In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2015: No. 203

BETWEEN:

(1) GRAHAM JACK
(2) SUSAN ARMSTRONG

Plaintiffs

-v-

THE MINISTER OF PUBLIC WORKS

Defendant

RULING

(in Chambers)

Summary judgment- admissions- application to remove counsel as a potential witness- overriding objective-duty to conduct litigation in a proportionate manner-Court's duty to ensure parties are on an equal footing

Date of hearing: November 21, 2016 and November 25, 2016

Date of Ruling: December 13, 2016

Mr. Alex Potts, Sedgwick Chudleigh Ltd., for the Plaintiffs
Mr. Norman MacDonald, Attorney-General's Chambers, for the Defendant (the "Minister")

Introductory

1. The Plaintiffs issued a Specially Endorsed Writ of Summons on May 14, 2015. They jointly own a property known as 'Banstead' ("the Property") which adjoins a portion of the Botanical Gardens for which the Defendant on July 4, 2012 obtained planning permission from the Development Applications Board ("DAB") to develop as an 'industrial' base for the Department of Parks ("the Site"). The Plaintiffs unsuccessfully objected to the grant of planning permission. Since then, they took various steps directed primarily at ensuring that developments at the Site complied with the conditions subject to which the planning permission was granted. In their present claim, they allege that the development activities at the Site constitute a nuisance and/or are unlawful.

2. In their Statement of Claim they make the following averment:

> "*18. Further and in any event, the Minister did not, so far as the Plaintiffs are aware, comply with section 4 of the Bermuda National Parks Act 1986 by publishing notice in the Gazette of his Ministry's proposal for the construction of buildings or the change of use with respect to the Site so as to give an opportunity for and so as to take into account public comments before acting on such proposal. The Plaintiffs believe that, had such notice been given, the general public would have opposed the proposal…*
>
> *25. Further or alternatively, the acts that have taken place at the Site between July 2012 and 5 July 2014, and which are continuing, are unlawful, being in breach of the Bermuda National Parks Act 1986 and/or the Bermuda National Parks Regulations 1988 and/or the Conditions and/or the 2008 Bermuda Plan, including the various provisions cited above.*" [Emphasis added]

3. In his Amended Defence, the Defendant makes the following responsive plea:

> "*47. Paragraph 25 of the Statement of Claim does not indicate or refer to any specific acts that are alleged to have taken place at the Site between July 2012 and July 5, 2014 therefore the Defendant is not able to admit or deny that such alleged acts are continuing and unlawful as alleged in paragraph 25 of the Statement of Claim. In any event the Defendant asserts that none of its acts at the Maintenance Yard are unlawful as alleged in paragraph 25 of the Statement of Claim or at all.*"

4. The Plaintiffs' case that section 4 of the Bermuda National Parks Act 1986 ("the 1986 Act") had been breached was first fleshed out in their interim injunction application which was granted by Order dated November 27, 2015 ("the Interim Injunction"). In paragraphs 19 and 21 of my August 28, 2015 Ruling on this application and the Defendants' strike-out application[1], I described the point as an "*argument which appeared on its face to have considerable merit, assuming it was competent for the Plaintiffs to advance it… There is no suggestion in the evidence at this juncture that these statutory requirements were met*".

5. I declined to decide the "complicated" issue of whether the Plaintiff lacked standing to seek relief in relation to the non-compliance at the strike-out stage (paragraph 31). This was in part to permit the Minister responsible for Planning to decide whether or not he wished to be separately represented before the Court, in part to permit the evidential position to be explored and in part because I felt the standing objection raised by the Defendant, although doubtful, required fuller argument. The Minister responsible for Planning subsequently agreed to be bound by any Orders made in these proceedings.

