



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 246

BETWEEN:

SAMUEL ANDREW BANKS

Plaintiff

v

SIMON STOREY

and

DEIRDRE STOREY

Defendants

RULING

Date of Hearing: 27 October 2022
Date of Ruling: 18 November 2022

Appearances: Jeffrey Elkinson, Britt Smith Conyers Dill & Pearman, for Plaintiff
Keith Robinson, Oliver MacKay, Carey Olsen Bermuda Limited, for Defendants

RULING of Mussenden J

Introduction

1. This matter appears before me on three Summonses as follows:
 - a. The Defendants' Summons dated 27 April 2022 pursuant to Order 38, rule 36(1) for the parties to be permitted to adduce expert evidence in the fields of horticulture, civil engineering and real estate. I ordered that the expert evidence be permitted with mutual inspection of the properties. I directed the parties to work to an agreed order in respect of the inspections failing which submissions would resume in order for the Court to issue a ruling on any outstanding issues.
 - b. The Defendants' Summons dated 21 October 2022 for disclosure by the Plaintiff of various documents. Counsel for the Plaintiff indicated that the discovery is being compiled. I adjourned the Summons on the basis that it is likely to be fulfilled in early course.
 - c. The Plaintiff's Summons dated 26 August 2022 for discovery ("**Discovery Summons**") by the Defendants of the documents as set out below. It is supported by the Affidavit of Katherine Blair sworn on 17 August 2022 ("**Blair 1**"). The application is opposed by the Defendants and is supported by the Fifth Affidavit of the First Defendant Simon Storey ("**Storey 5**"). The remainder of this Ruling deals with the Discovery Summons.

General Background

2. The parties are neighbours. The Plaintiff is the owner, since 2001, of 17 Inglewood Lane in Paget Parish and the Defendants are the owners, since 2012, of the neighbouring property 13 Inglewood Lane (together the "**Two Properties**"). Disputes have arisen between them. A Specially Endorsed Writ of Summons was issued 23 August 2021 (the "**Writ**"). The Statement of Claim (the "**SOC**") set out that there are boundary issues of trespass, nuisance, and conversion and seeks various orders including injunctions and damages.

3. A Defence and Counterclaim has been filed and a Reply and Amended Defence to the Counterclaim has been filed.
4. I have set out the detail background in previous Rulings in this matter.

Background to Discovery

5. On 18 March 2022 the parties provided discovery by mutual exchange of lists of documents and subsequently exchanged copies of the documents referenced therein. Each party had requested further documents in correspondence.

Rules of the Supreme Court 1985 (“RSC”) and the White Book governing Discovery

6. RSC Order 24 rule 1 and the White Book state as follows:

“24/1 Mutual discovery of documents

(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.”

7. The White Book at 24/2/11 in relation to the words “*relating to matters in question*” states as follows:

“These words refer, not to the subject matter of an action, but to the questions in the action. So, in an action for possession of title of land, where the plaintiff’s title is in question, they refer to the title, not the land ... any document which is reasonable to suppose, “contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those consequences” must be disclosed. (Compagnie Financiere du Pacifique v Peruvian Guano Co (1882) 11 QBD 55 at 63)”

8. RSC Order 24 rule 3 states as follows:

“24/3 Order for discovery

(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the cause or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) Where a party who is required by rule 2 to make discovery of documents fails to comply with any provision of that rule, the Court, on the application of any party to whom discovery was required to be made, may make an order against the first-mentioned party under paragraph (1) of this rule or, as the case may be, may order him to make and file an affidavit verifying the list of documents he is required to make under rule 2 and to serve a copy thereof on the applicant

(3) An order under this rule may be limited to such documents or classes of document only or to such only of the matters in question in the cause or matter, as may be specified in the order. ”

9. The White Book at 24/3/8 provides the following commentary concerning an application for a further and better list of documents:

“An order may be made for a further and better list of documents where it appears (a) from the list itself, or (b) from the documents referred to in it, or (c) from admissions made in the pleadings of the party making discovery or otherwise, that the party making discovery has or has had other relevant documents in his possession, custody or power. ”

10. RSC Order 24 rule 5 states as follows:

“24/5 Form of list and affidavit

(1) A list of documents made in compliance with rule 2 or with an order under rule 3 must be in Form No. 26 in Appendix A, and must enumerate the documents in a

convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.”

