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)

Date of hearing: August 10 - 11, 2015

Date of Ruling: August 28, 2015

Mr. Alex Potts, Sedgwick Chudleigh Ltd., for the Plaintiffs
Mr. Myron Simmons, 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 a Statement of Claim which runs to 14 pages, the first three paragraphs of the prayer seek the following relief:

> "*(1) An injunction to restrain the Defendant, by himself, his servants, or agents or otherwise from repeating or continuing the said nuisances or any nuisance of a like kind, and/or from continuing with unlawful development activities at the Site, and/or an injunction mandating the Defendant to abate the said nuisances or any nuisance of a like kind.*
>
> *(2)A declaration that the development activities at the Site are unlawful.*
>
> *(3)A declaration that the planning approval for the Site has lapsed altogether….*"

3. On June 11, 2015, the Plaintiffs' interlocutory Summons for an interim injunction was issued. It was first heard on June 18, 2015. Directions were given for the filing of evidence, the listing of the Summons and for a site inspection to take place on the first day of the hearing. On July 2, 2015 the Defence was filed. On July 6, 2015, the Defendant applied to strike out various paragraphs in the Statement of Claim on the grounds that, *inter alia*, they consisted of pleadings of evidence and not material facts and/or were frivolous or vexatious. By agreement, the respective interlocutory Summonses were listed to be heard together.

The Evidence

4. The Plaintiffs relied primarily upon the First Affidavit of Graham Jack ("First Jack") but also on the First Affidavit of Jennifer Flood ("First Flood"). Through First Jack the Plaintiffs explain that an application for the development of "169 South Road" was advertised shortly after they purchased the Property. They belatedly discovered that the application related to the Site and filed an objection. They did not pursue an appeal of the DAB decision, partly in light of the conditions attached to the permission which mitigated some of their concerns. These conditions included the following:

(a) "*4…the proposed landscaping within the 20 feet setback area to the south of the proposed Building B…should be installed prior to the commencement of construction of the approved development*…";

(b) "*9. In the interests of visual amenity, existing trees shown to be retained on the approved plan shall be protected by 4 feet high fencing prior to the start of building operations*…";

(c) "…***In Principle and Final planning approvals*** *are valid for two (2) years from the Board approval date, unless an alternative expiry date is explicitly noted as a condition of approval*…"

5. In July 2013 the Site was cleared, the first signs that the development of the Site was actually moving ahead. A meeting took place that August with Planning Department representatives at which the Plaintiffs expressed various concerns. They were assured that the proposed water tower "*wasn't going to be one of those big water towers*" and that it would not even be visible from their Property. Mr. Jack agreed to sign an acknowledgment form agreeing to a reduction of a set-back but his wife did not. In September 2013 the Plaintiffs attended a meeting with the then Minister and attempted to persuade him to locate the Site elsewhere. The November 2013 Sage Report and the February 2014 Budget suggested that consideration was being given to outsourcing the work being done by the Parks Department giving the Plaintiffs cause to believe, in the absence of development activity on the Site in the interim, that the project was not proceeding. In March 2014 a large prefabricated water tank was put on the Property, which did not comply with the specifications of the plans. The Plaintiffs were told by workers on the Site that this was simply a left over from another project and had to be put somewhere.

6. In January 2015, a meeting took place with the current Minister of Public Works and representatives of the Parks Department and the Planning Department at which the Plaintiffs expressed concerns about non-compliance with planning conditions. (That same month, according to First Flood, the deponent formed Take Back Our Park ("TBOP") to campaign against the development of the Site. TBOP had, by the time of the swearing of First Flood, collected over 3250 signatures in support of its campaign). The Plaintiffs experienced the overall attitude of Government as hostile and they were questioned about their links to TBOP. Following the meeting they were told that planting (which the planning permission contemplated would serve as a visual screen while the work was carried out) would only be done after the building work was completed rather than before. In March 2015 the Plaintiffs discovered that the set-back on their northern boundary, already reduced from 20 feet to 16 feet, was now proposed (according to plans in the Planning Department files) to be further reduced (without notice to them) to 9 feet. First Jack then proceeds to particularize the acts of nuisance complained of in the Plaintiffs' Statement of Claim.

