

COMMONWEALTH OF THE BAHAMAS

2023

IN THE SUPREME COURT

CLE/Gen/01010

Common Law & Equity Division

IN THE MATTER of The Planning and Subdivision Act, 2010

AND IN THE MATTER of the Subdivision and Development Appeal Board Rules, 2011

AND IN THE MATTER of an Appeal by The New Providence Development Company Limited and Old Fort Bay Company Limited pursuant to S 66 of the Planning and Subdivision Act, 2010

BETWEEN:

THE NEW PROVIDENCE DEVELOPMENT COMPANY LIMITED

OLD FORT BAY COMPANY

Claimants/Appellants

AND

THE DIRECTOR OF PHYSICAL PLANNING

HENRY F. STORR ELECTRIC COMPANY LIMITED

Respondents

Before: The Hon. Madam Justice Carla Card-Stubbs

Appearances: Bradley Cooper – Second Respondent/Applicant

Gail Lockhart-Charles – Claimants/Appellants (Respondents to the
(Application

RULING

CARD-STUBBS J.

Introduction

1. This is the Application of the Second Respondent to dismiss the Originating Application. For the reasons set out below, the Application of the Second Respondent is dismissed.

Background

2. On November 8, 2023, the Claimants/Appellants filed an Originating Application to found an appeal of a decision of the Subdivision & Development Appeal Board. The appeal is brought pursuant to The Planning and Subdivision Act 2010 and the Subdivision and Development Appeal Board Rules, 2011.
3. On November 27, 2023, the Second Respondent filed a Notice of Application to, inter alia, dismiss the Originating Application. That Application is the subject of this ruling. The Application is supported by the Affidavit of Sandy Hall, sworn on November 24, 2023 and filed on November 27, 2023.
4. By way of background, the evidence is that in November 1992, the Second Respondent (via its beneficial owner) purchased land from The New Providence Development Company Limited (a Claimant). That land was subject to certain restrictive covenants. The evidence of the Second Respondent is that they and others who had purchased tracts of land from The New Providence Development Company Limited made an application to the Department of Physical Planning to have the restrictive covenants removed. Eventually the Second Respondent made an application to “have the property that was designated as multi-family be granted commercial status.” The Town Planning Committee made a decision in favour of the application and gave a decision to extinguish “clause 1 and 8 in the Restrictive Covenants”. The Claimants/Appellant appealed that decision to the Subdivision & Development Appeal Board. The appeal was refused and this refusal was communicated in the letter of the Subdivision & Development Appeal Board dated

17th October 2023. The Claimants' Originating Application constitutes an appeal from that 17th October 2023 decision.

5. The Claimants' Originating Application seeks, inter alia, an order to set aside the decision of the Subdivision & Development Appeal Board and to quash the decision of the Town Planning Committee.
6. It is against that backdrop that the Second Respondent filed its Notice of Application on November 27, 2023.
7. The Second Respondent's application was originally made pursuant to the Rules of the Supreme Court, 1978 and under the inherent jurisdiction of the court. At the hearing of the application, Counsel for the Applicant asked the Court to exercise its jurisdiction under Part 66, Rule 66.3 and under Part 26, Rule 26.3 of The Supreme Court Civil Procedure Rules, 2022, as amended, for the several orders sought.
8. By way of its Notice of Application, the Second Respondent applied for an Order that

“a. The Agreement for Sale dated the 29th day of June, A.D. 2023 be finalized as there is no Stay of Execution granted by the Department of Physical Planning in this matter.

b. The alternative that the Appellants pay into Court the full amount of the contract to the benefit of the Second Defendant should they be unsuccessful in their claim.

c. That the Originating Summons be dismissed under Order 18, Rule 19 of the Rules of the Supreme Court.”

9. The Second Respondent set out the grounds of the Application as:

“a. The Action be dismissed as the Agreement for Sale has been executed and is still in existence

b. There is no stay of execution

c. The Second Respondent is now only a Trustee for the purchaser and does not own the land.”

10. The Application also sought:

“4. The Claimant’s/Appellants pay the second Respondent’s Costs of and occasioned by this Application.

5. Such further or other relief as to the Court deems just.”

Issues

11. The issues before this Court are:

- 1) Whether this is an appropriate case for the dismissal/striking out of a statement of case i.e. the Originating Application and
- 2) Whether this Court has the jurisdiction to grant the Orders sought.

12. I will treat with the issues together.

Legal submissions

Case for the Second Respondent/Applicant

13. The Applicant’s case is that on June 27, 2023, subsequent to the decision of the Town Planning Committee and prior to the decision of the Subdivision and Development Appeal Board, the Second Respondent entered an Agreement for Sale of the property to a third party who is not a party to these proceedings. In summary, the Applicant’s case is:

(i) there is an Agreement or Sale of the land and the Second Respondent is no longer the title holder of the property and ought not to be a party to these proceedings. The Applicant submits that “At the date of the Agreement for Sale and the execution of the said Agreement, the equitable title is automatically transferred to the Purchaser and the Vendors automatically becomes [sic] a Trustee for the Purchaser. Therefore it is the Vendors [sic] position that the sale has already been completed as the title no longer vests in the Vendors.”

