COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY

2021/CLE/gen/1259

IN THE MATTER OF a Declaration of Covenants dated the 28th day of January 2004 and an Amended Declaration of Covenants dated the 8th day of February2013 concerning lands situated in North Bimini, Bahamas known as "Bimini Bay".

AND IN THE MATTER OF the Memorandum of Association of the **BIMINI BAY HOMEOWNERS ASSOCIATION LIMITED** dated the 3rd day of February 2004.

AND IN THE MATTER OF the Articles of Association of the **BIMINI BAY HOMEOWNERS ASSOCIATION LIMITED** dated the 3rd day of February 2004.

AND IN THE MATTER OF Declarations of Condominium of **(1)** Bimini Bay Phase 1-A2 Condominium Association Limited, **(2)** Bimini Bay Phase l-A3 Condominium Association Limited, **(3)** Bimini Bay Phase 1-B1 Condominium Association Limited, **(4)** Bimini Bay Phase 1-B2 Condominium Association Limited, **(5)** Bimini Bay Phase 1 -B3 Condominium Association Limited, **(6)** Bimini Bay Phase l-B4 Condominium Association Limited, **(7)** Bimini Bay Phase l-CI Condominium Association Limited, **(8)** Bimini Bay Phase l-C2 Condominium Association Limited and **(9)** Bimini Bay Phase l-C3 Condominium Association Limited ("The Sub-Associations").

AND IN THE MATTER OF an Agreement dated the 7th day of November 2017 between **RAV BAHAMAS LIMITED** and the **BIMINI BAY HOMEOWNERS ASSOCIATION LIMITED** with reference to the Seawall in Bimini Bay.

B E T W E E N

Bimini Bay Phase 1-A2 Condominium Association Limited **(1)**
(For and on Behalf of its 20 Unit Owners)

Bimini Bay Phase 1-A3 Condominium Association Limited **(2)**
(For and on Behalf of its l4 Unit Owners)

Bimini Bay Phase l-Bl Condominium Association Limited **(3)**
(For and on Behalf of its 14 Unit Owners)

Bimini Bay Phase 1-B2 Condominium Association Limited **(4)**
(For and on Behalf of its 25 Unit Owners)

Bimini Bay Phase 1-B3 Condominium Association Limited **(5)**
(For and on Behalf of its 22 Unit Owners)

Bimini Bay Phase 1-B4 Condominium Association Limited **(6)**
(For and on Behalf of its 32 Unit Owners)

Bimini Bay Phase 1-Cl Condominium Association Limited **(7)**
(For and on Behalf of its 43 Unit Owners)

Bimini Bay Phase 1-C2 Condominium Association Limited **(8)**
(For and on Behalf of its 41 Unit Owners)

Bimini Bay Phase 1-C3 Condominium Association Limited **(9)**
(For and on Behalf of its 45 Unit Owners)

Plaintiffs

AND

RAV BAHAMAS LIMITED **(1)**

and

BIMINI BAY HOMEOWNERS ASSOCIATION LIMITED **(2)**

Defendants

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Krystal Rolle KC, Kendrea Demeritte for the Plaintiffs

Kevin Moree, Devaughn Rolle for the Defendants

Keod Smith, Rouschard Martin for the Intended Intervener

Date of Hearing: 1st March, 2023

DECISION

[1] By Origination Summons filed 22nd October 2021, the Plaintiffs commenced an action against the Defendants.

[2] Following the filing of that Originating Summons, the matter was assigned to the learned Charles, Senior Justice, who gave directions for the progress of the matter, including a date for the hearing of the substantive matter. Prior to the hearing date, counsel for the parties arrived at an agreed

position, and presented a consent order to the learned judge on 21st March 2021. The order was duly perfected, and was filed the following day.

[3] By Re-Amended Summons filed on 8th July 2022, Fairway Property Managers Inc. have now applied for the following relief:

1. Joining Fairway as a party herein; and
2. Disqualify Mrs. Krystal Rolle KC as Counsel for the Plaintiffs as she had no proper authority or approval from them in accordance with the laws of The Bahamas that govern the engagement of any such Counsel; and
3. Striking Out the Consent Order dated 21st March 2022 and filed herein on 22nd March 2022 as it is a nullity ab initio on the basis that, inter alia:

   3.1. The Presiding Judge at the time, Her Ladyship Ms. Justice Indra Charles (Justice Charles), had, on her own motion, recused herself from the proceedings herein on or about 21st or 22nd March 2022 because of the Counsel Fairway presented itself with before the Court which reason was made clear by Justice Charles in an email addressed to Counsel for Fairway dated 5th July 2022 with attachments; and/or

   3.2 it was fraudulently entered into by Mrs. Krystal Rolle QC purporting to be Counsel for the Plaintiffs herein and instructed by a purported Attorney based in the United States of America, Mr. Charles Brecker, but neither of whom had proper authority, or at all; and/or

4. Interimly staying the execution of the said Consent Order on the same grounds that Justice Charles had, in fact, recused herself from the proceedings herein:

[4] It transpired that counsel for the Intended Intervener had sent documents to the court on 21st March 2022, and an email dated 21st March 2021 from the learned judge has been exhibited to the affidavit of Arianne Cartwright, stating inter alia as follows:

"That said, I believe that Mr. Lopez received some documents from Mr. Keod Smith this morning. I saw him by Mr. Lopez' desk as I was coming into my Chambers this morning. I have not received those documents as yet.