7. The First Affidavit of William Francis, Acting Permanent Secretary in the Ministry of Public Works, was sworn in support of the Defendant's strike out application. This Affidavit supported (without elaboration) the complaint that paragraphs 2 to 23 of the Statement of Claim failed to plead material facts. It also averred that the same pleading was prejudicial and embarrassing in not enabling the Defendant to know what the Plaintiff's claim at trial for nuisance would be. Thirdly, the legal point was made that because the Plaintiffs had failed to appeal the granting of planning permission to the Defendant in respect of the Site, it was not open to them to advance any public law challenges to the validity of the planning permission in the context of a private law claim.

8. The Second Affidavit of William Francis responds to the Plaintiff's injunction application. It is averred that past damage to the shared northern boundary due to overgrowth has been repaired. It is averred that dust reduction measures have been taken on the Site, impliedly admitting a departure from the planning conditions. It is denied that the peace and tranquillity of the Botanical Gardens will be destroyed. It is not positively disputed that the development will result in the Site being used as a "*daily, early morning, mustering centre for the Department of Parks staff (estimated to be 100 or more people) as well as all of their vehicles, trucks, tractors, trailers, plant and equipment, as well as a vehicle wash-down location… (all of which is currently being done and has been done for the past 13 years from a site at Marsh Folly or the Quarry); this Site will also have a paint workshop, a carpentry shop, as well as a bio-pit which will require emptying by sewage trucks*…" (First Jack, paragraph 52.1). The suggestions that the Site would be a throughway and a water loading facility were denied. No assertions are made as to the timetable for the proposed works or inconvenience which would be occasioned were an interim injunction to be granted.

The Strike Out application

<u>Pleading complaints</u>

9. The criticism that paragraphs 2-23 of the Statement of Claim pleaded evidence and not material facts did not appear to me to be seriously pursued at the hearing. Paragraphs 2-4 describe the Minister's responsibilities. Paragraphs 5-9 describe the location and environmental law status of the Site. Paragraphs 9-10 make averments relating to the Plaintiffs' right of access to the property over a route the precise legal status of which is apparently contentious. Paragraphs 12-23 ("Background Facts") make various averments about the Defendant's application for planning permission to develop the Site, which are, arguably at least, relevant as a foundation for some if not all of the substantive claims asserted later in the pleading.

10. The first pleading complaint is rejected.

11. The second pleading complaint, that the Defendant is insufficiently informed of the case he has to meet at trial, needs to be viewed in light of (a) the additional particulars of the Plaintiffs' case on nuisance provided in First Jack (at paragraph 49), and (b) that the Defendant has been able to plead to the allegations and has not yet sought further and better particulars from the Plaintiffs. This complaint lacked substance in these circumstances.

12. The second pleading complaint is also rejected, without prejudice to the right of the Defendant, if so advised, to seek further and better particulars of the Plaintiffs' pleaded case on nuisance.

Do the Plaintiffs lack the standing to seek findings in relation to the validity of the Defendant's planning permission?

13. Mr. Simmons broadly submitted that the scheme of the Development and Planning Act 1974 ("the 1974 Act") excluded the Plaintiffs from launching a collateral attack on the decision to grant planning permission to the Defendant in respect of the Site. This was for essentially the following reasons advanced in the 'Defendant's Skeleton Argument':

> "*7. Once the decision of the Board has become final it enures for the benefit of the land of all person*[s] *for the time being interested therein (section 21) and its enforcement becomes a matter for* [the] *Minister responsible for planning under Part X (Enforcement) of the DPA 74.*"

14. This submission appeared to me to be sound and was not or not seriously challenged. More narrowly, and controversially, however, Mr Simmons advanced the following two points which attacked the public law limbs of the Plaintiffs' claim:

    (a) the termination of planning permission by reference to a time limit under section 24 of the 1974 Act could only occur if the Minister, in the exercise of his discretion, chose to serve an enforcement notice;

    (b) the concept of development in breach of planning permission being unlawful by virtue of the 'Whitley' principle only applied in the enforcement context and could not be relied upon in the context of a private law nuisance claim.

