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In The Supreme Court of Bermuda

CIVIL JURISDICTION
2013: No. 126

BETWEEN:-

MICHAEL PEARMAN

Plaintiff

-and-

(1) TERRY FRAY
(2) KENDAREE FRAY

Defendants

RULING

(In Chambers)

Date of hearing: 1st May 2015
Date of ruling: 8th June 2015

Ms Lauren Sadler-Best, Trott & Duncan, for the Plaintiff
Mr Martin L Johnson, Barrister and Attorney, for the Defendants

Introduction

1. By a specially indorsed writ of summons filed on 16th April 2013 the Plaintiff seeks *inter alia* a declaration that he has a right of way over a

private road known as Chapel of Ease Lane in St David's for the purpose of accessing his property known as "The Narrows" from the public highway. He also seeks damages and a declaration that the Defendants have no *locus standi* to oppose his right of way. In fact the dispute centres on another private road, which is marked on the various plans adduced in evidence as "The Roadway". Chapel of Ease Lane connects the Roadway to the public highway. The Roadway may in fact be part of Chapel of Ease Lane, but to avoid confusion I shall refer to them separately.

2. Additionally, the Plaintiff seeks a permanent injunction prohibiting the Defendants from obstructing the Roadway in an attempt to prevent him from using it. On 14th December 2014 the Court granted an interim injunction in those terms, the Defendants having breached an undertaking given on 9th May 2013 by their then attorney to Kawaley CJ not to obstruct the Roadway.

3. The Roadway runs past an adjacent property known as 19 Chapel of Ease Lane ("No 19"). The property was previously owned and occupied by both Defendants. However, by a defence filed on 21st October 2014, the First Defendant avers that on 1st July 2014 he transferred his entire interest in No 19 to the Second Defendant as part of a final divorce settlement. He has not played an active role in the proceedings.

4. By a defence and counterclaim filed on 16th August 2014 (this action has not proceeded expeditiously) the Second Defendant denies that the Plaintiff has a right of way over the Roadway and counterclaims for a declaration that he does not. It is not disputed that the Second Defendant has a right of way over the Roadway, at least insofar as is necessary for her to access No 19.

5. The Plaintiff served a reply and defence to counterclaim on 6th October 2014.

6. By a summons dated 14th October 2014 the Second Defendant seeks an order *inter alia*:

"*… to strike out the Plaintiff's Writ of Summons and Statement of Claim as disclosing no cause of action or no reasonable cause of action under O.18 rule 19(1)(a)(b)(d) of Rules of the Supreme Court 1985 and inherent Jurisdiction of the Court*

An order for Summary Judgment for the Counter Claim (Order 14)."

7. If successful, the Second Defendant seeks an injunction prohibiting the Plaintiff from using the Roadway and an enquiry into damages.

The Law

Strike out

8. Order 18, rule 19(1) of the Rules of the Supreme Court 1985 ("RSC") provides that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of the writ in the action, or anything in any pleading or in the indorsement, on the ground that:

   (a) it discloses no reasonable cause of action …

   (c) it may prejudice, embarrass or delay the fair trial of the action; or

   (d) it is otherwise an abuse of the process of the court;

   and that the Court may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

9. The wording in the summons is therefore confused in that an application to strike out a pleading or indorsement only arises under rule 19(1)(a) and not under rules 19(1)(c) or (d). An application to strike out the statement of claim under rules 19(1)(c) or (d) was not in fact pursued.

10. RSC Order 18, rule 19(2) provides that on an application under rule 19(1)(a) no evidence shall be admissible, although it is admissible where the inherent jurisdiction of the Court is invoked. However if the claim under the Court's inherent jurisdiction is merely duplicative of the claim under rule 19(1)(a) evidence is unlikely to be of assistance. Moreover, if the Court's inherent

jurisdiction is relied upon solely in an attempt to circumvent rule 19(2), any such reliance would likely be an abuse of process.

