In The Supreme Court of Bermuda

CIVIL JURISDICTION
2000: No. 148

BETWEEN:

ALEXANDER WINSTON JOSEPH ANGLIN SWAN

Plaintiff

- and -

LISA HOLLIS

First Defendant

and

MURIEL ANNETTA JONES

Second Defendant

and

WALTER STANLEY WELCH

Third Defendant

Date of Hearing: 12 January 2012

Rick Woolridge for the plaintiff;
No appearance for the first defendant; and
Kimberley Caines for the second and third defendants.

JUDGMENT

1. On 12th January 2012 I dismissed the first defendant's Counterclaim against the plaintiff in this matter for want of prosecution, and promised short written reasons to follow, which I now give.

2. The plaintiff's summons was issued on 7th October 2011, returnable on 20th October. It was very bare, seeking simply an order that "the First Defendant's Counter Claim be struck out for abuse of process and want of prosecution of the same." An earlier summons in like terms of 15th September had been abandoned because it had not been preceded by a notice of intention to proceed.

3. The original return date of 20th October 2011 was vacated by the Registry due to the unavailability of the assigned judge, and counsel were requested to submit new dates. On 19th December a Notice of Hearing was then issued for 12th January at 11.00 a.m. The Notice was addressed to J2 Chambers, for the attention of Mr. E. Johnston. Mr. Johnston had come on the record for the first defendant by a "notice of appointment of attorney" dated 6th October 2011 and filed on 10th October 2011.

4. Neither Mr. Johnston nor the first defendant herself attended the hearing before me. I proceeded in their absence on the basis that a Notice of Hearing had been issued by the Registry and I presumed that in the ordinary course it would have gone out to J2 Chambers. I was also told by Mr. Woolridge that all attempts to contact that Chambers had been in vain. An attempt by the Registry staff to telephone the Chambers also went to voicemail, and a message was left. I therefore proceeded under RSC Ord. 32, r. 5(1) and (2).

5. The action is inordinately old. It was commenced by writ of 10th May 2000, in which the plaintiff claimed a right of way over "land occupied by the defendant and known as 41 Slip Road, Wellington St. George's". The plaintiff claimed that he had purchased a lot of water-front land from the second and third defendants and that that included a right of way over the first defendant's land by virtue of a deed of 1939. That right of way was the only access to the property, and it was said that the first defendant was obstructing it, and hence the plaintiff's development of the property. The first defendant filed a Defence and Counterclaim, in which she at first simply claimed a declaration that the plaintiff had no right of way "over the eastern boundary of the plaintiff's property." However, by a re-amendment of 11th April 2001, made pursuant to an order of acting Justice Bell of 5th April 2001, the first defendant asserted new claims for:

"3. A declaration that [the first defendant] and her siblings are the beneficial owners of the Lot.

4. A decision that she and her siblings and the Plaintiff respectively each have a 20% beneficial interest in the Lot."

6. The lot referred to was the lot which the Plaintiff claimed to own. The action had originally been between the plaintiff and the first defendant alone, but following the filing of the re-amended Defence and Counterclaim, which put the plaintiff's title in issue, the plaintiff joined the second and third defendants, initially as third parties, and they entered appearances as such on 3rd July 2001. However, their status in the action was amended by a consent order of 27th September 2001 to show them as full Defendants.

7. According to the re-amended pleading, the first defendant's claim to the plaintiff's lot was based upon a lost modern grant between 1939 and 1949 said to arise out of the satisfaction of a mortgage by the first defendant's predecessor in title. The pleaded case was that one Carlton Leonard Welch had mortgaged the property and the debt was satisfied by his father William Walter Welch, who then "became the legal and/or beneficial owner of the Lot in consideration of his payment of the mortgage debt by a deed that is now lost on a date unknown between in or about 1939 and 1949": see paras. 23A and 23B of the re-amended Defence and Counterclaim. The first defendant then traces her title back to William Walter. The plaintiff traces his title, via the second and third defendants, to Carlton Leonard.