11. RSC Order 24 rule 7 states as follows:

“24/7 Order for discovery of particular documents

(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or rule 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document specified or described in the application and that it relates to one or more of the matters in question in the cause or matter”

12. The White Book at 24/7/2 provides the following commentary:

“... under the present rule an application may be made for an affidavit as to specific documents or classes of documents. This must be supported by an affidavit stating that in the belief of the deponent the other party has or has had certain specific documents which relate to a matter in question. But this is not sufficient unless a prima facie case is made out for (a) possession, custody or power, and (b) relevance of the specified documents.”

and further (in reliance on *Berkeley Administration v McClelland* [1990] F.S.R. 381):

“the order must identify with precision the document or documents or categories of documents which are required to be disclosed...”

13. RSC Order 24 rule 8 states as follows:

“24/8 Discovery to be ordered only if necessary

On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

Analysis of the Requests

14. I am satisfied that I should grant the Plaintiff's Discovery Summons in part for several reasons as set out below.

15. Mr. Robinson submits that the Blair 1 affidavit is not in compliance with the Rules as Blair 1 does not state that Ms. Blair “*believes*” the Defendants have or have had certain specific documents which relate to a matter in question. He says that the highest Ms. Blair puts it is “*it is likely that they are or have been in the possession of the Defendants ...*” Thus, Mr. Robinson argues that the statement is extremely vague in circumstances where the Plaintiff seeks a number of different categories of documents. He also complains that Blair 1 fails on a number of occasions to identify the precise matter in question to which each document is alleged to relate. Thus, the application under Order 24, rule 7 for an affidavit must therefore fail. Mr. Robinson also argues that the Plaintiff's application under Order 24, rule 3 should fail as Blair 1 does not identify where in the Defendants' list of documents, or in which document, it appears that certain documents exist. He reiterates that Blair 1 only attempts to comply with the requirement by stating “*Because of the nature of the documents sought, it is likely ...*”

16. Mr. Elkinson submitted that there were no technical defects in Blair 1. He argued that it was meant to be neutral and for identifying what was in the list.
17. Order 24 rule 7(3) requires an affidavit stating the belief of the deponent. Blair 1 does not use that express language. I consider this to be an irregularity under Order 2 rule 1 which does not nullify this application because in respect of the orders granted below, I am satisfied that there was a proper basis of belief to seek specific discovery, even if vague or neutral language was actually used in Blair 1.

1(a) Title Deeds in respect of the Defendants' property 13 Inglewood Lane, Paget and all documents contained within the deed pack for that property

18. Mr. Elkinson submitted that the Defendants should disclose the deed pack for 13 Inglewood Lane (the “**Deed Pack**”), as the contents would be relevant as in Bermuda the Deed Pack would show all easements and deeds that run with the property. He argued that the Defendants were denying that this matter was about a boundary dispute. However, he pointed to: (a) the Defence (paragraph 3) where it was pleaded that the Defendants had admitted that as a result of a lack of knowledge of the precise legal boundary between 17 Inglewood Lane and 13 Inglewood Lane, there was some admitted planting and construction; (b) the Counterclaim (paragraph 14) where the Defendants plead that there is only one easement that 17 Inglewood Lane enjoys in respect of 13 Inglewood Lane; and (c) the Amended Defence to Counterclaim (paragraph 12) where the Plaintiff pleads that he has an absolute right to the use of the roadway running the length of Inglewood Lane pursuant to a Zoning Order which would be in the Deed Pack; and (d) evidence and submissions to the Court in the injunction applications where counsel for the Defendants and Mr. Storey describe the matter as a boundary dispute.
19. Mr. Robinson submitted that the existence and/or location of the boundary between the properties is not a matter in question and it is not been pleaded by either party. In Storey 5, Mr. Storey explained that his use of the term “boundary dispute” was slightly inaccurate as the case is not about a boundary dispute, but about a dispute between two neighbours who share a boundary. He stated that there is no dispute about the existence or location of

the boundary and the Plaintiff has not identified any pleading which makes the case about a boundary dispute.

20. Mr. Robinson submitted that the fact that the Plaintiff says this is a case about easements, does not identify a matter in question. He asserted that there is no question regarding the existence of any easements. He argued that the only matter in question is the width and location of the asphalt road – the Plaintiff says it accords with the easement and the Defendants say it is too wide and the wrong location.

