

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2024/PUB/jrv/00025

B E T W E E N

BASIL W. BARNETT

First Claimant

AND

MARGOT M. BARNETT

Second Claimant

AND

**THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF THE BAHAMAS**

For and on behalf of THE BUILDINGS CONTROL OFFICER, an Officer of the Crown
First Defendant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
For and on behalf of THE DIRECTOR OF PHYSICAL PLANNING, an Officer of the Crown
Second Defendant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
For and on behalf of THE PORT CONTROLLER, an Officer of the Crown
Third Defendant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
**For and on behalf of THE DIRECTOR OF ENVIRONMENTAL PLANNING AND
PROTECTION, an Officer of the Crown**
Fourth Defendant

AND

THE ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
**For and on behalf of THE DIRECTOR OF THE BAHAMAS PUBLIC PARKS AND PUBLIC
BEACHES, an Officer of the Crown**
Fifth Defendant

Before: The Honourable Madam Justice Camille Darville Gomez

Appearances: Mrs Krystal Rolle for the Claimant
Ms Kenria Smith and Mrs Zoe Gibson-Bowleg for the Defendants

Hearing Date: 24th October and 25th October, 2024

Public law – Leave to apply for Judicial Review – Application for interim relief pursuant to Part 54.6 – No application for Judicial Review at this time – Whether to grant interim reliefs without leave for Judicial Review application being considered – interim reliefs include interim injunction and disclosure orders - whether fair to grant interim injunction where third party affected was unaware of application

RULING

Darville Gomez, J

The Claimants, one of the immediate neighbours of Sandals Royal Bahamian Resort (“Sandals”) have made an Application for Leave to Apply for Judicial Review and interim orders pending the final determination of the intended Judicial Review proceedings. It is their belief that: (i) Sandals is engaged in the unlawful construction of an overwater chapel; (ii) no public authority has demonstrated that Sandals has all the necessary permits for its construction, or that the regulatory regime necessary to supervise the construction of such overwater structures is in place; and (iii) no Environmental Impact Assessment Plan (“EIA”) and Environmental Project Implementation Plan has been produced. Therefore, they fear that there is no indication that the myriad attendant risks of long-term damage to the delicate ecological environment associated with this overwater chapel has been considered or are being managed. They have also asserted that there is a very real risk of loss of financial value of their property.

Therefore, the Claimants filed an application for leave to apply for Judicial Review which includes the Judicial Review final orders and relief and for Interim Relief pending the final determination of the intended Judicial Review proceedings. At the first hearing, the Claimants sought the following Interim Relief: (i) disclosure orders; and (ii) an interim order for the construction to cease at Sandals.

Introduction

- [1.] I gave my decision in relation to this application and promised to put my reasons in writing later. I do so now.
- [2.] This application came before me during my sitting as the duty Judge by counsel for the Claimants. The Claimants have filed an Application for Leave to Apply for Judicial Review, an Application for Judicial Review and an Application for interim relief set out in the Application for Leave to Apply for Judicial Review all filed on 24th September, 2024.
- [3.] It was supported by an Affidavit of the Claimants, Basil W. Barnett and Margot M. Barnett and a Certificate of Urgency also filed on the same date.

[4.] At the outset, the Claimants' counsel clarified that they did not wish to pursue leave to apply for judicial review at this time rather, they sought the interim orders, specifically (i) disclosure orders and (ii) an interim injunction.

[5.] The Interim remedies being sought:

(1) Disclosure orders

- (i) An Order pursuant to Part 54.3(10)(b) of the Rules and under the Court's inherent jurisdiction that the First, Second, Third and Fourth Defendants within seven (7) days of the date of the Court's Order disclose to the Claimants the following documents namely:

As regards the First Defendant

- (1) A copy of Sandals' application form submitted to the First Defendant relative to the Overwater Chapel.
- (2) Copies of all plans and drawings submitted by Sandals to the First Defendant relative to the Overwater Chapel.
- (3) Copies of all deviation applications submitted by Sandals to the First Defendant relative to the Overwater Chapel.
- (4) Copies of all approvals, including approvals of original plans and approvals of deviations granted to Sandals by the First Defendant relative to the Overwater Chapel.
- (5) A copy of the Seabed Lease for Sandals' original pier.
- (6) A copy of the Seabed Lease for the extended pier and Overwater Chapel.