6. The first of the two Summonses under present consideration was issued by the Plaintiffs on April 20, 2016 seeking by way of substantive relief an Order that:

> "*1. There be judgment for the Plaintiffs against the Defendant under RSC Order 27, rule 3, and/or under RSC Order 14, rule 1, on the Defendant's attorneys' letter dated 11 March 2016, that the Defendant has breached section 4 of the Bermuda National Parks Act 1986 with respect to the Defendant's development activities at the Site, as alleged at paragraphs 18 and 25 of the Plaintiff's Statement of Claim.*
>
> *2. On the basis of the admissions and judgment referred to above, the Court shall make a final declaration that the Defendant's activities at the Site are, and have to date been, unlawful (as claimed at paragraph (2) of the Prayer of the Plaintiff's Statement of Claim), and the Court shall issue a permanent injunction restraining the Defendant from continuing with unlawful development activities at the Site.*"

7. Directions were ordered on April 21, 2016[2] for the Plaintiffs to file their evidence by May 12, 2016 and for the Defendant to file his evidence by June 16, 2016 and for the Plaintiff to file any evidence in reply by June 30, 2016. The Plaintiffs' Summons was directed to be listed for hearing after July 7, 2016. These directions anticipated the Plaintiffs' reply evidence being filed as little as one week before the hearing of their Summons. The April 21 Order also resolved the Defendant's Summons dated April

[1] [2015] Bda LR 82.

[2] Although the Court's resolution of a dispute on the form of the Order was communicated to the parties by letter dated May 18, 2016, an engrossed copy of the final version of that Order does not appear on the Court file.

18, 2016 seeking to vary the November 27, 2015 interim Injunction granted to the Plaintiffs by directing that:

> "*5. For the avoidance of doubt, the Defendant's proposal to conduct public* [consultations] *at 169 South Road, the Site and/or such other venues as the Defendant deems appropriate, pursuant to section 4 of the Bermuda National Parks Act 1986 is not prohibited by this Court's injunction order of November 2015.*"

8. The Third Affidavit of Graham Jack was sworn on May 10, 2016 in support of the Plaintiff's Summons. The Affidavits of Aideen Ratteray Pryse (Director of Planning) and Craig Burt (Parks Officer) were sworn on June 16, 2016 in answer. The Defendant also relied on the witness statement of Lisa Dawn Johnston dated May 4, 2016. On June 21, 2016 the Court issued a Notice of Hearing for November 21, 2016. The Plaintiffs' reply evidence was sworn (Fourth Affidavit of Graham Jack) on September 8, 2016. This was more than two months after the prescribed deadline but more than two months before the fixed hearing date. The Fifth Affidavit of Graham Jack was sworn on November 15, 2016 to update the Court on the public consultation foreshadowed by the Defendant in April 2016 but which actually commenced on or about November 9, 2016.

9. By a Summons issued on November 16 (but filed on November 9), 2016, the Defendant applied for an Order:

> "*1. Removing Alex Potts and Sedgwick Chudleigh as counsel of record for the Plaintiffs, or alternatively, prohibiting them from appearing as counsel on the Plaintiff's application for summary judgment currently scheduled for November 21, 2016 and requiring the Plaintiffs to retain other counsel on that Application;*
>
> *2. Striking out the 'Jack Affidavits…'…;*
>
> *3. Vacating the interlocutory injunction granted on November 27, 2015 and requiring the Plaintiffs to return the $30,000.00 paid to them by the Defendant pursuant to that order…*"

10. I adjourned the Defendant's application to discharge the Interim Injunction to a date to be fixed for case management reasons. I indicated that I would decide on whether the Jack affidavits should be struck out together with the Plaintiff's summary judgment application. I dismissed the Defendant's application to remove the Plaintiffs' attorneys and indicated that I would give reasons for that decision in the present Judgment.

Reasons for refusing the application for an Order removing the Plaintiffs' attorneys from the record

11. I characterised the Defendant's application to remove the Plaintiffs' attorneys in the course of the hearing as "scorched earth tactics" and queried whether it was appropriate for counsel for the Crown to conduct litigation in such a manner. This was merely reformulating similar criticisms I had made in an unrelated judgment handed down seven days earlier at a point in time when, it must be admitted, the present application had already been filed. The grounds of the Defendant's application as set out in his Summons was as follows:

> "*1.1 The opinions and beliefs expressed in the Jack Affidavits are those of the Plaintiffs' counsel, Alex Potts and Sedgwick Chudleigh, and therefore they are acting as both witness and advocate contrary to the common law rule that a barrister may not act as a witness and advocate and contrary to Rules 29 and 55 of the Barrister's Code of Professional Conduct 1981.*"