21. In my view, the Deed Pack should be disclosed as it will contain documents that are relevant to the issues in this case, namely the boundaries, the easement or easements, the Zoning Order and other rights running with the two properties and the encroachments. At this stage, it appears to me that the case involves issues about boundaries as described by the Defendants and the admission in the Defence that the Defendants did not know where the boundary was between the two properties. I anticipate that the Court will have to be satisfied where the boundaries are located in order to determine the other issues in the case.

1(b) Documents obtained by the Defendants conveyance attorneys Trott & Duncan from the Planning Department as a result of the planning searches conducted prior to the Defendants' acquisition of 13 Inglewood Lane.

22. Mr. Elkinson submitted that the Defendants would have carried out searches in advance of the acquisition of 13 Inglewood Lane.

23. Mr. Robinson submitted that the Plaintiff has not identified with any specificity what documents they are referring to, or where in the pleadings, list of documents, or other documents it appears that Trott & Duncan were the Defendants' attorneys or where he has attained the belief that any such documents exist. He submitted that the Defendants searched for all documents in their possession, custody and power that fits this description, including by making enquiry of Trott & Duncan, and confirmed that no additional relevant documents exist. Further, the Defendants have asked the Plaintiff to identify additional documents in this category but that the Plaintiff has not done with any specificity or

clarification as to their belief such documents exist. Mr. Robinson submitted that the Defendants have offered to provide a verifying affidavit for their list.

24. In my view, on the basis that there is no evidence or further clarification that the requested documents exist, I refuse the Plaintiff's application to order further disclosure for this category of documents.

1(c) All copies of Clarke & Doidge Plan Job No. 6369 in respect of 13 Inglewood Lane, whether they be dated 1958 or otherwise.

25. Mr. Elkinson submitted that all copies of plans by Clarke & Doidge in respect of 13 Inglewood Lane must be relevant and it is clear that they do exist, which he stated is not disputed.

26. Mr. Robinson submitted that the Defendants had already disclosed the exact same document with a different red marking around 7 Inglewood Lane. That disclosure was in error and the Defendants have offered to replace the erroneous disclosed one with the correct one. He argued that the Plaintiff was pursuing a court application for a materially identical document which is extremely disproportionate and contrary to the overriding objective.

27. In my view, on the basis that the Defendants have stated that the first disclosure of the Clarke & Doidge plan was in error, then the Defendants should be allowed to swap out the one disclosed in error and replace it with the correct one. I am not satisfied that there is a valid reason to have the incorrectly disclosed plan remain as part of the disclosure.

1(d) Zoning Order 20

28. Mr. Elkinson submitted that the Inglewood Estate is a private estate that is now subject to a Department of Planning Zoning Order 20. He stated that the Plaintiff has a copy of Zoning Order 20 but what is significant is to discover that the Defendants had Zoning Order 20 and when.

29. Mr. Robinson submitted that Zoning Order 20 is a public document and as such cannot be in the “possession, custody or power” of the Defendants. Further, the document is not in the physical possession of the Defendants and they have no right to control or take custody of a copy of the document. Storey 5 sets out that the first time Mr. Storey recalled having a copy of the document in his possession was in relation to these proceedings. Mr. Robinson informed the Court that the Defendants’ counsel have obtained an electronic copy of the document in the course of these proceedings.

30. In light of the circumstances as set out above and in the evidence, I decline to order discovery of the Zoning Order 20 document as the Defendants state that they have never had possession of the document until these proceedings were commenced.

1(e) All architectural drawings, designs, invoices, and receipts, payment confirmations or other documents proving payment for the construction/development of the extension to the northwest corner of the Defendants’ house and south-running wall/retaining wall.

31. Mr. Elkinson submitted that the Defendants have stated that they built the “extension” to 13 Inglewood Lane over a period from May 2018 to sometime in June 2019 for the sum of \$1,450. Mr. Robinson referred to this building work as a “retaining wall”. I understand that both counsel are referring to the same building work by different labels. For convenience, I will refer to this building work as the “**Patio Retaining Wall**”. The Defendants do state that the combined cost for the labour and materials for the “Admitted Construction”, namely the Patio Retaining Wall, was \$1,450.

32. Mr. Robinson submitted that the Defendants have confirmed numerous times to the Plaintiff that no documents of this description exist and have never existed in the Defendants’ possession, custody or power. Further, no drawings or designs were produced for the Patio Retaining Wall and no contractors were engaged as Mr. Storey constructed the Patio Retaining Wall himself.