As Regards the Second Defendant

- (1) A copy of Sandals' Application Form to the Second Defendant for approval relative to the Overwater Chapel.
- (2) A copy of the Environmental Impact Statement submitted to the Second Defendant pursuant to Section 14 of the P&S Act.

- (3) A copy of the Output/ Report or conclusions of the Second Defendant and the Town Planning Committee relative to its assessment of the submitted Environmental Impact Statement on the Overwater Chapel.
- (4) A copy of the Approval issued by the Second Defendant relative to the Overwater Chapel.
- (5) Copies of Notices to the public and/or advertisements to solicit the views of interested parties relative to the proposed Overwater Chapel.

As Regards the Third Defendant

- (1) A copy of Sandals' application form submitted to the Third Defendant relative to the Overwater Chapel.
- (2) Copies of all plans and drawings submitted by Sandals to the Third Defendant relative to the Overwater Chapel.
- (3) Copies of all supporting documents and/or reports submitted by Sandals to the Third Defendant relative to the Overwater Chapel.
- (4) Copies of all approvals granted to Sandals by the Third Defendant relative to the Overwater Chapel.

As Regards the Fourth Defendant

- (1) A copy of Sandals' application for a Certificate of Environmental Clearance relative to the Overwater Chapel.
- (2) A copy of the Certificate of Environmental Clearance issued by the Fourth Defendant to Sandals.
- (3) A copy of the Environmental Impact Assessment Report relative to the Overwater Chapel.
- (4) A copy of Sandals' Environmental Management Plan relative to the Overwater Chapel.
- (5) A copy of the Output/Report or conclusions of the DEPP relative to its assessment of the submitted Environmental Management Plan.

As Regards the Fifth Defendant

- (1) A copy of Sandals' application to the Fifth Defendant for permission to block or obstruct the public beach or access thereto.
- (2) A copy of any approval granted by the Fifth Defendant to Sandals to block or obstruct the public beach or access thereto.

(2). **Interim Injunctive Relief**

(a) **Mandatory Interim Injunctions**

- i. A Mandatory Interim Injunction pursuant to Section 21 of the Supreme Court Act, 1996, Chapter 53 of the Statute Laws of The Bahamas, Part 54.3(10) (b) of the Rules and under the Court's Inherent Jurisdiction directing the First, Second, Third and Fourth Defendants to direct Sandals to cease all construction and related work on the Overwater Chapel pending the final determination of these proceedings.

(b) **Interim Injunctions**

- i. An Interim Injunction pursuant to Section 21 of the Supreme Court Act, 1996, Chapter 53 of the Statute Laws of The Bahamas, Part 54.3(10) (b) of the Rules and under the Court's Inherent Jurisdiction restraining the Defendants and each of them from allowing the continued construction of the Overwater Chapel and/or the completion of the same pending the final determination of these proceedings.
- ii. An Interim Injunction pursuant to Section 21 of the Supreme Court Act, 1996, Chapter 53 of the Statute Laws of The Bahamas, Part 54.3(10) (b) of the Rules restraining the First, Second, Third and Fourth Defendants from issuing any further permits or approvals allowing further advancement of any stage of the Overwater Chapel pending the final determination of these proceedings.

[6.] The Defendants filed two affidavits, the first by Senior Commander Berne Wright ("Senior Commander Wright") filed on 22nd October, 2024 and the second by the Director of Environmental Planning and Protection, Rihanna Neely-Murphy filed on 25th October, 2024.

[7.] The application was heard on 24th October and 25th October, 2024 and I reserved my decision.

[8.] For the reasons that follow, I denied (i) the Disclosure Orders; and (ii) the interim injunction.

Facts

[9.] The facts are generally undisputed.

[10.] The Claimants are the beneficial owners of a waterfront residence located at number 15 Coral Road, West Bay Street, New Providence, The Bahamas where they have lived for twenty years. During that time, they allege that save for the *“presence of a small and unimposing basic wooden pier (“the original pier”) owned by Sandals, they have had full enjoyment of the environmentally sound shoreline and beautiful vistas to the seas”*. They assert as follows:

- (4) The original pier was damaged by hurricane more than 4 years ago. In August 2023, Sandals commenced what was purported to be the repair of the Original Pier that had been damaged by hurricane. Sandals however proceeded with work on a scale that exceeded the scope of mere “repairs” to the Original Pier.
- (5) The Claimants by email and letter dated 30th August, 2023 and 21st May, 2024 to Sandals and to the Third Defendant, respectively, stated their express opposition to the nature and scope of the work Sandals was undertaking.
- (6) After the Claimants’ objections Sandals stopped working on the Original Pier.
- (7) Sandals had commenced their work and intended expansion of the Original Pier without having obtained the requisite Governmental approvals.
- (8) Subsequently, in or about May, 2024 Sandals recommenced work on the Original Pier.
- (9) The Claimants again embarked upon an inquiry which revealed that Sandals was expanding the Original Pier by approximately forty (40) feet in either a western or northern direction and that in addition to Sandals’ proposed expansion of the length of the Original Pier beyond its original dimensions, Sandals was also constructing a wedding chapel (“The Overwater Chapel”) onto the expanded pier infrastructure.

[11.] The Defendants’ in their affidavit sworn by Senior Commander Wright have averred inter alia, as follows:

“9. On October 5, 2023, the Docks Committee reconvened to hear the application. Between the deferral of the application and the current meeting, I, along with Sandals representatives, met with the Applicants. During the meeting, Sandals proposed reangling the construction of the Overwater Chapel so that it would face the existing dock housing the restaurant, which is located to the west and is longer than the proposed chapel dock. This adjustment was to ensure that the Applicants current view from their home, which is three lots east of Sandals and approximately 300 feet away from the dock, remained unobstructed. The Committee had no objection to Sandals’ application for a dock extension and construction of an Overwater Chapel.”

[My emphasis added]

[12.] The Affidavit of the Director of the Department of Environmental Planning and Protection, Rhianna Neely-Murphy filed on 25th October, 2024 asserted inter alia,

- “5. The application by Sandals for a Certificate of Environmental Clearance (“the CEC”) was made to the DEPP in 2021. The CEC was issued to Sandals by then Director of the DEPP, Rochelle Newbold on October 28, 2021 for the renovations and extension of the Overwater Chapel.
6. According to the Environmental Planning and Protection Act, 2019, an EIA is necessary for projects that may have significant adverse effects on the environment. This is specified in Section 12 of the Act and Regulation 4 of the Environmental Impact Assessment Regulations, 2020 which requires a preliminary review to determine if an EIA is necessary. In this case, the proposed renovations to an already existing dock and construction activities were confined to an already disturbed area. Given that the area had already been subject to development and that the intended renovations and construction were similar in footprint to the already existing structure, the anticipated environmental impacts would be negligible.
7. Further, according to section 5(3)(a) of the Environmental Impact Assessment Regulations, 2020 where the Director is satisfied that a proposed project does not require an EIA or an EMP, the Director may grant a CEC specifying any environmental clearance conditions required. In this instance, it is clear that the then Director was satisfied that an EIA was not warranted due to the nature and scope of the proposed project, which involved renovations within an already disturbed footprint. The CEC which was issued ensures that relevant environmental conditions were attached to the approval, thereby aligning with the regulatory framework established under the Environmental Planning and Protection Act and its associated regulations.”

[13.] The real contention here is whether the Court ought to grant the interim orders sought in advance of the application for leave to apply for judicial review.

[14.] The Defendants have strenuously opposed the grant of these interim orders without the Claimants having successfully obtained leave to apply for judicial review. They have asserted that the Claimants do not possess sufficient interest to bring this matter before the Court. This they assert is fundamental. They have relied upon section 54.3(7) of the Civil Procedure Rules, 2022:

“The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.”

[15.] They delved deeply into this “sufficient interest” issue and have relied upon an excerpt from the Civil Procedure 2020 where it was noted that it is a mixed question of fact and law. Additionally, they referred to Lord Donaldson MR in **R v Monopolies and Mergers Commission, Ex p. Argyll Group Plc** [1986] 1 W.L.R who coined the phrase a “meddlesome busybody” which refers to an applicant who has no standing. The Defendants submitted that the Claimants property is located approximately 300 feet from the Sandals Resort with two intervening properties situated between their land and the resort itself. They allege that the Court cannot entertain the application for interim orders by the Claimants without a consideration of this very issue.

[16.] The Claimants on the other hand, have pushed back on the test of “sufficient interest” because they are not seeking at this stage to apply for leave to commence judicial review. Therefore, they submitted that this test is premature.