12. On a superficial analysis, this appeared to be the sort of argument that could not easily be advanced with a straight face. The conventional view of the governing Bermudian rules is that a barrister must simply avoid swearing affidavits on contentious factual matters and avoid appearing in a case where he is otherwise likely to be a witness to facts relevant to the merits of a claim. The matters complained of here did not remotely appear to infringe these well-known prohibitions. The complaints were based on the following averments:

    (a) Third Jack (paragraph 6): "*I understand that there may be a dispute between the parties as to the true meaning and effect of this correspondence, but I am advised, and I believe, that by the Attorney-General's Chambers letter dated 11 March 2016, the Defendant was expressly admitting, and intending to admit, that the development activities at the Site had been commenced and carried on in breach of section 4 of the Bermuda National Parks Act 1986, i.e. unlawfully*";

    (b) Fourth Jack (paragraph 19): "…*For the avoidance of doubt, I would also make clear that my reference, at paragraph 6 of my Third Affidavit, was intended to be a reference (without waiving legal professional privilege) to advice and information received from our Bermuda lawyers, Sedgwick Chudleigh Ltd. (as I assumed would have been obvious from the context)"*.

13. These were nothing more than formal averments supporting an application that turned on a question of law (the construction of a document) to the effect that the deponent's lawyer had advised him that the application for summary judgment had legal merit. One may quibble about whether such averments are strictly necessary (or even appropriate) in evidential terms, but affidavits in interlocutory applications have for years served the practical function of pleadings in Bermudian civil litigation. There is a settled practice of deponents supporting the legal (as opposed to factual) validity of an application by reference to advice received from counsel. Opposing parties can

hardly complain of being prejudiced by being informed of the legal basis of the case they have to meet. The suggestion that the Defendant might need to cross-examine counsel about the contents of his advice was preposterous because it related to a matter of law: whether or not statements made in correspondence amounted to an admission. No arguable breach of the following rules was established on the face of the Jack Affidavits:

> "*29. (1) A barrister shall not appear as counsel in a matter in which he is likely to be a necessary witness unless—*
>
> *(a) the testimony relates to an uncontested issue; or*
>
> *(b) the testimony relates to the nature or value of legal services rendered; or*
>
> *(c) the Bar Council, being satisfied that his not appearing would work a substantial hardship on the client, gives its prior approval for him so to appear.*
>
> *(2) A barrister may properly appear as counsel in a matter in which a partner or employee or employer of his, or a registered associate employed in a practice to which they both belong, is likely to be called as a witness, unless his so appearing would involve a breach of some other provision of this Code…*
>
> *55. A barrister shall not in any proceedings in which he is appearing as an advocate express his personal opinion or beliefs as to facts or suggest as a fact anything of which there is no evidence before the court.*"

14. Mr MacDonald insisted that persuasive English and Canadian authorities supported what I regarded as the novel proposition that a reference by a client deponent to advice on the legal merits of an application received from his lawyer converted the lawyer into a witness as to material facts. The true legal position demonstrated by the authorities was clearly, and unsurprisingly, substantially the same as the Bermudian law position:

- *R-v-Secretary of State for India in Council, Ex parte Ezekiel* [1941] 2 All ER 546: a litigant's foreign lawyer is not competent to give expert evidence as to foreign law;
- *Imperial Oil Ltd.-v- Gabarchuk*, 1974 CanLII (ON CA): a lawyer who was a deponent at first instance may not argue an appeal;
- *International Business Machines Corp.-v- Printech Ribbons Inc.* [1994] 1 FCR 692: a firm could not act in a matter where one of its lawyers swore an affidavit on the merits in a trade mark dispute;

- *GMAC Leaseco Limited-v-1348259 Ontario Inc, Ontario Superior Court of Justice, January 21, 2004 (unreported): "There is little doubt that if counsel is found to be a witness on contentious issues-whether directly…or indirectly through another person's affidavit via information and belief-counsel cannot argue the motion*";

- *Cross Canada Auto Body Supply (Windsor) Ltd-v-Hyundai Auto Canada*, 2005 FC 1254: solicitors in a trade mark dispute were removed from the record where an articling student attached to a party's firm of solicitors swore an affidavit containing "*a significant amount of substantive information with respect to the matters in issue*";

- '*Ontario Superior Court Practice 2012*' (Rule 39.01):

  "*The rule that the deponent of an affidavit cannot act as counsel in the same matter also applies to a lawyer who is the source of the information relied on by the deponent of an affidavit in support of a motion. The lawyer cannot act as counsel on that motion*". There was no suggestion that this principle applied to information from a lawyer about the legal merits of an application supported by a legal argument.