8. Notwithstanding that pleading, the first defendant also attempted to strike out the Statement of Claim on the basis that the mortgage debt had not been repaid and that the title therefore remained with the mortgagee and his descendants. That application to strike out was dismissed by Wade-Miller J on 12th May 2003, largely relying upon a common law presumption of repayment where the circumstances were otherwise consistent with that, citing Pickett v Packham (1868) LR 4 Ch. 190.

9. The matter then went wholly silent until 7th October 2008, when the plaintiff issued a notice to proceed. But nothing happened on that, and then on 30th September 2009 Mr. Woolridge came on the record for the plaintiff and issued a further notice of intention to proceed and a summons for trial directions, which were given by Simmons J on 4th November 2010, but nothing came of those either. There was a proposal to amend the Defence to Counterclaim, to plead limitation and that the first defendant's claim was overreached onto the purchase monies in the hands of the second and third defendants, but that was not perfected. There is a letter on the file suggesting that that was because the plaintiff's counsel had come to the view that limitation was already adequately pleaded in paragraph 11 of the existing Defence to Counterclaim of 8th May 2001. That paragraph pleaded that the first defendant's claim had become time-barred in or before 1969.

10. The plaintiff's application before me was not supported by any evidence, other than that already on file from before 2003. Nor does the summons state the grounds on which it is made, although it would appear that the case is that the first defendant's delay in prosecuting her Counterclaim is inordinate and inexcusable and that, because this was a commercial development intended for resale, the attack on title contained in the Counterclaim has caused the plaintiff serious prejudice because it impeded resale in a falling market. There is no evidence to support that, but I am willing to take it on faith that such a root and branch attack on the plaintiff's title would indeed impede resale, and that the market is and has been falling. Indeed, I would be willing to infer that a cloud on the title of the sort caused by the Counterclaim was of itself seriously detrimental, and that the prejudicial effect of it would in the nature of things get worse as time went by.

11. It would also have been helpful to have had a brief chronology of the action, with a summary of the salient steps. However, doing the best that I can, it appears that the first defendant took no step to advance the Counterclaim after Wade-Miller J's refusal to strike out the action on 12th May 2003. Of course, the plaintiff took no steps either, at least until the notice of intention to proceed of 7th October 2008, and then no effective step until the Summons for Directions of 13th October 2010. However, once the Counterclaim was filed, the plaintiff's own claim to a right of way, and an injunction to protect it, paled into insignificance. Having taken up the sword, the first defendant was, in my view, under an obligation to pursue her claim with vigour, which she did not do.

12. I therefore dismissed the re-amended Counterclaim for want of prosecution. The summons had asked that I strike it out, but I think that in the circumstances "dismissal for want of prosecution' is a more apt description of the action taken. In the absence of an affidavit I could make no determination on the allegation that the Counterclaim was also an abuse of process, and I therefore dismissed that part of the summons.

13. For the avoidance of doubt, my dismissal of the Counterclaim includes everything in the re-amended Defence and Counterclaim from paragraph 11 thereof onwards: i.e. everything under the heading "Counterclaim". That necessarily leaves the Defence in place, and the summons does not seek to impugn that. Where that leaves the action, I do not know. I am told by counsel that this has all been overtaken by events: that the development is complete and the plaintiff is now in occupation and unchallenged use of the right of way, but there is no evidence of that beyond counsel's assertion and I do not take it into account. The plaintiff himself also seemed to think that the question had been settled by an Order of Bell J, but if it has that was not in this action as far as I can see from the file, and counsel has referred to no other action, nor asked for any other file to be placed before me. In the circumstances, therefore, it is for the plaintiff to advise himself as to how he wishes to proceed on the main action, if at all, and I express no view on that.

14. As to costs, I gave the plaintiff the costs of his application to dismiss for want of prosecution. I also gave him the costs of the Counterclaim to be taxed if not agreed. It may be difficult to attribute costs as between the Counterclaim and the primary action itself, particularly because of the passage of time, but that is an argument for taxation if that course is ever pursued.

15. The second and third defendants were represented by counsel at the hearing, and indicated that they did not oppose the striking out. I considered that they were entitled to be there, and awarded them the costs of their attendance against the first defendant, again to be taxed if not agreed.

Dated this 13th day of January 2012

Richard Ground
Chief Justice