[17.] The Claimants have placed reliance on the decision of the Honourable Justice Klein in **Paul Fuchs et al v The Director of the Environmental Planning and Protection and DeepBlue Properties LLC** 2021/pub/jrv/00039 where an application for an interim injunction (made ex parte) was granted in similar circumstances, viz. where leave had not yet been granted for judicial review. Paragraphs 13 and 29 of that decision were highlighted as follows:

“I am conscious that leave has not yet been granted for judicial review, and I therefore express no opinion on whether or not the test for leave for judicial review is satisfied. But I would be prepared to hold that there are serious issues to be tried within the meaning of the American Cyanamid test as to the lawfulness of the CEC, in absence of an EIA and EMP, particularly in light of the recent affidavits filed by the intended applicants which throw new light on the extent of the excavations.

Indeed, it would be a remarkable thing if a court were powerless to grant an interim order to prevent possible irreversible damage to the environment in urgent cases simply because no leave had been granted, when the very feature or subject matter which the application was seeking to protect could be completely destroyed in the meantime.”

[18.] It is undisputed that the court has the power to grant various forms of relief ancillary to the grant of leave to apply for judicial review under Part 54 including injunctive relief.

[19.] The grant of an interlocutory injunction is discretionary and the case of **American Cyanamid Co. Ltd. v Ethicon [1975] 1 All ER 504** remains the authority on the factors that the Court must consider in the exercise of its discretion.

[20.] The four-part test is as follows:

- (i) whether there is a serious issue to be tried?
- (ii) whether damages would be an adequate remedy for any loss sustained by either party pending the outcome of the trial.
- (iii) whether the balance of convenience favours the plaintiff or defendant if there is any doubt as to the adequacy of the respective remedies available in damages.
- (iv) whether there are any special factors that might affect the court’s consideration of the matter.

[21.] For reasons that will become clearer later, I do not intend to delve too deeply into the four-part save to admit that I am willing to accept that based on the evidence as contained in the affidavit of the Claimants that there is a serious issue to be tried and I concur with the reasoning of Justice Klein in the **Paul Fuchs** case that it would be *“a remarkable thing if a court were powerless to grant an interim order to prevent irreversible damage to the environment in urgent cases simply because no leave had been granted, when the very feature or subject matter which the application was seeking to protect could be completely destroyed in the meantime.”*

[22.] However, the real issue and distinction between **Paul Fuchs** and the instant case is the fact that the grant of the interim injunction would affect a non-party to the proceedings, viz., Sandals Royal Bahamian.

- [23.] The Claimants have not joined Sandals Royal Bahamian to the proceedings and given the non-appearance of any individual representing them, it would appear that they were unaware of the hearing. This issue was raised by the Counsel for the Defendants at the initial hearing.
- [24.] Both Counsel would be aware of the warning of the Privy Council in **National Commercial Bank of Jamaica v Olint Corp. Ltd. [2009] UKPC 16** an oft cited authority that a judge should not entertain an application for an interlocutory injunction of which notice had not been given unless it was impossible to give notice or it would frustrate the application.
- [25.] I can find no justifiable reason why Sandals could not have been notified of this application because to quote the Judge in the **National Commercial Bank of Jamaica** (supra) case, “*any notice is better than none*”.
- [26.] Similarly, I believe that it would be premature at this early stage of the action to grant the disclosure orders being sought without the grant of leave for judicial review because in my view the entitlement to these disclosures rests primarily or solely upon it. Moreover, it is already apparent to this court that there will be a substantial dispute regarding whether or not the Claimants can prove “sufficient interest” pursuant to section 54.3(7) of the Civil Procedure Rules, 2022.
- [27.] Given that 25th October was my last day as the Duty Judge and I will be travelling for the next ten days, I did not deem it fair to adjourn the matter until I return given that the action had been filed since 24th September, 2024 and did not come on for hearing until 24th October, 2024.
- [28.] Accordingly, I make the following orders:
- (i) I refuse to grant an interim injunction;
 - (ii) I refuse to grant the disclosure order.
 - (iii) Costs to the Defendants to be paid by the Claimant, to be summarily assessed in accordance with the Civil Procedure Rules, 2022 unless otherwise agreed between the parties. The Defendants’ Counsel to lay over to the Court and Claimants’ Counsel a draft bill of costs within 21 days of the date of this ruling in the event the parties are unable to agree.

Dated this 25th day of February, 2025



Camille Darville Gomez
Justice