Unfortunately, once Mr. Smith represents any party, I will have to recuse myself from this matter.

Please advise whether any documents have been served on you and whether I should send this file back to the Listing Office."

[5] There is also exhibited another email in which the learned Senior Justice indicated in July 2022, in response to a letter sent by Mr. Smith to the Chief Justice, that she had long recused herself from any further hearing of the matter.

[6] Counsel for the Plaintiffs has taken a preliminary point, supported by counsel for the Defendants, that this court is functus officio, as the matter was completed once the consent order was signed and filed. They therefore submit that this court has no jurisdiction to entertain any application to intervene.

[7] Counsel for the Intended Intervener, on the other hand, submits that once the learned Senior Justice recused herself, as she clearly did, any order made in the matter, including the consent order, should be void and of no effect. The Privy Council authority of **Almazeedi v Penner & Another Privy Council Appeal No 0054 of 2016**, is cited in support of this proposition. In that case, the court found that a judge who had heard a matter should have been disqualified from hearing the matter on the basis of perceived bias as he had failed to disclose an appointment to another court which have involved persons connected with the parties. The proceedings before the judge were therefore set aside.

[8] Counsel also relied on the Privy Council decision of **Stephen Stubbs v The Queen Privy Council Appeals No 0015 and 0016 of 2017 and 0098 of 2016**, in which a judge who had presided over an aborted trial of the appellant, had also sat as an appellate judge on the appeal of the appellant against a subsequent conviction in the same matter. It was therefore concluded that the judge should not have sat on the appeal, and the order dismissing the appeal was reversed.

[9] Counsel for the Intended Intervener further submitted that the court still had jurisdiction, as the learned senior Justice Charles had recused herself, as opposed to saying that the court was functus officio, in a clear indication that Justice Charles did not consider that the court was functus officio.

[10] In the instant case, I note that the circumstances are markedly different from that which obtained in **Stubbs** and **Almazeedi**, as in both of those cases there was a finding by the appellate court that the judge in the court below should not have heard the matter, and the orders of the lower court were therefore vacated. In the instant case, the order signed by the judge was made prior to any recusal, and prior to the involvement of counsel who was at the root of that recusal. There is therefore no basis to the contention that the learned Senior Judge was tainted by the perception of bias at the time of the making of the order as, at the time of the making of the order, counsel for the Intended Intervener was not involved.

[11] I am further of the view that there is no merit to the submission that the learned Senior Justice did not consider the Supreme Court to be functus officio. The court was not being asked to consider whether there was jurisdiction to do anything, but merely indicating that if a particular counsel was to be involved in any applications in the matter, it would have to be dealt with by another judge. That is not a decision on jurisdiction, but an indication that any decision on any subsequent application in the matter, such as the issues being considered in this application, would have to be made by another judge.

[8] Counsel has also raised the issue of whether the consent order was a final judgment, as the matter was not heard on the merits., In **Woodside v Attorney General [2007] 3 BHS J. No. 20** the Court was challenged to consider whether it was functus officio. At paragraph 18 of the case Isaacs J stated:

> 5. To be a final judgment, the judgment must satisfy two conditions: first, it must have been perfected and entered in the court record; and second, it must have resolved all the issues between the parties of which the court was seised. The question, "Of which issues was the court seised?" was to be answered by reference to the pleadings and by taking account of any pleaded issues which may have been abandoned during the course of the trial.""

[9] In the instant case, it is clear that the order was perfected and filed, satisfying the first criteria identified by the learned Isaacs J. It is also clear that the consent order disposed of the issues raised in the Originating Summons. Counsel has also contended that the order was not the order of the court, but merely an agreement between the parties. With respect, I do not agree. The order, once signed by the judge, is the order of the Court. Whether the contents of the order are articulated by the parties is of no moment. I am therefore satisfied that the consent order is a final order.

[10] In **Colin Wright v The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Avril Clarke, Andrea Culmer and Steve Hepburn in their capacities as trustees) (A Judgment Creditor) (SCCivApp No. 111 of 2018) & Ors.**, the Court of Appeal held that the Judge was functus officio once final judgment had been entered. Isaacs JA explained that at a time when final judgment had been entered, the Court has no power to entertain an application challenging the results of the case at paragraph 31:

> "The Judge did not err when she focused on the applications that were before her and did not allow herself to be distracted by an application to impeach the action in which the final judgments had been given. We are satisfied that the Judge was functus officio once final judgment had been entered and, even if she had been minded to entertain a summons questioning the propriety of the results in the case, she would have fallen into error has she so done."

[11] In the instant case, counsel for the Intended Intervener seeks to have his clients joined as parties to the action, and to have the consent order struck out. This falls squarely within the comments cited immediately above. With respect to this application, and for the reasons given above, I am satisfied that this court is functus officio, and has no jurisdiction to entertain the application. I therefore uphold the preliminary objection, and dismiss the application of the Intended Intervener.

[12] On the question of costs, the Plaintiffs and Defendants submit that they should be awarded their costs for opposing this application. The Intended Interpleader sought to submit that costs should not follow, on the basis that the Plaintiffs were not proper parties to the action in the first place. In my view, this amounts to an attempt to attack the final order, which I have already concluded could not be done in these proceedings. In the circumstances of this case, I see no reason to depart from

the usual rule that costs should follow the event. I therefore order that the costs of this application be paid to the Plaintiffs and Defendants by the Intended Intervener, and to be taxed if not agreed.

Dated this 1st day of March, A.D. 2023

Neil Brathwaite

Justice