15. Section 23 of the 1974 Act provides that development must start within two years of the grant of planning permission or such other period as may be specified in the relevant in principle or final permission. Section 23(9) provides:

"*(9)For the purposes of this section development shall be taken to have begun on the earliest date on which any operation comprised in the development begins to be carried out with the exception of works of excavation or site clearance preparatory to the building, erection or construction of any building or structure.*"

16. Section 24 provides:

"(1) *Where by virtue of section 23 a planning permission is subject to a condition that the development to which the permission relates must be begun before the expiration of a particular period and that development has been begun within the period but the period has elapsed without the development having been completed the Minister may, if he is of the opinion that the development will not be completed within a reasonable period, serve a notice (hereinafter in this section referred to as a "completion notice") stating that the planning permission will cease to have effect at the expiration of a further period specified in the notice, being a period of not less than twelve months after the notice takes effect.*

(2)A completion notice shall be served on the owner and occupier of the land and on any other person whom in the opinion of the Minister will be affected by the notice.

(3)If, within such period as may be specified in a completion notice (not being less than twenty-eight days from the service thereof) any person on whom the notice is served so requires the Minister shall afford to that person an opportunity of appearing before, and being heard by, a person appointed by the Minister for the purpose and the Minister may then, after receiving the report of the person so appointed, if he thinks fit, confirm, vary or revoke the completion notice.

(4)The planning permission referred to in a completion notice shall at the expiration of the period specified in the notice, whether the original period specified in subsection (1) or a longer period substituted by the Minister under subsection (3), lapse.

(5)Where by reason of subsection (4) any planning permission lapses, the Minister may, upon giving not less than fourteen days' notice to the persons upon whom the completion notice was served, enter upon the land and take such steps as may to him seem necessary, whether by the removal of any building or structure or by the execution of any works, to restore the land to its state previous to the grant of such planning permission or to render any building or structure erected or works undertaken in accordance therewith safe or sightly, and the Minister may further recover as a debt owing to the Crown in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by him in taking such steps."

17. On a straightforward reading of section 24(1), this provision confers on the Minister a power supplementary to section 23 to effectively bring a development which is not in breach of a time condition to an end where (a) the development has started within the specified period of time; (b) the development has not been completed and the permission period has expired; and (c) it is unlikely in the Minister's opinion to be completed within a reasonable time. It is not easy to read section 24, as the Defendant's counsel invited the Court to do, as providing the sole legal basis on which it can be contended that a development cannot lawfully be continued by reason of the non-compliance with a time condition attached to the grant of planning permission.

18. On the other hand, apart from a not immediately impressive argument advanced by Mr. Potts to the effect that the water tank was not a "building" for the purposes of the Act, the Plaintiffs' case that the development was not started within the requisite two year period does not at this point appear evidentially strong. It is admitted that "*an electrical storage unit/hut was built on the eastern side of our shared entrance*" (First Jack, paragraph 49.15), but not seemingly that this was erected on the Site itself. It is, however, also contended that the water tank installed in March 2014 did not comply with the specifications of the original plans (First Jack, paragraph 37). This assertion is not positively challenged. It is far from clear, in these circumstances, that any argument to the effect that the development did not start within the period required by the planning permission is bound to fail.

19. However, Mr. Potts advanced another argument which appeared on its face to have considerable merit, assuming it was competent for the Plaintiffs to advance it. This was that the development could not lawfully be continued because planning permission was granted in breach of the requirements of section 4 of the Bermuda National Parks Act 1986 ("the 1986 Act"). It seems to me to be clear beyond serious or sensible argument that the Site falls within a protected area, namely the Botanical Gardens for the purposes of the 1986 Act (First Schedule, Class B, paragraph 27). In this regard, paragraph 5(1)of the 1986 Act provides as follows:

> "*(1) A protected area specified in the First or Second Schedule shall have one or more of the following objectives—*
>
> *(a) to safeguard and maintain plants and animals as well as geological, marine and other natural features or products, and fragile ecosystems of national or international significance where strict protection is required and human use is generally limited to scientific research and educational purposes in order to protect and preserve these special or fragile natural resources;*
>
> *(b) to provide for the use of the area in its natural state with a minimum of commercial and mechanized activity;*
>
> *(c) to provide open space;*

> *(d) to protect and maintain historic monuments and buildings (including forts), marine products, sites of particular historic, archaeological, or aesthetic value and to so manage them so as to protect them from deterioration, and to provide public enjoyment, research and educational opportunities.*" [emphasis added]

20. It is with a view to furthering the legislative objectives set out in section 5 that section 4 of the 1986 Act requires the following 'procedural' steps to be taken before altering the status of a protected area:

> "*4. (1)The Minister shall by notice published in the Gazette announce any proposal for—*
>
> *(a) the construction of any road or building, the change of use or the change of boundary with respect to any existing protected area;*
>
> *(b) any amendment to the First Schedule, and shall give opportunity for and shall take into account public comments before acting on the proposal.*
>
> *(2)A notice under subsection (1) shall specify the nature of and the reason for the proposed action, and the time within which and manner by which public comments will be received.*" [emphasis added]

21. There is no suggestion in the evidence at this juncture that these statutory requirements were met. On the contrary, the planning permission was obtained following a notice which cryptically referred to "*169 South Road, Paget*", apparently resulting in numerous potential objectors being "blindsided" by the application. It is unclear to me whether at the time the application was made the Defendant was also the Minister responsible for Parks. However, the present Minister responsible for Parks is the Defendant, the 'developer', who has by his very defence of the present proceedings demonstrated his inability by virtue of conflict of interest to advance the legislative objectives of the 1986 Act in relation to the Site.

22. It would be wrong to assume that the Minister responsible for Planning will not exercise an independent judgment merely because a Cabinet colleague is the developer, as Mr. Simmons rightly submitted. On the other hand the record suggests that planning permission was very arguably granted in circumstances where an important statutory public consultation requirement, expressed in mandatory terms and which ought to have been regarded as imported into the planning approval process by necessary implication, was overlooked.

23. It is against this background that the central controversy of whether it is legally tenable at all for the Plaintiffs to complain of non-compliance with public law requirements of any description falls to be considered. It is immediately obvious that from a high-level rule of law perspective, the proposition that the Plaintiffs could not raise public law arguments in support of their private law claim is, in all the circumstances of the present case, a somewhat unattractive one. While I accept that it

is arguable that even the 1986 Act point ought to have been taken as part of the Plaintiffs planning objection, it is not plain and obvious that the Minister himself can with clean hands seek to raise an estoppel argument with a view to achieving an obvious avoidance of his own continuing statutory duties. The estoppel argument arises out of a quite unusual constellation of law and facts. As Lord Browne-Wilkinson observed in *Barrett-v-Enfield London Borough Council* [2001] 2 AC 550 in a passage (at 557F-G) upon which Mr. Potts relied:

> "*In my speech in the Bedfordshire case [2001]2 AC 633, 740-741 with which the other members of the House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff's claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.*"

24. The need to avoid determining difficult or developing points of law before trial in the context of a strike out application applies with equal force to the main plank of the Defendant's application. The argument that a public law point cannot be raised in support of a private law claim was not supported by clear authority.

25. Mr. Simmons clearly demonstrated that the Plaintiffs could potentially apply for judicial review of the Planning Minister's failure to take enforcement action: *R(on the application of Barker-v-Brighton and Hove City Council* [2014] EWHC 233. The existence of an alternative remedy did not refute the existence of (or ability to pursue) a corresponding private law remedy. More to the point was the submission that declaratory relief can only be granted to deal with live legal issues between the parties in circumstances where all parties affected are before the Court: *Gouriet-v-Union of Post Office Workers* [1978] AC 541 (per Lord Diplock at 501).