11. As the commentary to the 1999 edition of the White Book states at 18/19/10:

> "*A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1096, CA). So long as the statement of claim or the particulars (Davey v. Bentinck [1893] 1 Q.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v. Lawson (1915) 31 T.L.R. 418, CA; Wenlock v. Moloney [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871, CA): ...*"

12. Moreover, as the commentary states at 18/19/1:

> "*Not every writ or pleading which offends against the rules will be subjected to sanctions. An applicant must show that he is in some way prejudiced by the breach, for example on the basis that 'a defendant may claim ex debito justitiae to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it' (per James L.J. in Davy v. Garrett (1878) 7 Ch.D. 473 at 486).*"

Summary judgment

13. RSC Order 14, rule 5 provides that where a defendant to an action begun by writ has served a counterclaim on the plaintiff, then, subject to certain exceptions which do not apply to this case, the defendant may, on the ground that the plaintiff has no defence to a claim made in the counterclaim, or to a particular part of such a claim, apply to the Court for judgment against the plaintiff on that claim or part.

14. 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.

15. 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)."

16. A defendant may show cause "*by affidavit or otherwise*". But where the defendant seeks to set up a defence on the facts then, save in exceptional or obvious cases, the Court will generally require an affidavit before being satisfied that he should have leave to defend. See the commentary to the 1999 edition of the White Book at 14/4/4. As that commentary states at 14/4/5:

"*The defendant's affidavit must 'condescend upon particulars,' and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied upon to support it.*"

Factual background

17. Before considering the summons, it will be helpful to explain the background to the dispute. This is most conveniently done by reference to the plan exhibited to this ruling.

18. At the top of the plan is a large parcel of land marked in the name of Charles Theophilus Taylor ("Mr Taylor"). This is "The Narrows". Adjacent to the

southern boundary of "The Narrows" is a plot of land marked "C". This is now No 19. Adjacent to the southern boundary of "C" is a plot of land marked "B", and adjacent to the southern boundary of "B" is a plot of land marked "A". Formerly, "The Narrows" and plots A, B and C were all owned by Mr Taylor, who was the Plaintiff's uncle. He purchased "The Narrows" in 1959. I have no information as to when he purchased plots A, B and C.

19. The Roadway runs from the southern boundary of "The Narrows" along the western boundaries of plots C and B down to the northern boundary of plot A. Another private roadway intersects the Roadway to the east, opposite plot B. This is Chapel of Ease Lane. The plan shows that Chapel of Ease Lane and the Roadway are the sole means of accessing plots A, B and C from the public highway. Access from the public highway to "The Narrows" is provided by both the Roadway and another private road that runs along the north-west boundary of the property. The access arrangements shown on the plan remain in force today. The disputed portion of the Roadway is marked in yellow.

20. By an indenture dated 7th January 1961, Mr Taylor conveyed plot C to a third party named Edward Richards ("Mr Richards") and his heirs:

> "[*1] …TOGETHER WITH all houses buildings fixtures ways rights of way rights liberties privileges easements advantages and appurtenances whatsoever to the said lot of land belonging to or in anywise appertaining or usually held or enjoyed therewith or reputed as part thereof or appurtenant thereto*
>
> *[2] AND ESPECIALLY TOGETHER WITH full free and unrestricted right and liberty of way and passage … OVER AND ALONG the roadway … coloured yellow on the said plan [including the entirety of the Roadway] …*
>
> *[3] AND ALL THE ESTATE right title interest claim and demand whatsoever of the said Charles Theophilus Taylor in to and upon the same and every part thereof*
>
> *[4] TO HAVE AND TO HOLD the hereditaments and premises hereby appointed granted and released or expressed to be so unto the said Edward Trenton Richards and his heirs to the uses hereinafter declared concerning the same …*"

I have broken the text into numbered paragraphs for ease of reference.

21. By an indenture dated 2nd October 1964, Mr Taylor conveyed plots A and B into the joint names of Mr Trenton and one Leslie Wilson. It is unnecessary to follow theirs conveyancing history any further, other than to note that plots A, B and C are no longer in common ownership.

22. Plot C was conveyed to new owners in November 1993 and October 1995, and then to the Defendants on 25th June 2001. All three conveyances contained a clause analogous to paragraph [2] in the indenture of 7th January 1961. I have not seen a copy of the plans annexed to the November 1993 conveyance, but on the plan annexed to the October 1995 and June 20001 conveyances it is only the disputed portion of the Roadway which is coloured yellow. None of these three conveyances include equivalent provisions to paragraphs [3] and [4] of the 7th January 1961 indenture.

23. The Plaintiff purchased "The Narrows" from the estate of Mr Taylor in 2002. The "Property Description" annexed to the conveyance describes the property to be conveyed as including "*full free and unrestricted right of way and access*" over the private road that runs along its north-west boundary, but makes no mention of the Roadway.

