

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

(ii)

IN COMMON LAW

SUIT NO. C.L.052 of 1998

BETWEEN	KINGSTON & ST. ANDREW CORPORATION	PLAINTIFF
A N D	CRIPPS INVESTMENT LTD.	1 <sup>ST</sup> DEFENDANT
A N D	RIVA RIDGE LIMITED	2 <sup>ND</sup> DEFENDANT
A N D	VISCOL SERVICES LIMITED	3 <sup>RD</sup> DEFENDANT

SUIT NO. C.L. 1998/R-038

BETWEEN	RIVA RIDGE LIMITED	1 <sup>ST</sup> PLAINTIFF
A N D	VISCOL SERVICES LIMITED	2 <sup>ND</sup> PLAINTIFF
A N D	KINGSTON & SAINT ANDREW CORPORATION	DEFENDANT

Attorney for the Plaintiff - Miss Carol Davis, instructed by Davis, Bennett and Company.

Attorneys for Defendant – Mr. Ransford Braham, instructed by Livingston, Alexander and Levy.

ORAL JUDGMENT

HEARD: March 27, 28 and 29, 2001

BROWN, J. (Aq.)

The Plaintiff seeks:

1. A Declaration that it is the owner of and entitled to Possession of all that parcel of land known as Riva Way and extending from Ridgeway Terrace to Lot

12 Barbican Heights (otherwise called Lot 28 A) and being part of land comprised in Certificate of Title Registered at Volume 1180 Folio 208 of the Registered Book of Titles and that the said lot 28A is part of the reserved Riva Way shown as proposed Road 3.

2. An order directing the Registrar of Titles to issue a Certificate for said Lot 28A endorsed in the name of The plaintiff.

The Plaintiff was at all material times the Planning authority for the parish of St. Andrew.

Riva Ridge Limited was the Registered proprietor of all the lands registered at Volume 1180 Folio 207 and Volume 1180 Folio 208 of the registered Book of Titles and was the developer of the said land known as Riva Ridge.

The facts are not in dispute.

On or about 31<sup>st</sup> September, 1982 the defendant submitted an application to the K.S.A.C. for sub-division approval of the said land. The proposed sub-division plan was prepared by Ronald Haddad.

On the 16<sup>th</sup> November, 1982 the K.S.A.C. approved the sub-division plan "for permission to sub-divide the said lands comprising 15.3 acres into 73 residential lots.....and that lots 63 and 10A be reserved for open space."

It was also a condition for the titles for the roadway(s) to be handed over to the corporation be prepared from the deposited plan at the Titles Office and plan to be attached to Title, and that the Title to the roadway in the sub-division be transferred to the corporation as soon as the corporation issues to the sub-divider a certificate that such roadway(s) has/have been satisfactorily completed.

Ronald Haddad ~~carried out~~ the Survey in January 5 October 1983 and prepared the survey plan. This plan was checked by the Department of Survey and

3) on the 2<sup>nd</sup> March, 1984, deposited in the office of the Registrar of Titles.

The deposited plan dated 2<sup>nd</sup> March, 1984 had one significant difference from the plan approved by the K.S.A.C. On the latter plan there was no Lot 28A and the proposed road No. 3 later named Riva Way ends at the boundary Lot 12 Barbican Heights.

On the deposited plan there was a Lot 28A which is part of the reserved roadway Riva Way shown as proposed Road 3.

On the 3/12/84 the Town Clerk of the K.S.A.C. issued a letter to the Registrar of Titles stating that the K.S.A.C. offers no objection to the issuing and transfer of the Certificate of Titles in respect of lots fronting on roadways in the abovementioned sub-division.

On the 8<sup>th</sup> November, 1984 the registered title Volume 119 Folio 837 for the roadways was issued to the K.S.A.C. as set out in the deposited plan. Consequently Lot 28A was not transferred to the K.S.A.C.

By letter dated the 26<sup>th</sup> September, 1994 the K.S.A.C. wrote to the Registrar of Titles advising that the Building and Town Planning Committee of the K.S.A.C. at its meeting held on the 2<sup>nd</sup> June, 1992 had approved the sub-division of Lot 12B Barbican Heights registered at Volume 1052 Folio 663 and that the entrance to the sub-division is by way Lot 28A which forms a part of the road reservation in the original sub-division of Riva Ridge. The K.S.A.C. advised that Lot 28A is still required as a road reservation and should be transferred to the K.S.A.C.