33. In light of the circumstances as set out above and in the evidence, I decline to order discovery of these documents as the Defendants state that they do not exist subject to one

exception that I am satisfied that I should order disclosure of the invoices for the materials used for the Patio Retaining Wall.

1(f) The Planning Department's Enforcement Notices/Issues/orders in respect of Lot 7, Lot 10 and number 13 Inglewood Lane, Paget and related correspondence

1(g) The Survey and corresponding plans for the Defendants property Lot 7 Inglewood Lane

1(h) The title deeds for the Defendants' property, 11 Inglewood Lane, Paget, and all documents contained within the deed pack for that property

1(i) All surveys obtained by the Defendants in respect of 11 Inglewood Lane, Paget, prior to the Defendants' acquisition of that property.

34. Mr. Elkinson submitted that these categories of documents are relevant to the proceedings and to the claim for aggravated damages as set out in the SOC based on the assertion that the Defendants committed tortious acts of cutting down trees and removing vegetation. He argued that one of the issues in the action is in respect of the road constructed on the Plaintiff's property and the construction of the Patio Retaining Wall where no Planning Permissions or Building Permits were sought. Thus, these were matters which go to the trespass as recited in the SOC. Further, he argued that the Plaintiff will rely on the pattern of behaviour in respect of the aggravated damages sought. In respect of the documents described in 1(f), Mr. Elkinson argued that the background was relevant as to why the Defendants came onto the property, excavated a road and carried out other actions. In respect of the documents at 1(g) and 1(h) Mr. Elkinson argued that the estate road was important as the Zoning Order 20 was executed with the consent of all estate property owners, before the Defendants bought the property.

35. Mr. Robinson submitted that planning enforcement issues are not matters in question in these proceedings and that the Plaintiff has failed to identify a matter in question to which the documents relate. He argued that the Plaintiff is conflating the question of the Defendants' relationship with the Department of Planning and the question of trespass and

nuisance. The actions by each party against the other in respect of trespass and nuisance will be determined by the Court and the question of whether planning laws have been breached is entirely irrelevant. In respect of the claim for aggravated damages, Mr. Robinson argued that in such a claim for suffering mental anguish, documents involving the Department of Planning for works carried out at 13 Inglewood cannot advance the case for trespass onto 17 Inglewood Lane. Further, he argued that there is no matter in question in these proceedings concerning either Lot 7, Lot 10 or number 11 Inglewood Lane and thus the application is a blatant fishing expedition.

36. In my view, there are no pleadings that touch on Lots 7 and 10 or number 11 Inglewood Lane. Thus there are no matters in question in relation to those properties. The fact, if established, that the Defendants also own those properties does not automatically lead to a requirement for discovery about them. Therefore, I decline to grant any orders for disclosure of Lots 7 and 10 or number 11 Inglewood Lane. However, in light of the claim for aggravated damages, in my view, the conduct of the Defendants in respect of 13 Inglewood Lane and the Department of Planning is relevant in that any damages to be assessed must be considered in light of the notices, orders and correspondence between them. Therefore, I grant the order for disclosure as set out in 1(f) in respect of 13 Inglewood Lane.

1(j) All receipts, payment confirmations or other documents proving payment of each of the invoices produced to the Plaintiff on 30 March 2022 and contained in the Defendants' List of Documents dated 18 March 2022 at number 15 to 22

4 The Defendants provide descriptions of the below documents with particularity sufficient to identify them as follows:

(a) Description of the services/items, and what the services/items relate to, in respect of each of the invoices from Almeida's Landscaping & Estate Maintenance produced to the Plaintiff on 30 March 2022 and contained in the Defendants' List of Documents at number 17

(b) Descriptions of the services/items, and what the services/items relate to, in respect of each of the invoices and other documents produced to the Plaintiff on 30 March 2022 and contained in the Defendants' List of Documents at numbers 18 to 22.

37. Mr. Elkinson submitted that he did not expect the Defendants to go beyond their obligations in respect of these documents. However, he argued that the invoices should describe whether the work performed was on the Plaintiff's land or on the Defendants' land.
38. Mr. Robinson submitted that no prior request was made for these documents, no explanation has been given as to why they are relevant and Blair 1 does not identify any matter in question to which they relate. He noted that the invoices relate to a matter of the dates on which planting took place but there is no question over whether the invoices were paid. In respect of the descriptions of the invoices, Mr. Robinson submitted that there exists no legal basis upon which the Plaintiff can seek additional descriptions of documents. Also, there is no further obligation on the Defendants and the Plaintiff failed to articulate the legal basis for its application.
39. I decline to grant the order for disclosure of proof of payment in this category of documents as there is no question of whether the invoices were paid or when they were paid. In my view, the invoices will speak for themselves as to what work was carried out. However, I grant the application for the invoices to be further described as to which property they relate, that is to either 17 Inglewood Lane or 13 Inglewood Lane as such information is relevant to the questions of what value of work was performed on 17 Inglewood Lane.

