~~10/10/96~~ 30/10/96
Civil

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO: 253/96

In the matter of
THE DEVELOPMENT AND PLANNING LAW
(REVISED)

-and-

In the matter of
AN APPEAL PURSUANT TO SECTION 40(4) OF
THE SAID LAW

-and-

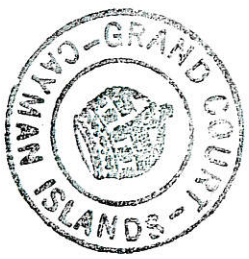
In the matter of
AN APPEAL UNDER S.43(4) OF THE SAID LAW
FROM A DECISION OF THE PLANNING APPEALS
TRIBUNAL DATED THE 1ST DAY OF APRIL 1996
CONFIRMING PERMISSION TO MR.KENNETH HALL
TO DEVELOP LAND AT BREAKERS BLOCK 56B
PARCELS 14 AND 15.

BETWEEN: GEORGE NOWAK
FRANK LANZA — APPELLANTS

AND: THE PLANNING APPEALS TRIBUNAL — RESPONDENT

APPEARANCES : M. Parkinson for the Appellants
R. McMillan, Crown Counsel for the Respondent the Planning Appeals Tribunal.
S. Brooks for the Respondent Kenneth Hall

October 28, 1996.



BEFORE MURPHY J.

REASONS FOR DECISION

I have before me a summons set down by counsel for the appellants for leave to adduce additional evidence on the hearing of this appeal. The appeal, which was set down for today as well, is pursuant to subsection 43(4) of the Development and Planning Law (1995 Revision) ("the Law"). In a nutshell, the appellants are objectors to a proposed development by the respondent Kenneth Hall ("Hall"). Hall was successful before the Central Planning Authority ("CPA"), and also before the Planning Appeals Tribunal. As will become apparent, the appeal will have to be adjourned as the result of the outcome of the summons before me, and accordingly I intend to say as little as possible about the substantive issues. It would be improper to do otherwise.

In brief, it suffices to say that planning permission purportedly resulted from a series of CPA meetings in June 1995. There is a suggestion in the record that final approval was granted as a result of a CPA meeting on June 29, 1995. The objectors now appeal, inter alia, on the basis that no formal meeting of the CPA was ever held on June 29, 1995. There is clearly a factual dispute as to this. Crown Counsel asserts that there was such a meeting, but concedes, quite properly, that if there was not, no planning approval could have

been granted.

In their summons before me, the objectors seek to adduce the evidence of two persons who were members of the CPA at the relevant time. It is said that their evidence will be to the effect that while they attended a scheduled site visit on June 29, 1995 they were not aware of any official meeting of the CPA that day.

The appeal record contains what purport to be minutes of a June 29, 1995 meeting. These minutes merely recite matters that were contained in minutes of earlier meetings, with no new substance. Curiously, there is no reference to the site visit which was to have taken place that day. They do, however, record the granting of conditional planning approval. Letters dated August 1, 1995 from the CPA to the objectors state that planning permission was granted at the meeting of June 28, 1995, but that clearly was not so. A similar letter was sent to the applicant Hall but the June 28 date has been crossed out to read June 29. To further complicate matters, one of the witnesses the objectors now propose to call appears to have been the mover of a motion to approve the CPA minutes for June 29, 1995, as appears from a later CPA document. This situation is nothing if not bizarre.

Appeals to the Grand Court are provided for under section 43 of the

Law. In addition, Order 55 makes general provision for procedure on appeals to the Grand Court from the decisions of tribunals. In particular, Order 55, Rule 7 provides as follows:

> "7.- (1) In addition to the power conferred by rule 6(2), the Court when hearing an appeal to which this Order applies shall have the powers conferred by the following provisions of this rule.
>
> (2) The Court shall have power to receive further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in Court, by affidavit, by deposition taken before an examiner or in some other manner.
>
> (3) The Court shall have power to draw any inferences of fact which might have been drawn in the proceedings out of which the appeal arose.
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> (4) It shall be the duty of the appellant to apply to the person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; and in default of production of such note, or, if such note is incomplete, in addition to such note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient.
>
> Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.
>
> (5) The Court may give any judgment or decision or make any order which ought to have been given or made by the Governor-in-Council,the Registrar of Lands, tribunal or other person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.