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By letter dated 22<sup>nd</sup> August, 1997 the K.S.A.C. advised the defendant that based on the conditions of approval of Lot 12B Barbican Heights it was evidence that Lot 28A should be in the possession of the K.S.A.C. and advised of its intention to take possession of Lot 28A on 31<sup>st</sup> March, 1998. The Defendant refused to comply with the K.S.A.C. request.

The primary issues before the Court were:

- (1) whether a developer was entitled to transfer to the K.S.A.C. all the road ways as approved by Council.
- (2) whether the Registrar of Titles was permitted to issue a title for a lot not approved by the Planning Authority.

The Plaintiff claimed that the defendant was in breach of the planning approval and therefore the roadways as laid out on the approved plan remains valid.

The Defendant denied that they had breached the planning approval. They maintained they had complied with the conditions of approval endorsed on the approved plan.

The fulcrum of the defence was that the title was prepared from the deposited plan in the Titles Office. The title to roadways in the sub-division was transferred to the K.S.A.C. as soon as the K.S.A.C. issued the certificate of compliance.

The Defendant further maintained that this condition in any event was *ultra vires*, void and of no effect and unconstitutional. The K.S.A.C. was merely seeking to acquire the land to provide access for Lot 12A Barbican Heights without compensation.

The Defendant had applied to the K.S.A.C. for sub-division approval as prescribed by Section 5 of the Local Improvement Act.

Section 5 reads:

Every person shall, before laying out or sub-dividing land For the purpose of building thereon or for sale, deposit with the Council a map of such land; such map shall be drawn to such scale and shall set forth all such particulars as the Council may by regulations prescribe and especially shall exhibit, distinctly delineated, all streets and way to be to be formed and laid out and also all lots into which the said land shall also show the area and shall if required by the council be declared to be accurate by a statutory declaration of a Commissioned Surveyor.

Every such person shall also deposit with the Council as Respects each street and way as shown on the said map.

- (a) A specification showing how such streets or way is to be constructed and the nature, location and dimensions of the sewers, water pipes, gas pipes and lighting mains, hereinafter called street worked, to be laid within the boundaries thereof whether for the purposes of the street or way itself or for the use of the buildings adjoining. Such specification shall, if the Council by regulations so prescribe, be accompanied by plans and sections giving full details and drawn to such scales as may be fixed in the regulations;
- (b) an estimate of the probable expenses of the street works being done.

Such specifications, plan, sections and estimates shall comprise the particular required by regulations made by the Council.

The K.S.A.C. gave their approval and the conditions were endorsed on the back of the plan.

Section 8 of the Act states:

- (1) Subject tot he provisions of section 9, the Council shall on such deposit as prescribed in section 5 consider the said map, specifications, plans and sections and estimates and shall, by resolution

within a reasonable time after the receipt of the same, refuse to sanction or sanction subject to such conditions as they may by such resolution prescribe, the sub-division of the said land and the formation and laying out of the said streets and ways, and may approve of the map, specification and estimates of the said street works or may alter or amend the same as to them may seem fit and may prescribe the time within which the said street works shall be completed.

- (2) Where under subsection (1) the Council sanction a sub-division, whether subject to conditions or not, they shall report their decision and the reasons therefor to the Minister.
- (3) Before making a decision under sub-section (5) The Minister shall, unless he proposes to confirm a decision of the Council to sanction a sub-division without imposing conditions, afford to the Council and to the person who will be affected by such decision an opportunity of being heard.

The Local Improvement Act governs schemes of development of land for the protection of the public and once the Parish Council approves the application and imposes conditions, it is submitted to the Minister for approval. After the Minister has given his approval, no further amendment can be affected by the parish council. The conditions imposed have the force of regulations breach of which attract penal consequences to which both the respondent (the developer) and the Parish Council will be subject. No contracts thereafter for the sale of land could validly be made, and if made were void.

The Parish Council; has a duty to complete the infrastructure, where the developer fails to so. (*per Harrison , J.A. Garnett Palmer v. Prince Golding and Another S.C.C.A. No.46/98*).

There was no evidence before the court that the developer sought any amendment to the approved plan.

The K.S.A.C. and the developer were therefore bound by the plan as sanctioned.

