and Others [1985] 1 WLR 78 at 81 Sir Robert Megarry V.C.** observed:

I need not cite authority for the proposition that it is of high importance that orders of the court should be obeyed. Wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and

liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of court for doing what they did, nevertheless those acts were validly done. Of course, if an act is done, it is not undone merely by pointing out that it was done in breach of the law. If a meeting is held in breach of an injunction, it cannot be said that the meeting has not been held. But the legal consequences of what has been done in breach of the law may plainly be very much affected by the illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them. ... Even if the defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it; the remedy is to apply to vary or discharge it.

[25.] In a case, such as this, where the Order of the Court is being openly flouted, the administration of justice is being brought into disrespect and disrepute. The Court has an inherent jurisdiction to protect its process and I am satisfied that the Court is empowered to cause those Applicants who have breached the Order to remove these offending structures.

[26.] I am also satisfied that I am not restricted by the fact that there is a process for committal which has not been engaged by the Respondents. Rule 51.1 of the Supreme Court (Civil Procedure) Rules 2022 (the CPR) provides that:

51.1 Committal for contempt of court.

(1) The power of the Court to punish for contempt of court *may* be exercised by an order of committal.

(2) Where contempt of court — (a) is committed in connection with— (i) any proceedings before the Court including but not limited to the making of a false statement of truth in a witness statement or breach of duty of a party or his attorney in relation to disclosure; or (ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court; or (b) is committed otherwise than in connection with any proceedings, then, subject to paragraph (4), an order of committal may be made by the Court.

(3) Where contempt of court is committed in connection with any proceedings in the Court, then, subject to paragraph (2), an order of committal *may* be made by a judge of the Court.

(4) Where by virtue of any enactment the Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the Court, have been a contempt of that Court, an order of committal *may* be made by a judge of the Court.

(5) An application for committal under rule 51.1(2)(a)(i) *may* be made only with the permission of the court dealing with the claim.

(Emphasis added)

I am satisfied that the CPR did not intend to take away or curtail the inherent jurisdiction of the Court to control and regulate its process or to protect the administration of justice from disrespect and disrepute. There is no exclusive recourse to an order for committal.

[27.] In the circumstances therefore I order that only the offending structures of Rose St. Fleur and Aviole Francois-Burrows, built in defiance of the Court's order be removed within 45 days, failing which the Respondents may have them removed at the expense of Rose St. Fleur and/or Aviole Francois-Burrows. I am comforted in arriving at this decision having regard to the other lawful means at the Minister's disposal to cause the demolition of these premises if in fact he deems it appropriate under the Buildings Regulation Act.

[28.] I make no order as to costs.

Dated the 3rd day of May 2023



Sir Ian R. Winder

Chief Justice