(ii) This appeal has not yet been heard and has not been listed for hearing and there “was never a Stay of Execution granted to the Appellants”. The Applicant’s submission is that since there is no stay of the decision of the Subdivision and Development Appeal Board, the decision stands.

14. It is on those grounds that the Applicant seeks to have the case dismissed or to have the Originating Application set aside. The Applicant also submitted, in the alternative, that the matter should be dismissed as against them because the Second Respondent is not a proper party.
15. The Applicant also sought a declaration of this court that the Agreement for Sale which exists could proceed and be finalized unaffected by any stay or other decision, including any decision to be rendered by this Court concerning the appeal. As I understood it, this declaration would be a “comfort declaration” to the purchaser. However, I note that such a declaration sought would also serve to declare the rights of the purchaser as it concerned the issue of the restrictive covenants not just at the present time but in the future. Counsel submitted that since the Agreement for Sale now existed, it would not be affected, and ought not to be affected, by a subsequent adverse decision.

Case for the Claimants/Appellants (Respondents to the Application)

16. The case of the Claimants/Appellants (Respondents to the Application) is that this action is an appeal pursuant to statute and that the “Agreement for Sale is completely irrelevant to the legal issues engaged by this appeal and which fall to be determined by the Court on the hearing of this appeal.” The Claimants/Appellants contend that the appeal concerns the powers of decision-making bodies under the statute and submits that there is no challenge on the laws as to the effect of an Agreement for Sale.
17. Counsel for the Claimants/Appellants concedes that there is no ‘stay’ of the decision of the Town Planning Committee or the Board.
18. In summary, the case of the Claimants/Appellants is that the Agreement for Sale “is entirely irrelevant to any issue before the Court on this appeal and it has no bearing on the Court’s jurisdiction to hear and determine this appeal which relates to the ambit of the powers of the TPC under S 25 of the PSA to extinguish restrictive covenants”.

Law and Analysis

19. The Applicant relies on Part 26, Rule 26.3 and Part 66, Rule 66.3 of The Supreme Court Civil Procedure Rules, 2022, as amended.

20. Rule 26.3 provides as follows.

26.3 Sanctions – striking out statement of case

- (1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —
 - (a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;
 - (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
 - (c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or
 - (d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.
- (2) Where —
 - (a) the Court has struck out a claimant's statement of case;
 - (b) the claimant is ordered to pay costs to the defendant; and
 - (c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts,

the Court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid.

21. Rule 66.3 provides as follows.

66.3 Effect of appeal.

The filing of an appeal does not operate as a stay of proceedings on the decision against which the appeal is brought unless —

- (a) the court; or
- (b) the tribunal or person whose decision is under appeal so orders.

22. The issue before the court in the substantive appeal is whether, on the grounds set out in the statutory enactments, the decision of the decision-maker can be impugned. This requires consideration of a point of law.

23. Section 66 of The Planning and Subdivision Act 2010 provides:

66. Appeal to Supreme Court.

(1) Any party to the proceedings before the Subdivision and Development Appeal Board who is aggrieved by the decision of the Board may appeal to the Supreme Court *on a point of law*, but not on any matter of fact or on the merits of any decision made by the Board, within twenty-one days after the making of the decision by the Board.

(2) On an appeal under this section the Supreme Court may make such order, including an order for costs, as it thinks fit.

[emphasis supplied]

24. The basis of the Claimants'/Appellants' action, as set out in the Originating Application, is the jurisdiction of the Town Planning Committee.

25. The Applicant must show that the Originating Application does not disclose any reasonable ground for bringing the claim.

26. The Applicant's case shows that there was an application made by them and that the decision-makers rendered the decisions which lead to this appeal. The Applicant has not established that the Originating Application discloses no reasonable ground for bringing the claim.

27. The Applicant raised the matters of the Agreement for Sale, the lack of a "stay of execution" and that the Second Respondent does not own the land as its various grounds for this application. Each ground is misconceived as it relates to the application.

28. Counsel for the Second Respondent relied on principles cited in Halsbury's Laws of England (Fourth Edition) Paragraph 1343. Those principles are reproduced in a later iteration of that source of law at Halsbury's Laws of England, Volume 47 (2021), paragraph 215. As relevant, it states,

Upon the signing of a contract for the sale of land a change takes place in the equitable, but not the legal, interest in the land. At law the purchaser has no right to the land, nor the vendor to the money, until the conveyance is executed. In equity, however, if the contract is one of which specific performance would be ordered, the beneficial interest passes to the purchaser immediately on the signing of the contract, and thereupon the

vendor, in regard to his legal ownership and possession of the land, becomes constructively a trustee for the purchaser.