The developer proceeded to layout the infrastructural works as set out on the approved plan.

There was no need therefore for the Parish Council to complete the roadways  
(See Section 10):

10. If the owner shall fail to execute the street works shown in the specifications, plans and sections (if any) or as the same may have been altered or amended by the Council or any part thereof within the time prescribed by the Council as provided in section 8, the Council may execute the said works or such part thereof as shall not have been executed in accordance with the said specifications, plans and sections and the expenses incurred by the Council in executing such works, together with a commission not exceeding six per centum in addition to the actual cost, shall be recoverable from the owner as a debt due to the Council and shall until payment thereof be a charge on the land shown in the map deposited as provided in section 8 in priority to all mortgages, charges, estate and interest created subsequent to the deposit of such map.

Mr. Richard Khouri a Director of the Defendant disclosed they had decided to create Lot 28A. He said as follows:

"Lot 28A was created for several reasons. One director Mr. Vicens owned the corner lot in a company called Vixol and so one reasoned it would enhance his Lot 29 and as a director this was not a problem. As directors we considered it prudent for the development as it would be a family community with young children, to prevent through traffic."

The defendant proceeded to submit the deposited plan with the Registrar for Titles in accordance with section 126 of the Registration of Title Act. Section 126 reads:

"Any proprietor sub-dividing any land under the operation of this Act for the purpose of selling the same in allotments shall deposit with the Registrar a map or diagram of such land exhibiting distinctly delineated all roads, streets, passages, thoroughfares, squares or reserves, appropriated or set apart for the use of purchasers and also all allotment into which the said land may be divided, marked with distinct marks or symbols, and showing the areas and declared to be accurate by a statutory declaration of a Commissioned Land Surveyor:

Provided always that when any such land is situated within any portion of a parish to which the provisions of the Local Improvements Act and any enactment amending the same shall apply the proprietor shall deposit with the Registrar copies, certified by the Clerk of the board under that Act, of the map deposited with the Board and the resolution of the Board sanctioning the sub-division, and no transfer or other instrument effecting a sub-division of any such land otherwise than in accordance with the sanction of the Board shall be registered.

This deposited plan was not required to be sent to the Council.

The Registrar of Titles could only issue splinter titles in accordance with the resolution sanctioned by the Council.

The defendants were required to lodge with the Registrar of Titles a copy of the approved plan with the resolution.

Mr. Llewellyn Allen a Commissioner Land Surveyor said he had examined both plans. He found one major irregularity. The deposited had one additional lot that is Lot 28A. This was created by reducing the length of the proposed road No. 3 (Riva Way). It was his opinion that this was a breach of the sub-division approval

and was only permissible if the developer had gone back to the K.S.A.C. for approval. He agreed with the defendant's Counsel that some variations are allowed such as the sizes of the lot. However, he maintained if there is a significant change there would be need for re-approval. 9

Mr. Allen visited the site and observed that the road on ground was constructed up to the external boundary with the exception of the verge. A part of the road was constructed on Lot 28A.

He saw no physical boundary between Riva Way and Lot 28A. It was a continuous paved carriageway. There were no surveyors' pegs or barriers between Lot 28A and Riva Way.

This was a well disguised scheme by the developer and the land surveyor to alter the roadway without seeking the K.S.A.C. approval.

It was impossible to detect the creation of Lot 28A by merely visiting the roadway. It was constructed in accordance with approved plan.

The K.S.A.C. quite properly concluded that the defendants had completed the infrastructural works satisfactorily and issued the letter to the Registrar of Title. This could not be interpreted by either the Registrar of Titles or the defendant that the deposited plan was to the K.S.A.C.'s satisfaction and approval.

It was the duty of the Registrar of Title to satisfy herself that Lot 28A was sanctioned by the Parish Council's resolution. A careful examination of both plan would have revealed the irregularity.

The Registrar of Titles therefore had no authority to issue a title for Lot 28A.

This irregularity was deliberately created by the defendants for their own reasons. They had acted improperly and cannot be allowed to benefit from their misdeeds.

Although the defendant had purportedly transferred the roadways to the K.S.A.C. they now complain that condition was ultra vires, void and of no effect and or unconstitutional.

Counsel had submitted that neither the Local Improvement Act and the Town and Community expressly confers powers on the K.S.A.C. to acquire land without paying for it.