15. I accordingly had little difficulty in concluding that the application to remove the Plaintiffs' attorneys was wholly unmeritorious and could only have been advanced for tactical ends, most obviously putting off the 'evil day' when their summary judgment application could be fully heard. Mr Potts fairly complained that this attack was unreasonable and came to Court prepared to substantiate my own disapproval of overly aggressive litigating on the part of a Government litigant by reference to the following dictum of Borins J in *Everingham-v-Ontario* 1991 Can LII 8322(ON SC):

"*[10] Although the Rules of Professional Conduct of the Law Society of Upper Canada must necessarily apply to all lawyers, it is my view that one who is a lawyer employed by the government must be particularly sensitive to the rules which govern his or her professional conduct. Such lawyer may be said to have a higher obligation than lawyers generally. The government lawyer, to use the expression employed by counsel, is usually one who is a principal legal officer of a department, ministry, agency or other legal entity of the government, or a member of the legal staff of the department, ministry, agency or entity. This lawyer assumes a public trust because the government, in all of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the applicable laws and regulations and the Charter of Rights. While the private lawyer represents the client's personal or private interest, the government lawyer represents the public*

interest. Although it may not be accurate to suggest the public is the client of the government lawyer as the client concept is generally understood, the government lawyer is required to observe in the performance of his or her professional responsibility the public interest sought to be served by the government department, ministry or agency of which he or she is a party. That is why I believe there is a special responsibility on the part of government lawyers to be particularly sensitive to the rules of professional conduct, a responsibility which, regrettably, Mr. Wickett overlooked in this case."

16. No question of breach of professional rules on the part of Crown Counsel arises in the present case. In a general way, though, these judicial observations indirectly supported my intuitive view that litigation brought or defended on behalf of the Crown should generally be conducted with a slightly higher degree of restraint than would be expected of the ordinary private litigant. And this view affords a very generous margin of appreciation for differences in temperament and advocacy style. It may well be that the notion that the Crown only litigates seriously arguable points in the public interest and does not pursue hopeless arguments belongs to a bygone era[3].

17. But I had little doubt that our very modern 21st century rules require all civil litigants to conduct civil proceedings in a proportionate manner. Litigating on behalf of the Crown in a proportionate manner is particularly important where, as was the case here, the playing field between the State and the private litigant is not a level one. Order 1A of this Court's Rules not only first and foremost requires this Court to ensure that "*the parties are on an equal footing*" (rule 1(2)(a)). Order 1A/3 provides: "*The parties are required to help the court to further the overriding objective.*"

18. Although I reserved costs until after delivering my reasons, it was or ought to have been obvious that serious costs sanctions were on the cards. My provisional view was and is that the costs related to this application are to be awarded to the Plaintiffs to be taxed if not agreed on an indemnity basis and payable forthwith.

Application to strike-out the Fourth and Fifth Jack Affidavits

19. The Defendant's counsel complained that the Plaintiffs' counsel had assumed the right to ignore this Court's Orders and that the Jack Affidavits should be struck-out because they were filed late. The Fourth Affidavit was originally due to be filed in late June on the assumption that the Plaintiffs' Summons would be heard in July. Before it fell due the hearing was fixed for late November. It was sworn (and apparently served) far longer in advance of the hearing than the original directions contemplated.