26. The Plaintiffs' attempts to obtain relief from acts which they contend amount to a nuisance are clearly grounded in a live dispute between the parties. However, Mr. Simmons suggested that the Minister responsible for Planning ought to be before the Court. This was a valid point, as regards the attack on the planning conditions, although not one which supported striking out the public law claims. It was somewhat technical, as Mr. Potts pointed out, but as a matter of principle it does seem to me to be right that if it is sought to obtain a declaration of invalidity in relation to planning permission granted by the DAB, the responsible Minister ought to be joined as an additional Defendant unless he signifies that he is content to be bound by whatever findings are formally made against the Defendant. As a practical matter, it is the norm rather than the exception that the Attorney-General's Chambers represents all Government interests when multiple Ministries' interests are engaged by legal proceedings.

27. The Defendant's counsel, while relying on the doctrine of procedural exclusivity supposedly established by *O'Reilly-v-Mackman* [1983] 2 AC 237, conceded that

subsequent case law, notably *Roy-v-Kensington and Chelsea and Westminster* [1992] 1 AC 624, made it clear that it was possible to advance public law arguments in private law proceedings wherever private law rights were involved. Following this approach and putting aside the happenstance that the developer is a Minister rather than a private citizen, the proposition that it is impermissible for the Plaintiff to rely on collateral public law issues is far from being plainly and obviously correct. Unlike in *X-v-Newham LBC* [1994] 2 WLR 554, the Plaintiffs here are not seeking to assert a cause of action based on breach of statutory duty. Mr. Potts argued that the present case fell within the ambit of the following observations of Lord Steyn in *Boddington-v-British Transport Police* [1999] 2 AC 143 at 172G:

> "*…Since O'Reilly v. Mackman, decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's sole aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision…"*

28. This *dictum* demonstrates that it may, depending on the circumstances, be possible to challenge the validity of a public law decision in private law proceedings. Even more context-relevant support was found in a case of private law proceedings where a declaration was sought about a planning agreement: *Milebush Properties Limited-v-Tameside Metropolitan Borough Council* [2011] EWCA Civ 270. The majority (Mummery LJ and Jackson LJ) held that a declaration was rightly refused in the trial judge's discretion, primarily because the predominant character of the claim was public rather than private in nature. What the *Milebush* case non-controversially illustrates is that the party opposing the grant of declaratory relief based on the construction of a public law document only took the point at trial, and not by way of an interlocutory strike out application. This indirectly demonstrates that it is not always easy to determine before trial whether or not a particular head of relief which is hotly contested ought to be refused at the interlocutory stage. Mr. Potts, however, relied on the dissenting judgment of Moore-Bick LJ who stated:

> "90. *In my view the present proceedings for a declaration are a sensible and economical means of achieving that end. The principal objection to that course is that the obligation, being a planning obligation, exists in the public law sphere and should be enforced, if at all, only by means of proceedings for judicial review. In my view, however, that is not a good reason for the court to refuse to entertain a claim for a declaration in the circumstances of the present case. A similar objection was made in the Mercury case – see pages 56B-E – but it was rejected both by the Court of Appeal and the House. The circumstances of that case were admittedly different in so far as the dispute*

> *could be viewed as one relating to the contract between the parties, but the principle underlying the decision is that the court should be guided by considerations of justice and convenience rather than being bound by a rigid adherence to certain forms of procedure. Lord Slynn expressed this as follows at page 58A-B:*
>
> *'Moreover it cannot be said here, in my view, that the procedures under Order 53 are so peculiarly suited to this dispute (as they would be in a claim to set aside subordinate legislation or to prohibit a government department from acting) that it would be a misuse of the court's process to allow the originating summons to continue. On the contrary it seems to me that the procedure by way of originating summons in the Commercial Court is as least as well, and may be better, suited to the determination of these issues than the procedure by way of judicial review."*"