Counsel was unaware of the Parochial Road Act. This Act regulates the acquisition of land by the parish Council for roads.

Where the K.S.A.C. seeks to acquire land for the purpose of construction of new road or to alter existing road the land owner is entitled to be compensated as stipulated by Section 25, 26, 27 28 and 29 of the Parochial Roads Act.

However, in this case the K.S.A.C. was not seeking to construct a new road or to alter the existing roadway. It was merely requesting that the Defendant transfer the roadway as laid out in the approved plan.

Section 40 of the said Act states as follows:

"In cases in which lands are laid out by the owner or owners therefore with roads, street or lanes, intersecting the same, such road, street or lane shall not be taken over or repairable by the Parish Council until the owner or owners of such lands shall have thoroughly constructed the same to the satisfaction of the Parish Council and the owners of any such land shall also pay all the costs of and incident to the transfer of such road, streets and lanes to the Parish Council."

The evidence before the Court clearly demonstrated that the Developer had laid out the roads, street and lanes in accordance with the plan.

The Developer constructed the roadway to the satisfaction of the K.S.A.C.

The Developer purportedly transferred the roadways to K.S.A.C. The K.S.A.C. had taken over the roads in the scheme and was responsible for any repairs to all the roads in the scheme including Lot 28A.

There are instances where a developer may desire not to transfer a road to the Parish Council. He must apply to the Parish Council.

Section 36 of the Parochial Road Act reads:

"Whenever application shall be made to a Parish Council for any private road, and they shall be of the opinion that such application is reasonable and well founded, the same mode of proceeding shall be adopted in every respect as in the case of a highway, but the damages awarded and the expenses of such roads, and the maintenance thereof, shall be paid by the party applying for the road."

Section 37:

"Every such private road, when so laid out, shall be for the use of the applicant, his heirs and assigns, but not to be converted to any other uses or purpose than that of a road; and such applicant shall be compelled to keep up and maintain fit and proper fences on each side of the road."

In this case the Defendant were not seeking to have a private road. It was their intention to have the K.S.A.C. responsible for the maintenance, notwithstanding this they proceeded to retain portion of the roadway.

I find no merit to the arguments advanced by Counsel for the Defendant.

It was incumbent on Mr. Haddad to submit a survey plan to the Registrar with the lots and roadways as approved by the K.S.A.C.

There was no requirement that survey plan was to be submitted to the K.S.A.C. They did not have any duty to check the plan to ensure that it conformed with their resolution.

It was the duty of the K.S.A.C. that the road works were constructed to their satisfaction before they issued the letter of compliance to the Registrar of Title.

There was no complaint that the roads were otherwise than satisfactory.

I find that there was no wrong doing on the part of the K.S.A.C. They acted properly in issuing the letter.

They could not have known of the conspiracy between the developers and the Land Survey. It was a well concealed scheme to deceive the K.S.A.C. A check on the ground would not have alerted anyone that Lot 28A existed.

The Registrar of Titles had a duty to check both the deposited plan and the approved plan to ensure that it was reflecting the Council Resolution.

A careful check by the Registrar would have shown that Lot 28A was not approved by the Council. The Registrar was negligent in the discharge of her duty. She had no authority to issue a title for Lot 28A as it was not approved by the Council.

The problem would not have arisen if the Commissioned Land Surveyor had acted properly.

It would be wrong for the defendants to benefit from their misdeeds. They cannot be allowed to retain the land thereby excluding the public from using it as a road.

In the circumstances I make the following declaration:

"The plaintiff is the owner of and all that parcel of land known as Riva Way and extending from Ridge Way Terrace to Lot 12 Barbican Heights and being part of the land comprised in Certificate of Title Registered at Volume 1180 Folio 208 of the Registered Book of Titles and that the said Lot 28A is part of the reserved road, Riva Way as shown as proposal Road 3.

It is hereby ordered:

- (1) that Lot 28A be removed from the deposited plan.
- (2) That the K.S.A.C. surrender the Registered title Volume 1190 Folio 837 to the Registrar of Titles for the plan attached to the Title be corrected to show Riva Way extending to Lot 12 Barbican Heights.

It is also ordered that the cost incurred in rectifying the plans and title to be borne by the Defendant.

In the circumstances thereof there shall be judgment for the K.S.A.C. with costs to be agreed or taxed.