20. Acting reasonably and assisting the Court to achieve the overriding objective, the Defendant had no basis for complaining about a wholly technical failure to comply

[3] The fact that the specific holding at first instance in *Everingham* that differential standards of professional conduct apply for Crown attorneys was disapproved on appeal (*Everingham-v-Ontario* [1992] 8 O.R. (3d) 121) is wholly immaterial to my operative finding of a breach by the Defendant of Order 1A of this Court's Rules. I reached no concluded view on whether higher litigation conduct standards apply to the Crown as a matter of Bermudian law, despite leaning to the view that this ought to be the position. The Defendant's invitation that I reconsider these 'findings' advanced upon receipt of a draft of this Ruling is based on a misapprehension of my actual findings and is accordingly declined.

with a directions timetable that had for all material purposes lapsed. The Fifth Affidavit filed uncontroversial updating information relating to the Defendant's own consultation exercise to which no response was required. No valid grounds were advanced for excluding this evidence. For the avoidance of doubt I grant leave to rely on those Affidavits and dismiss this limb of the Defendant's application.

21. It is convenient to deal at this point with an ancillary objection raised to the Third and Fourth Jack Affidavits. Mr MacDonald relied on the following statement found in the '*Ontario Superior Court Practice 2012*' (Rule 39.01):

> "*Rules 39.01 (5) and 20.2 effectively preclude affidavits on information and belief in respect to contested facts, on the rationale that the person who provided the information to the deponent is shielded from cross-examination.*"

22. This Ontario statement of principle simply does not reflect the Bermudian law position[4]. The best persuasive authority for construing Bermuda's Rules is English commentary on the English Rules which are the source of the entire local procedural scheme. Of course the starting point is to consider what the Bermudian Rules themselves provide. Our own summary judgment rule (Order 14) is substantially based on the English pre-CPR Order 14. Order 14 rule 1 permits the making of an application for summary judgment "*on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed*". Order 14 rule 2 provides:

> "*(1) An application under rule 1 must be made by summons supported by an affidavit verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.*"

23. Paragraph 14/1/8 of the English Supreme Court Practice 1999 states:

> "*This rule does not confer a right upon a plaintiff to proceed under O.14 in every case…but only 'on the ground that the defendant has no defence' to a particular claim or part of a claim. This summary process, therefore,*

[4] The Defendant's counsel invited the Court, in commenting on a draft of this Ruling, to reconsider the refusal to strike-out the Jack Affidavits in light of two authorities I did not expressly advert to. These were plainly irrelevant to an argument which completely ignores the express terms of the governing provisions of this Court's Rules. The first case, *In re J.L. Young Manufacturing Company, Limited* [1900] 2 Ch 753 was based on a provision in the English Rules of the Supreme Court 1887 which is no longer in force in England and Wales, let alone Bermuda. The second case, *Rossage-v-Rossage* [1960] 1 WLR 249, was irrelevant for two reasons. Firstly it did not deal explicitly with Order 14 at all and pre-dated the 1962 version of Order 14 rule 2 upon which the current Bermudian rule is based. This 1962 vintage version of Order 14 rule 2(2) explicitly permitted affidavits based on information and belief: see discussion at paragraph 14/2/8 of *Supreme Court Practice 1999*. Secondly, the affidavits in *Rossage* were primarily struck out because they contained scandalous and irrelevant matter.

should only be used in proper cases. And should not be employed for tactical purposes…This is all the more important, now that the affidavit of the plaintiff can be made on statements of information and belief."

24. A summary judgment application may be supported by an affidavit making contested factual averments based on information and belief because Order 41 ("*AFFIDAVITS*") rule 5 expressly provides:

> "(2) *An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.*"

25. Where the application is based on a legal argument (such as whether a document should be construed as an admission) the Rules (by necessary implication) positively require the deponent supporting the application to state that, based on legal advice (unless the deponent is himself a lawyer), the deponent believes there is no defence to the claim. The objections raised to the reliance placed in the Jack Affidavits on legal advice as the source of information for the deponent's belief that no legal defence existed were wholly misconceived.

