



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
(COMMERCIAL COURT)**

2020: No. 198

In the matter of the Estate of Howard Caisey (Deceased)

BETWEEN:

DOLETA BEAN

Plaintiff

- and -

ANTHONY CAISEY (As Executor of the Deceased's Estate)

First Defendant

-and -

KEITH WAYNE CAISEY (As Sole Beneficiary of the Deceased's Estate)

Second Defendant

RULING

Date of Hearing: 26 July 2021

Date of Ruling: 28 July 2021

Appearances: Jaymo Durham, Amicus Law Chambers, for the Plaintiff

Paul Harshaw, Canterbury Law Limited, for the Second Defendant

RULING of Mussenden J

Introduction

1. This matter came before me by the Second Defendant's Summons dated 5 July 2021 for an order that (a) the Second Defendant's Summons dated 11 December 2020 be set down for a hearing on an expedited basis; (b) specific direction for trial of the Plaintiff's claim on an expedited basis; and (c) unless the Plaintiff strictly complies with the directions prayed for at paragraph (b) above, this action be struck out and the Plaintiff be ordered to pay the Second Defendant's Costs of and occasioned by this action.
2. The Second Defendant's Summons dated 11 December 2020 was for an order that the Plaintiff do pay into Court notional mesne profit or damages for trespass in the amount of \$1,000.00 for each month she has remained and continues to remain at the real property situate at 3 Riviera Road in Southampton Parish in the Islands of Bermuda (the "**Property**") or any portion of it commencing 1 December 2019.

Background

3. The parties are siblings and are the children of Howard Caisey (Deceased) (the "**Deceased**"). By a Will dated 9 August 2012 (the "**2012 Will**"), the Deceased revoked a previous Will, and then bequeathed the Property to the Second Defendant as the beneficiary absolutely and appointing the First Defendant as the Executors and Trustees of the 2012 Will.
4. The Deceased died on 5 August 2018 leaving the Second Defendant entitled to the Property. Probate of the estate of the Deceased was granted by the Supreme Court on the 18 September 2019 to the First Defendant. By a vesting deed dated 19 November 2019, the Property was vested in the name of the Second Defendant.
5. The Plaintiff commenced these proceedings by way of a Specially Indorsed Writ of Summons issued 22 June 2020 on the basis that the First and Second Defendants exercised

undue influence over the Deceased when he executed the 2012 Will and but for the undue influence, she would have been entitled to a beneficial interest in the Property. She seeks a declaration to void the 2012 Will.

6. In the Second Affidavit of Julica Harvey, counsel assisting Mr. Harshaw for the Second Defendant, sworn on 30 November 2020, she asserts that the present claim has been filed by the Plaintiff as part of her defence to the claim of the Second Defendant for possession of premises that the Plaintiff occupies without his permission as the legal owner. That possession action is Supreme Court Case 2020: No. 44 (the “**Possession Action**”), which was commenced on 22 January 2020 but because of the closure of Government buildings due to the Covid-19 pandemic, has never had a first return. Notably, this action was commenced by the Plaintiff in June 2020.
7. Ms. Harvey asserts that on the assumption that the Second Defendant’s title to the Property is good, the Plaintiff’s continued occupation of one of the dwelling units of the Property without paying any money in the nature of rent or otherwise is a windfall for the Plaintiff and a detriment to the Second Defendant. Thus, this is the basis for the application for an order for the Plaintiff to pay into Court a notional mesne profit or damages for trespass in the amount of \$1,000 for each month that she has occupied the premises at the Property. If she succeeds in her action, she can claim repayment of that money otherwise if she fails then the Second Plaintiff can lay claim to that money.
8. In an Order dated 18 February 2021 Subair Williams J ordered that the Plaintiff, if so advised, file affidavit evidence in response to the Summons dated 11 December 2020. The Plaintiff did not file any affidavit evidence.
9. In a second Order dated 18 February 2021 Subair Williams J made an order for directions, none of which have been complied with by the Plaintiff. In turn, in order to save expense, the Second Defendant also did not comply.

The First Defendant's Application

10. Mr. Harshaw filed a brief skeleton argument and relied on the Supreme Court Act 1905 and the inherent jurisdiction of the Supreme Court to control its own process and to prevent the administration of justice being used to an unjust end to support the order for the payment of the mesne profit or damages into Court. He submitted that the 5 July 2021 Summons was a way to get this matter back on track as the Second Defendant is being deprived of the use of his property by the presence of the Plaintiff at the Property. Further, Mr. Harshaw submitted that the Plaintiff has not complied with the directions of Subair Williams J and shows no sign of so doing, arguing that the Plaintiff cannot be permitted to live at the Second Defendant's property rent free against his will.

11. Mr. Harshaw relied on an ancient Privy Council case of *Lindsay v Duff* [1862] UKPC 23 as support for payment into Court of the mesne profit or damages. He also relied on another ancient case of *McHenry v Lewis* (1881) 22 Ch. D. 397 in relation to when a party pursues actions on the same matter in two Courts, citing the passage "*I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather that than attempt to define what vexation and oppression mean; they must vary with the circumstances of the case.*" Mr. Harshaw was not able to direct the Court to any recent or Bermuda authority about the usage of the payment into Court of the mesne profit or damages for trespass.

The Plaintiff's Reply

12. The Plaintiff opposes the application for payment into Court of a mesne profit or damages for several reasons. Mr. Durham also filed a brief skeleton argument wherein he submitted that what the Second Defendant was in effect seeking was a mandatory injunction. He relied on the principles in the case of *American Cyanamid and Ethicon Limited* [1975] 2 WLR 316 and submitted that the test had not been met as damages were an adequate remedy in the present case and was actually what the Second Defendant seeks by way of

the counterclaim to the Writ. He also relied on the Bermuda case of *Yvonne Cacace v Jason Sukdeo* [2018] Bda LR 52 where Hellman J addressed the principles of granting injunctions.

13. Mr. Durham submitted that the proper approach to the current state of affairs would be to make an unless order so that the Plaintiff would comply with the order for directions dated 18 February 2021.

Analysis of the Defendant's Applications

14. I have considered the evidence, submission and case authorities in this case.
15. In my view, it is not appropriate to grant the application for payment by the Plaintiff of the mesne profit or damages into Court in order to get the case back on track. Further, in the final determination of the case, the outcome could possibly be an award of damages. Therefore, there is no rational requirement presently to mandate the Plaintiff to make payment into Court now to be used for damages later. The suitable approach is to make an unless order in respect of the order for directions dated 18 February 2021.

Conclusion

16. For the reasons above, I decline to make an order for payment into Court of the mesne profit or damages. However, I do order that unless the Plaintiff complies with the terms of the order for directions dated 18 February 2021, effective as from the date of this Ruling, the matter be struck out and the Plaintiff be ordered to pay the Second Defendant's costs of and occasioned by this action.

17. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that each party bear their own costs for the Summons dated 11 December 2020 and for the Summons dated 5 July 2021.

Dated 28 July 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**