Strike out

24. The Second Defendant applies to strike out the Plaintiff's claim that he has a right to use the Roadway to access "The Narrows".

25. The statement of claim lays the ground for the Plaintiff's claim by pleading at para 1 that he is and was at all material times in possession of the freehold interest in "The Narrows" and at para 3 that he and his predecessors in title have been in possession and occupation of that property since 27th April 1948. The claim is then articulated at para 4:

"*The Plaintiff and his predecessors in title have enjoyed [the Roadway]* ***as of right*** *and* ***without interruption*** *for the purpose of passing, repassing and generally accessing ['The Narrows'] by themselves, their servants and licensees on foot and with motor vehicles at*

other times and for all purposes. The Plaintiff claims the right to do so by virtue of this continued and uninterrupted use ***for in excess of 53 years****, since at least the year 1959 when ['The Narrows'] was acquired by the Plaintiff's uncle Charles Theophilus Taylor.*" [Emphasis added.]

26. The Plaintiff's claim is avowedly based on the doctrine of lost modern grant. The Second Defendant alleges that the elements of the claim have not been adequately pleaded.

27. It is common ground that, as the Court of Appeal acknowledged in Lathan v Darrell and Hill [1986] Bda LR 30 and Gleeson and Gleeson v Bell [1994] Bda LR 8, the doctrine of lost modern grant applies in Bermuda. Having reviewed these cases, Kawaley J (as he then was) summarised the doctrine thus in Bean and Smith v Frost [2006] Bda LR 87 at para 31:

"*So an easement such as a right of way over land may be acquired on proof of the following circumstances: (a) uninterrupted exercise of the right for more than 20 years, (b) exercise of the right of way as of right, which implies the absence of any evidence of either (i) it being impossible for the grantor to have expressly conferred a right of way, or (ii) an admission by the claimant that the grantor was entitled to grant a license during the period in question. Once these matters are proved, the law will presume that a right of way was granted expressly in a deed that has been lost.*"

28. In my judgment these elements are adequately pleaded at para 4 of the statement of claim, as is apparent from the highlighted wording in that paragraph.

29. However, they fall to be construed within the four requirements for any easement as stated by Lord Evershed, accepting the formulation in Cheshire's Modern Real Property, 7th Edition at 456 ff, in In Re Ellenborough Park [1956] Ch 131 EWCA at 163:

"*They are (1) there must be a dominant and a servient tenement [ie one piece of land that benefits from the easement and another piece of land that provides that benefit]: (2) an easement must 'accommodate' the dominant tenement [ie benefit the land and not merely the user]: (3) dominant and servient tenement owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject-matter of a grant.*" [Explanatory text in square brackets added.]

30. A more complete statement of requirement (3) would be that where the dominant and servient tenement owners are the same person the tenements must not have the same occupier. See, for example, the leading judgment of Lord Wilberforce in Sovmots Ltd v Environment Sec [1979] AC 144, HL, at 169 B – C:

> "*when land is under one ownership one cannot speak in any intelligible sense of rights, or privileges, or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner and, until a separation occurs, of ownership or at least of occupation, the condition for the existence of rights, etc., does not exist: see Bolton v. Bolton (1879) 11 Ch.D. 968 , 970* per *Fry J. and Long v. Gowlett [1923] 2 Ch. 177 , 189, 198, in my opinion a correct decision.*"

31. As to these requirements, (1), (2) and (4) follow from the facts pleaded in the statement of claim. However (3) does not necessarily follow and is not addressed. In my judgment, a proportionate response is to give the Plaintiff leave to amend the pleading to remedy this lacuna. I would expect the amended statement of claim to state that, if such is the Plaintiff's case, at all material times during the period relied upon to establish a lost modern grant "the Narrows" and the land over which the disputed portion of the Roadway runs were (as the case may be) in separate ownership or alternatively common ownership and separate occupation.

32. Any such amendment would have to be consistent with the Plaintiff's defence to counterclaim. This states at para 7:

> "*The Plaintiff further avers that the property belonging to the Plaintiff and that belonging to the Defendants, together with certain neighbouring properties, were part of a single tract of land then owned by Charles Theophilus Taylor who then subdivided the land, carving out [the Roadway] to access these properties.*"

33. Thus, assuming that the facts were as pleaded in the defence to counterclaim, the period of usage relied upon to establish a lost modern grant could not have commenced for so long as "The Narrows" and the land over which the disputed portion of the Roadway runs were in common ownership and occupation.