Summary Judgment application

Governing legal principles

26. The legal principles governing summary judgment applications are concisely set out in Hellman J's judgment in *Mehta and MFP-2000 LP-v-Viking River Cruises Ltd* [2014] Bda LR 99 which Mr Potts placed before the Court. I am guided by the following passages in that judgment upon which the Plaintiffs' counsel relied:

> "*15. The provisions of RSC Order 14 are well known. Where a statement of claim has been served on a defendant and the defendant has entered an appearance in the action, a plaintiff may apply for judgment on the ground that the defendant has no defence to all or part of a claim included in the writ. A defendant may show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the Court. What the defendant must show is that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of all or part of that claim. The Court may give the defendant leave to defend all or part of the action either unconditionally or on such terms as it thinks fit.*
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> *16. As the commentary to the 1999 edition of the White Book states at 14/4/9:*
>
> *'The power to give summary judgment under Ord. 14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay" (Jones v Stone [1894] AC 122). As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona*

fide defence, he ought to have leave to defend (Saw v Hakim (1889) 5 TLR 72 ; Ironclad, etc v Gardner (1892) 4 TLR 18 ; Ward v Plumbley (1890) 6 TLR 198; Yorkshire Banking Co v Beatson (1879) 4 CPD 213 ; Ray v Barker (1879) 4 Ex D 279).

Leave to defend must be given unless it is clear that there is no real substantial question to be tried (Codd v Delap (1905) 92 LT 519 , HL); that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment (Jones v Stone [1894] AC 122 ; Thompson v Marshall (1880) 41 LT 729 , CA; Jacobs v Booth's Distillery Co (1901) 85 LT 262 , HL; Lindsay v Martin (1889) 5 TLR 322)…

18. It has been said that leave to defend should be given where a difficult question of law is raised. See Campbell v Vickers [2002] Bda LR 3, SC, per Meerabux J at page 3, citing Electric Corporation v Thompson-Houston 10 TLR 103. On the other hand, there will be cases where the Court has heard full argument on the question and where the facts necessary to resolve it are not in dispute. In such cases, if there is no reasonable doubt that the question should be resolved in favour of the plaintiff, who would in that event be entitled to judgment, then, absent a compelling reason to the contrary, the Court should in my judgment grasp the nettle and decide the question at the summary judgment stage."

The evidence

27. By an open letter dated March 11, 2016, the Attorney-General's Chambers wrote Sedgwick Chudleigh Ltd. as follows:

> "*The Defendant is prepared to concede that the Defendant did not strictly comply with section 4 of the Bermuda National Parks Act 1986 as alleged in the Statement of Claim and wishes to publish the Defendant's proposal with respect to the Site and hold public consultations before acting on the proposal, pursuant to section 4 of the Act. We are writing to request the Plaintiff's consent to an order varying the temporary injunction for the purpose of permitting the Defendant to publish any proposal with respect to the Site and hold public consultations…*
>
> *We enclose the Defendant's offer to settle this issue.*"

28. The final paragraph of the 'OFFER TO SETTLE' document, which was designed to procure the Plaintiffs' consent to a variation of the Interim Injunction on terms that each side would bear its own costs, stated: "*This offer to settle is made without prejudice save as to costs.*" This correspondence was somewhat ambiguous and was reasonably open to one of two possible interpretations. The first and more straightforward reading was that an open admission was being made that section 4 of the 1981 Act had not been complied with but a without prejudice offer was being made in relation to the variation application. The alternate and more convoluted interpretation was that the admission of non-compliance with section 4 was itself being made on a without prejudice basis and that the Defendant's counsel had omitted to mark the March 11, 2016 letter itself "WITHOUT PREJUDICE". With

consummate professional courtesy, the Plaintiffs' counsel sought to clarify the position by email dated Friday March 11, 2016:

> "*1. Your letter is not headed 'without prejudice' or 'without prejudice save as to costs', although there is a 'without prejudice save as to costs' reference in paragraph 6 of the 'Offer to Settle'. In the circumstances, please can you clarify whether the letter was intended to be sent on an open basis, on a 'without prejudice basis' basis, or on a 'without prejudice save as to costs' basis?*
>
> *2. Is there some legal distinction you have in mind between 'strict compliance' and 'compliance' with section 4 of the 1986 Act?*"

29. The Defendant's counsel responded by email sent on Monday March 14, 2016 embedding the answers to the two queries in the initial email as follows: "*1….**Open**…2…**No***"[5]. The Plaintiffs' counsel in subsequent correspondence then ambitiously sought to rely upon the express admission as embracing an implied admission that the development activities at the Site were unlawful, a contention which was robustly refuted. The issuing of the Defendant's April 18, 2016 Summons evincing an intention to pursue a section 4 consultation appeared to confirm the admission that section 4 had not been complied with in the past and that the only controversy was what legal consequences flowed from such non-compliance. The Plaintiffs' summary judgment application sought both summary judgment based on the admissions and a declaration that the development activities at the Site had been unlawful.