1(k) Original digital files of each of the photographs produced to the Plaintiff on 30 March 2022 and contained in the Defendants List of Documents at number 28 (the "Photographs")

4 The Defendants provide descriptions of the below documents with particularity sufficient to identify them as follows:

(c) Descriptions of each of the Photographs, including the date these Photographs were taken and the purpose for which they were taken.

40. Mr. Elkinson submitted that the Defendants had clearly thought that the Photographs were relevant to this matter, but they failed to provide any meaningful descriptions including

when they were taken, where they were taken and the date they were taken. He referred to RSC Order 24, rule 5 which requires the documents to be enumerated with a description. He noted that Counsel for the Defendants had offered electronic copies which would show some information in the metadata for each photograph. The Plaintiff has now accepted such offer but argued that the Plaintiff still requires a list of the Photographs and description. Mr. Elkinson referred to the case of *Sveriges Angfartygs Assurans Forening v The 1976 Eagle insurance Company SA and others* [1990] Lexis Citation 1487 where it was stated by Hobhouse J that the rules require the party giving discovery to itemize the individual documents with some description, however brief, of the document. He added that the obligation is qualified by a limited exception regarding documents of the same nature which may be disclosed by a bundle.

41. Mr. Robinson submitted that the Defendants have offered to provide the electronic copies of the Photographs which would show the metadata behind each photograph, namely the date and time the Photographs were taken. In respect of the descriptions of the Photographs, Mr. Robinson submitted that there exists no legal basis upon which the Plaintiff can seek additional descriptions of documents. Also, there is no further obligation on the Defendants and the Plaintiff failed to articulate the legal basis for its application.
42. In my view, I anticipate that the Photographs will be relevant in any trial of the matter, even before the trial they may be of some importance to the experts. There should be a description of each picture with details including on what part of which property it was taken and what it is showing. Having reviewed some pictures briefly in the hearing of this matter, it is not clear where the picture was taken or what was the focal point of the picture. In my view, pursuant to the RSC Order 24, rule 5 such information is required and will be useful to all parties and to the Court.

2 The Defendants file and serve an affidavit verifying the List of Documents referred to in paragraph within 21 days

43. In light of the circumstances as set out above, I grant the application for the Defendants to file and serve an affidavit verifying the List of Documents within 21 days of the date of this Ruling.

3 The Defendants produce to the Plaintiff the documents described in paragraph 1 which are in their possession, custody or power within 21 days

44. In light of the circumstances as set out above, I grant the application for the Defendants to produce to the Plaintiff the documents I order to be disclosed within 21 days of the date of this Ruling.

Conclusion

45. For the reasons asset out above, I grant the Plaintiff's application for disclosure of documents in part as follows:

- a. 1(a) -The Deed Pack for 13 Inglewood Lane;
- b. 1(c) - The Defendants should be allowed to swap out the Clark & Doidge Plan in respect of 13 Inglewood Lane disclosed in error and replace it with the correct one;
- c. 1(e) – The invoices for the materials used for the Patio Retaining Wall;
- d. 1(f) – The Planning Department's Enforcement Notices/Issues/orders in respect of 13 Inglewood Lane, Paget and related correspondence;
- e. 1(j), 4(a) and 4(b) – The invoices to be further described as to whether they pertain to work performed on 13 Inglewood Lane or 17 Inglewood Lane;
- f. 1(k), 4 – The Photographs to be further described with the location of the picture and what is the focal point of the picture;
- g. The Defendants to file and serve an affidavit verifying the List of Documents within 21 days of the date of this Ruling; and
- h. The Defendants to produce to the Plaintiff the documents I ordered to be disclosed within 21 days of the date of this Ruling.

46. 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 costs in respect of the Plaintiff's Discovery Summons

dated 26 August 2022 shall follow the event in favour of the Plaintiff against the Defendants on a standard basis, to be taxed by the Registrar if not agreed.

Dated 18 November 2022



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