



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 117

BETWEEN:

LLEWELLYN TROTT

First Plaintiff

DILTON CAINES

Second Plaintiff

-And-

PATRICIA CAINES

First Defendant

EARLSTON CAINES

Second Defendant

Date/s of Hearing: 24 November 2008

Date of Judgment: 30 January 2009

Trott and Duncan, for the Plaintiffs;
Durrant & Co., for the Respondent.

1. The Plaintiff, Llewellyn Trott and Dilton Caines, pursuant to Order 18 Rule 19 of the Rules of the Supreme Court 1985 or under the inherent jurisdiction of the Court seek, orders that:

The Defence be amended or struck out as disclosing no reasonable cause of action or as tending to prejudice or delay the fair trial of this action; the court sign judgment in the favour of the Plaintiffs and the cost of the application.

2. In their defence the Defendants' contend that they are under no obligation to pay rent as they were given an interest in the property by the deceased before her death.

Background

3. The two Plaintiffs and the two Defendants, Patricia Caines and Earlston Caines are brothers and sisters all four of them are children of the deceased, Lois Gloria Caines (hereinafter referred to as 'Mrs. Caines'). In February 2006 Mrs. Caines died leaving a will. The sole Executor, Llewellyn Trott, the first Plaintiff, read the Will to all the children. The First and Second Plaintiffs were the only two persons named as beneficiaries under the will. No one filed a caveat disputing the administration of the estate.

4. By separate rental agreements the Defendants occupy the two lower apartments for which they paid rent to Mrs. Caines prior to her death. After Mrs. Caines died the Defendants ceased to pay rent.

5. In August 2006, the first Plaintiff commenced proceedings in the Magistrates Court against the Defendants for arrears of rent from February 2006 to August 2006.

6. In September 2006, in defence to the first Plaintiffs' claim for arrears of rent, the Defendants asserted an "expectation of an interest" in the property under the will of Mrs. Caines. The Magistrates Court adjourned the proceedings sine die to give the parties an opportunity to resolve this issue.

7. In 1983, Mrs. Caines purchased the property situate at No. 2 Mission Lane the subject of this dispute. In 1988, she borrowed funds from the Bank of Butterfield to renovate and extend the property into 3 self contained apartments – one four bedrooms at the top level; a two bedroom unit at the lower east level and a one bedroom at lower west level.

8. In 2007, probate was granted to Llewellyn Trott. The estate was divided between the Plaintiffs absolutely in equal shares.

9. The Plaintiffs have been paying the land tax and insurance despite both accounts remaining in the deceased's name. The Plaintiffs say that the Defendants have failed to pay any rent since Mrs. Caines' death and they are now some 27 months in rental arrears.

10. The Plaintiffs by Generally Endorsed Writ of Summons sought relief including “A declaration that the First Plaintiff and Second Plaintiff are the sole beneficial owners of the property at No. 2 Mission Lane, Pembroke pursuant to the Last Will and Testament of Lois Gloria Caines, and the First and Second Defendant are not entitled to a legal or beneficial interest in the property including the lower apartments of the property in which they reside; and an order for payment of \$16,200.00 BMD and \$18,999 by the First and Second Defendants respectively to the Plaintiffs in arrears of rent on the lower apartments of the property;

11. The Defendants deny the Plaintiffs' claim filed a defence, Further and Better Particulars and an Amended Defence.

12. The parties concur that where the application is made under Order 18 Rule 19(1) b – d, or under the inherent jurisdictions of court evidence is admissible. The Court had the opportunity to consider the affidavit evidence filed by the parties. It is not disputed that the Defendants executed tenancy agreements by which they were required to pay rent for the premises which they occupy. What is disputed is the Defendants contention that Mrs. Caines entered into oral agreements with the Defendants that they would have an interest in the property. Also denied is the substantial contribution that the Defendants say that they made to enhance the property.

13. The Plaintiffs have advanced a number of reasons why the Defence should be struck out among them assertions that on the facts the Defendants’ do not make out a claim under the law. The Plaintiffs maintain that there are a number of significant discrepancies between the Defendants’ account of what transpired. For example, the Defendants say there contribution was towards the mortgage despite the rental agreements. They also say that in 2004 when the mortgage was satisfied they had no further obligation to pay rent but if that was the case, why did the Defendants continue to pay rent until the date of Mrs. Caines’ death? The Plaintiffs say that the Defendants do not satisfy the test for a constructive trust nor the test for proprietary estoppel, the defence is internally inconsistent, that they seek to assert the right to prove the will in solemn form in the wrong jurisdiction and the misconceived plea of res judicata.

14. I have to be satisfied that the pleaded defence discloses no reasonable defence or that it is scandalous, frivolous or vexatious; or that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the Court. No evidence can be admitted in respect of the first ground.

15. I remind myself that it is only in plain and obvious cases that a court should exercise its discretion in favour of an applicant under the Rule. The Court cannot at this stage of the process engage in a minute and protracted examination of the documents and facts of the case, in order to see whether the defendant has a reasonable defence.

16. I also bear in mind that where an application to strike-out, in this case the defence, involves prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial.

17. Exercising my discretion, on all the material which has been placed before me and arguments made to me, the Court is not satisfied that the defence does not disclose a reasonable ground of defence.

18. I have carefully considered all the Plaintiffs' arguments, for example, as to the apparent discrepancies/inconsistencies in the defendants' accounts of what actually transpired. They no doubt all call for a credible explanation by the defendants and there may or may not be such credible explanation at the end of the day. I am not entirely satisfied that the claims are wholly or even substantially without merit. In my view, therefore, those are not matters which this Court can or should attempt conclusively to determine on affidavit evidence. Those are matters which, to my mind can and should only be resolved at trial after oral evidence is heard and cross-examination has taken place.

19. By way of example only, it is part of the Defendants' case that they have made significant contributions to the upkeep and maintenance of the property and that this was not simply a case of making rental payments. In a case like this, involving close family members, where for example, emotions often can run high when serious disputes arise and, where what may appear to be formal arrangements might well not be reflected in the actions of the parties on the ground as it were, a trial is, in my view, the appropriate vehicle for resolving the issues.

20. I agree with Counsel for the Plaintiffs that the Defendants have not made their assertions with sufficient clarity. The pleading is unsatisfactory in many respects, but unsatisfactory as it is there is sufficient there to avoid being struck out.

21. Accordingly, I order that the application for strike-out be dismissed.

22. The Plaintiffs requested that if the Court declined to dismiss the strike-out application (as it has) then it should give directions. I now do so. The Plaintiffs are to file reply if any to the Defence on or before 20th February 2009. Thereafter I invite the parties to agree directions for trial within 14 days after the reply to the Defence has been filed i.e. on or before 6th March 2009. If the parties are unable to agree directions for trial the Plaintiffs are to apply to the Court for directions.

Dated the 30th day of January, 2009

The Hon. Mrs. Norma Wade-Miller

Puisne Judge