34. The manner in which the Plaintiff's claim for an easement by way of lost modern grant has been pleaded is in all other respects satisfactory. The application to strike out the statement of claim is therefore dismissed.

Summary judgment

Lost modern grant

35. The Second Defendant avers in her counterclaim that the Plaintiff does not have the benefit of an easement over the disputed portion of the Roadway. She alleges that when the Defendants purchased No 19 in 2001 the disputed portion of the Roadway was not accessible and (notwithstanding the plans annexed to the various conveyances) was not in fact a road or footpath but was covered with thick bushes. She further avers that in 2001 the Defendants hired a landscaper to clear the bushes. She alleges that after purchasing "The Narrows" the Plaintiff excavated the disputed portion of the Roadway to create a roadway to the property, and that prior to that time there was no vehicular access to his property via the Roadway.

36. The counterclaim is supported by affidavit evidence from the Second Defendant and witness statements from a number of neighbours. The burden of the neighbours' statements is that Mr Taylor did not use the disputed portion of the Roadway to access "The Narrows", and that during his ownership of the property what is now the Roadway was not a road or pathway and was covered with trees or bushes.

37. The Neighbours further state that Mr Taylor did not (and impliedly was not asked) to contribute to the cost of asphalting and installing street lights in Chapel of Ease Lane, which was borne by the Defendants and the other neighbours. However in my judgment that does not take the matter much further.

38. The Second Defendant has also exhibited some aerial photographs of the area. In a photograph taken in June 1973 what appears to be the disputed portion of the Roadway is visible, although it is overgrown or at least overhung in places. In a photograph taken in July/August 1981 it is not visible at all. It is visible in photographs taken in February 2003 and May 2012.

39. The Plaintiff's pleaded case is that since 1948 "The Narrows" was in the possession of Mr Taylor, who spent several decades constructing what was intended to be his home, and that throughout this period Mr Taylor, his friends, family and workmen used the disputed portion of the Roadway to access his property. He states at paras 6 and 7 of his affidavit filed in opposition to the Defendant's application for summary judgment:

> "*... I intend to call several witnesses which include relatives and also other persons familiar with the area. ... myself and my family members had been regular visitors to my uncle's property while he had been slowly building a home on the narrows.*
>
> *... I know from information received from my father and other family members that my uncle began to build on the Property after he purchased it in 1959 and work continued for decades. At the time my uncle purchased the property, there was unfortunately some discord between himself and his neighbours on the Northern side of the Property, due to the racial segregation that existed in Bermuda at that time. These neighbours made efforts to hinder my uncle's building process and as a result, my uncle used only the [Roadway] to access the property and carry out the building work. My uncle left Bermuda for Canada in the 1960s but frequently returned to Bermuda to continue construction on the Property. He continued this work, using the [Roadway] to access the property, until his death in 1986.*"

40. There is therefore a factual dispute between the Plaintiff and the Second Defendant as to whether, assuming that he divested himself of ownership of the land over which the disputed portion of the Roadway runs, Mr Taylor exercised uninterrupted use of that disputed portion for more than 20 years.

41. If Mr Taylor did, there will be a legal dispute as to whether he used the disputed portion of the Roadway as of right, and hence whether he acquired the benefit of an easement for "The Narrows" by way of lost modern grant.

42. In this regard, it is relevant that although the benefit of an easement may impliedly be released when the conduct of the dominant owner is such as to manifest an intention to abandon that benefit, the dominant owner must in order to do so make it clear that his intention is that neither he nor his successors in title should thereafter make any use of the right. Abandonment is not to be lightly inferred because owners of property do not normally wish to divest themselves of property unless to do so is to their advantage, even if they have no present use for the property in question. Thus mere abstinence from the use of an easement such as a right of way is insufficient to establish such an intention. See the judgment of Buckley LJ in Gotobed v Pridmore (1971) EG 759 EWCA.[1]

43. It appears from the above passages of the Plaintiff's said affidavit that he seeks to prove his case from his own evidence; that of witnesses, including members of his family and other people familiar with the area; and possibly, subject to the admissibility requirements of section IIA of the Evidence Act 1905, hearsay evidence.