30. The Third Jack Affidavit relied on the admission contained in the March 11 and 14, 2016 correspondence and complained about "*Other acts of unlawfulness*". The Ratteray Pryse Affidavit sworn in response most importantly disputes that the concession that section 4 had not been complied with included the related concession that development activities had been unlawful as a result. A positive case is asserted (in particular in paragraph 12) that those activities were lawful because planning approval had been obtained and the National Parks Commission had been consulted and had not objected. This was, generously read, essentially an attempt to provide the factual basis for the same legal argument which Mr MacDonald rightly reminded me I had declined to determine summarily at the Interim Injunction stage. Namely, the Plaintiffs could not complain of or impugn the invalidity of the activities at the Site based on non-compliance with the 1981 Act because they could and ought to have raised this complaint as part of their objections to the application under the Development and Planning Act 1974.

31. The Burt Affidavit advanced the further argument to the effect that <u>in fact</u> section 4 had been complied with because a consultation had taken place in relation to similar plans in 2003 and a section 4 notice had been re-advertised out of an abundance of caution in January 2012. These assertions were not supported by the exhibits relied upon as demonstrating their accuracy. Firstly, the 2003 consultation as advertised

[5] This answer to my mind makes it impossible to sensibly argue that the Offer to Settle Document retained any privilege and ought not to have been exhibited to the Third Jack Affidavit. This is why I summarily reject the application to strike-out that Affidavit on breach of privilege grounds.

related to a Management Plan (governed by section 11 of the 1981 Act) and made no mention of section 4 at all. Secondly, the January 2012 advertisement was a standard planning notice which made no mention of the 1981 Act, let alone section 4, at all. Any remaining chimera of credulity which might have attached to the notion that section 4 had in fact been complied with despite any contrary admission completely evaporated with the advertisement of a section 4 consultation in relation to the Site in the Royal Gazette for November 9, 2016.

The alleged admissions

32. The March 11-24, 2016 correspondence clearly evidences an admission that the Defendant failed to comply with section 4 of the 1981 Act before commencing development activities at the Site in or about 2012.

33. The only arguable controversy was whether that admission included, by necessary implication, the further admission that development activities were unlawful. That is not a reasonable construction to place on the correspondence in the wider context of the way the case had been pleaded and argued before the express admission was made. Mr MacDonald was, in my view, very properly conceding a hopeless point, without abandoning the major plank of the Defendant's responsive case on this issue, namely that any non-compliance did not matter because, *inter alia*, the regime under the Development and Planning Act 1974 was an overlapping legal regime which provided the Plaintiff with adequate means of redress which they had now exhausted as regards the section 4 of the 1981 Act issue. He unreservedly confirmed the narrow admission made on March 11, 2016 on March 14, 2016 when first afforded an opportunity to do so. The Defendant's counsel responded quite vigorously to the later over-reaching suggestion that this discrete concession embraced a wider consequential concession. It is not possible to infer the wider admission Mr Potts contended for.

Summary

34. The Plaintiffs are entitled to summary judgment substantially in terms of paragraph 1 of their April 20, 2016 Summons. Their ancillary application for the relief set out in paragraph 2 of that Summons is refused. There is reasonable doubt at this stage as to whether that secondary issue should be resolved in the Plaintiffs' favour. The question of whether non-compliance with the Act results in any subsequent development activities being unlawful requires analysis in light of (a) contested evidence as to whether or not the Plaintiff's participation in the Planning process debars them from impugning the validity of work carried out at the Site, and (b) fuller argument on the construction of statutory provisions, the meaning of which is not clearly illuminated by persuasive authority.

Conclusion

35. I shall hear counsel if required on a date to be fixed by the Registrar on the terms of the final Order and as to the costs of the respective Summonses dealt with in this Ruling.

Dated this 13th day of December, 2016 _____
IAN R C KAWALEY CJ