(6) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just.

(7) The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned."

This Court has power to receive further evidence pursuant to Rule 7(2). Rule 7(4) clearly contemplates an inquiry, where necessary, into the actual proceedings of the tribunal.

The matters which I must consider in deciding whether further evidence is warranted are set out in the well-known case of Ladd v Marshall [1954] 3 All E.R. 745. There are three well established conditions.

1. First, it must be shown that the evidence could not have been obtained with reasonable diligence. This summons is supported by the affidavit of one of the objectors who deposes that he became suspicious of the June 29, 1995 meeting only after consulting with two members of the CPA in late May 1996. This was after the appeal to the Planning Appeals Tribunal. There is no evidence to contradict this.

2. Secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive. If the appellant's new evidence is accepted, this Court on an appeal might well conclude that there was no actual planning permission granted. Alternatively, this evidence goes directly to the issue of natural justice.

3. Thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible. As indicated, there is a suggestion in the appeal record that the proposed witness Whittaker actually moved the approval of minutes of the June 29, 1995 meeting, and, arguably, this casts doubt on his proposed evidence. There is no such uncertainty, however, about the proposed evidence of the witness Wood. More to the point, there is enough uncertainty in the Government documents that I would not want to exclude this proposed evidence.

Crown Counsel objects that the summons is not well-founded because this whole issue should not be dealt with by the Grand Court on an appeal in any case. He argues that the appellants should proceed instead by way of judicial review. However, it is quite apparent to me from the wording of section 43 of the Law, a self-contained code as to appeals, that the principles of natural justice must be taken into account not just by the CPA, but also by the Planning Appeals Tribunal, and the Grand Court as well. Given the grounds of appeal

set forth in subsection 43(1) in particular, I regard it as essential that this factual issue be determined as part of the appeal process.

Both Crown Counsel and counsel for the appellant argued that leave should not be granted because the application could have been made much earlier than it was . Indeed it was only set down a few days ago, returnable on the day of the appeal. I do have some suspicions as the appellants' motives in this regard, particularly since, on the face on the Grounds of Appeal dated 24 June 1996, there does appear to be some issue raised as to whether there was in fact a June 29, 1995 meeting. The respondent Hall is prejudiced, to a certain extent, by the fact that a new date for the appeal will have to be set. In the final analysis however, I regard the issue to which this proposed evidence relates as so fundamental that it must be considered adequately and fully.

Accordingly, I grant leave to the appellants to adduce further evidence relating to the issue of the June 29, 1995 meeting. The appellants are to serve and file affidavit evidence within 7 days. The Crown is at liberty to serve and file affidavit evidence in response within 21 days thereafter. The appellants are at liberty to serve and file reply evidence within 14 days thereafter. The evidence of all deponents is to be adduced <u>viva voce</u> at the hearing of the appeal. There will be liberty to apply for further directions if required. The hearing of the appeal is adjourned to the next

available full day.

As to costs, my initial inclination in view of the delay in bringing this application was to award costs of this summons to the respondents in any event of the cause. I have decided, however, that the costs of today should be reserved to the Court hearing the appeal. I have done this because I think it important that the Court also consider the outcome of this particular factual dispute before the costs award is made.

Dated this 30th day of October, 1996

J.D. Murphy

Judge of the Grand Court

(vii) GCR Order 45 rule 5 therefore does not apply to allow affidavits containing merely statements of information or belief. Hearsay evidence is inadmissible and irrelevant.

(viii) In the summons proceedings the standard of proof will be the civil standard and the onus will be upon the Crown to disprove any legal title in the applicant's name.

GRAND COURT CAYMAN ISLANDS

Anthony Smellie
Chief Justice

Dated the 23rd day of June 2003.