44. I cannot resolve that factual dispute on the papers. Therefore I cannot presently resolve the legal issues that are dependent upon that factual determination. In the circumstances, I cannot properly conclude that the Plaintiff will be unable to establish that he has the benefit of an easement by way of lost modern grant as a defence to the Second Defendant's counterclaim.

"*Standing*"

45. The Plaintiff raises the defence that the Second Defendant has no "*standing*" to bring her counterclaim, and hence her application to strike out the statement of claim and for summary judgment. However "*standing*" or "*sufficient interest*" is a public law concept which is not applicable to a private law action such as this. Translated into private law terms, what the

[1] This summary of Buckley LJ's remarks is derived from the summaries by Lloyd LJ in CDC2020 Plc v Ferreira [2005] EWCA Civ 611 at para 24 and in Westlaw.

Plaintiff submits is that his use of the disputed portion of the Roadway does not infringe any right or interest which the Second Defendant may have in the Roadway in such a way that the Court will intervene to protect that right or interest by prohibiting the Plaintiff from using the disputed portion of the Roadway. If the Plaintiff wishes to pursue this point she should amend her pleadings accordingly.

46. The gist of the Plaintiff's case on this point, which was not developed in detail at the hearing, is that the Second Defendant has no proprietary right or interest in the disputed portion of the Roadway but merely has the benefit of an easement over it. In those circumstances, it is submitted, the Plaintiff's use of the Roadway will not be actionable unless it interferes with the Second Defendant's reasonable use of the same, which, he submits, it manifestly does not. The Plaintiff relies on para 30-004 of the Seventh Edition of Megarry and Wade on The Law of Real Property, and the cases there cited, eg Pettey v Parsons [1914] 2 Ch 653 EWCA.

47. The Second Defendant submits, if I understand her case correctly, that she is the owner and occupier of the disputed portion of the Roadway and that she therefore seeks to exclude the Plaintiff as a trespasser.

48. She relies on case law, eg Wheeldon v Burrows (1879) 12 Ch D 31 EWCA; Tilbury v Silva (1890) 45 Ch D 98 EWCA; and Commission for New Towns v JJ Gallagher Ltd [2003] 2 P&CR 24 Ch, as authority for the proposition that as Mr Taylor did not reserve a right of way over the disputed portion of the Roadway in the 7th January 1961 indenture he should be presumed to have conveyed ownership of the land over which it runs to the purchaser of plot C, which ownership has subsequently run with the land. Indeed, she submits that the indenture should be read as making an express grant of that land to the purchaser.

49. She also relies inter alia on section 6 of the Private Roads (Improvement) Act 1969 (frontager liable to contribute to cost of improvement of private road) and sections 1(d) and 11 of the Occupiers' and Highway Authorities'

Liability Act 1978 (occupier is person responsible for upkeep of right of way and owes duty of care to persons lawfully using it).

50. I am satisfied that the Plaintiff's position is properly arguable, although I express no further views as to its merits. That is in itself sufficient reason to dismiss the Second Defendant's claim for summary judgment.

Summary

51. The Second Defendant's applications to strike out the statement of claim and for summary judgment are dismissed.

52. The Plaintiff has leave to amend her pleadings to: (i) address separate ownership of the dominant and servient tenements and (ii) clarify her case on what she has erroneously termed "*standing*". It may be that the "*standing*" point is more properly dealt with in the defence to counterclaim than in the statement of claim as its forensic purpose is to provide a defence to the counterclaim, but I will not insist on the point. Any amendments to the statement of claim must be made within 14 days of the date of this ruling.

53. The Second Defendant has 14 days thereafter to amend her defence and counterclaim, if so advised; the Plaintiff has 7 days thereafter to amend her reply and defence to counterclaim, if so advised; and the Second Defendant has 7 days thereafter to serve a reply to the defence to counterclaim, if so advised. This timetable may be varied by consent of the parties.

54. The Plaintiff will pay any costs of and incidental to her amendments which are incurred by the Second Defendant.

55. I am minded to reserve the costs of the Second Defendant's summons. However if either party wishes to address me as to costs I shall hear them, provided that they notify the Registry in writing within 7 days after the date of this ruling.

56. I am grateful to both counsel for their assistance, and in particular to Mr Johnson for his exhaustive and scholarly research on the law relating to private roads in Bermuda.

Dated this 8th day of June, 2015

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Hellman J