29. The settled position in law is that the mere signing of an agreement of sale for land does not pass the legal interest to the purchaser. The legal title remains in the vendor. The effect of the executed agreement for sale is to vest an equitable interest in the purchaser. A purchaser may, via that equitable interest, pursue an equitable remedy that could lead to the acquisition of a legal interest. Until then, the legal interest remains with the Vendor and, in the normal course of events, the legal interest passes when the conveyance is executed.
30. In the case before me, the evidence of Affiant Sandy Hall is that an agreement of sale was executed. Counsel's submission that the Second Respondents, as Vendors, have become a trustee for the Purchasers is correct. However, it is erroneous to conclude that the Second Vendors are not proper parties for the reason that the title has passed. The law is that title does not pass on its mere execution. That Counsel has asked this court to make an order that "The Agreement for Sale dated the 29th day of June, A.D. 2023 be finalized as there is no Stay of Execution granted by the Department of Physical Planning in this matter" highlights the fallacy in the submission that "title no longer vests in the Second Respondent". If title had passed there would be no need for such an order. In any event, this court, in this matter, cannot order the finalization of an agreement for sale and it is unclear to me what such a finalization would entail. However, it is apparent that legal title remains in the Vendor.

Conclusion

31. The substantive matter before me is an appeal pursuant to statute and the issue raised is whether the decision-maker properly came to its decision. That decision is in relation to certain tract(s) of land. That an agreement for sale has been executed in relation to land affected by the decision is irrelevant to the question as to whether the decision was made in accordance with the law. That there is an agreement for sale is not a proper ground for the summary dismissal of the appeal. The existence of an agreement of sale does not render the decision to extinguish the restrictive covenants uncontestable.
32. That there is no "stay of execution" does not affect a claimant's right to appeal – this is a statutory right of appeal. The 17th October 2023 letter from the Subdivision & Development Appeal Board expressly gives the parties notice of their right of appeal, viz, "All parties are reminded of their respective right of appeal to the

Supreme Court in accordance with section 66 of the Planning and Subdivision Act". The referenced statute provides a right of appeal on a point of law, and on the face of the pleadings, that is the ground on which Claimant has approached this court.

33. The Applicant has contended that there is "no reasonable cause of action" and that the Originating Application discloses no reasonable ground for bringing the claim but that has not been borne out in this instance.
34. In a case such as this, any determination on appeal will have implications for a parcel of land held by the Second Respondent or a subsequent owner. This is true whether the appeal is successful or is dismissed. The evidence before me is that there is an agreement for sale but no conveyance. Therefore, to the extent that the appeal concerns an application originally advanced by the Second Respondents and, to the extent that a determination on appeal will have implications for any parcel of land which was the subject of that application, then the Second Respondent is a proper party to this action (in as much as the Second Respondent purports to be Vendor and therefore the current holder of the legal title to the tract of land). Indeed, one would be constrained in a case such as this to allow a party a right to be heard in relation to an appeal from a decision regarding restrictive covenants on land it holds. Such is the status of the Second Respondent in this matter.
35. While I understand that the possibility of a reversal of the decision being appealed may cause a purchaser to be wary of an agreement already signed, that is not a proper consideration for this court. Nor can this court make a declaration which would provide that any determination that this court may make on the hearing of the appeal would not affect the parcel of land which is the subject of the agreement for sale. There is no basis on which to do so and, certainly, there is no evidence before me in that regard. It is my opinion that if this court were to take into account the sales agreement, that would be an improper consideration.
36. I reject the submission that the Second Respondent is no longer the title holder. Counsel's submission on behalf of the Second Respondent is that the Second Respondent is Vendor and legal trustee. That being so then, until there is an executed conveyance, the legal interest vests in the Vendor while an equitable interest vests in the purchaser. It is that equitable interest that allows the purchaser to pursue specific performance of the agreement. The vendor is also, in certain instances, able to pursue specific performance. It seems to me that some of the remedies sought in the Second Respondent's application are matters appropriate

for an action between the parties to the agreement for sale. The purchaser is not a party in this action.

37. I accept the Claimants'/Appellants' submission that the Second Respondent's application is misconceived in law. I find that there is no legal ground relied upon, nor evidence advanced, that would cause this Court to grant the orders or to make the declaration sought.

38. In the circumstances, I find that

1. This is not an appropriate case for the dismissal/striking out of the Originating Application and
2. There is no ground or evidence advanced to grant the Orders or declaration as sought by the Second Respondent.

39. For the foregoing reasons, the application is dismissed.

COSTS

40. The costs of this Application are awarded to the Claimants/Appellants (Respondents to the Application), costs to be fixed by the Court. The parties will provide written submissions on same in the manner and pursuant to the timeline directed.

ORDER

41. The order and directions of this Court are as follow:

- a. The Second Respondent's Notice of Application filed November 27, 2023, is dismissed.
- b. Costs to the Claimants/Appellants (Respondents to the Application) to be fixed by the Court.

Dated this 16th day of July 2024

A handwritten signature in black ink, appearing to read 'Carla D. Card-Stubbs', with a stylized flourish at the end.

Carla D. Card-Stubbs J