29. More pertinently still, the Plaintiffs' counsel referred the Court to a highly authoritative and recent United Kingdom Supreme Court decision which in my judgment supports two important general points, and a third but equally significant narrower point. Firstly, and more generally, the interaction between nuisance claims and public planning law is a longstanding yet complicated and evolving area of the law. Secondly, and also more generally, a permanent injunction is the usual remedy granted in respect of a successful nuisance claim. And thirdly, and more narrowly, it may depending on the facts be possible for a plaintiff suing for nuisance to rely on non-compliance with planning conditions in support of his claim. The following passage in Lord Carnwath's judgment in *Coventry et al-v-Lawrence et al* [2014] UKSC 13 supports the point which contradicts the Defendant's main standing argument:

> "*226. Where the evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance, there may be much to be said for the parties and their experts adopting that as a starting-point for their own consideration. It is not binding on the judge, of course, but it may help to bring some order to the debate. However, if the defendant seeks to rely on compliance with such criteria as evidence of the reasonableness of his operation, I would put the onus on him to show compliance (see by analogy Manchester Corpn v Farnworth [1930] AC 171, relating to the onus on the defendant to prove reasonable diligence under a private Act). By contrast, evidence of failure to comply with such conditions, while not determinative, may reinforce the case for a finding of nuisance under the reasonableness test.*"

30. Mr. Potts more broadly invoked the ancient principle that "*an Englishman's home is his castle*" in support of the contention that the Plaintiffs' right to advance their private property interests should be broadly construed. That principle is indeed

mediaeval and sexist, as counsel conceded, but its antecedents go back 800 years to Magna Carta. The principle was in turn transported to Bermuda 400 years later via James I's Letters Patent 1615 which guaranteed to English settlers in Bermuda "*all libertyes franchesies and immunities of free denizens and naturall subjectes within any of our dominions to all intents and purposes, as if they had been abiding and borne within this our Kingdome of England or in any other of our Dominions*". Sections 7 and 13 of the Bermuda Constitution, which protect the privacy of the home and private property rights of all kinds from compulsory acquisition, are simply restating those ancient principles in modern terms. Unless proceedings are obviously an abuse of process and inconsistent with countervailing public policy interests[1], this Court should ordinarily be cautious about accepting invitations to deny litigants asserting private law rights connected with their home the opportunity to fully air their grievances at trial. This policy leaning might be weakened by claims which clash with the corresponding private property rights of the opposing litigant, but the present case asserts a claim against an emanation of the Crown.

31. In the present case, subject to ensuring that the Minister of Planning is afforded the opportunity to address the attacks on the validity of the Defendant's planning permission, there is clearly a serious issue to be tried as to the Plaintiffs' standing to seek public law declarations in aid of substantively private law relief. In the exercise of my discretion, I decline to determine the merits of this complicated standing issue summarily in favour of the Defendant at the present stage. I am guided by the following principles articulated on behalf of the Court of Appeal for Bermuda in *Broadsino Finance Co. Ltd.-v- Brilliance China Automotive Holdings Ltd.* [2005] Bda LR 12 (at pages 4-5) upon which Mr. Potts relied:

> "*In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: "It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known…..There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation…*"

The injunction application

[1] See e.g. *Allied Trust and Allied Development Partners Ltd.-v- Attorney-General et al* [2015] SC (Bda) 65 Civ (24 August, 2015).

32. In *Coventry-v-Lawrence* [2014] UKSC 46, Lord Carnwath opined as follows:

> "*101.Where a claimant has established that the defendant's activities constitute a nuisance, prima facie the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case…*"

33. For the reasons set out above in refusing the strike out application, there is a serious issue to be tried, not simply on the Plaintiffs' nuisance claims narrowly construed. The nuisance claims must properly be assessed together with the arguable claims that the development of the Site cannot lawfully be pursued. As the logical remedy if the Plaintiff succeeds at trial is a permanent injunction, it follows that damages must be an inadequate remedy for any interim loss the Plaintiffs would suffer. The Plaintiffs' interlocutory Summons primarily sought an Order that:

    (1) the Defendant be restrained from continuing development activities;

    (2) further or alternatively, that the Defendant be restrained from entering into any binding contracts in relation to the development;

    (3) further or alternatively, that the Defendant remedy all historic acts of nuisance and going forward comply with all planning conditions.

34. Mr. Simmons suggested in his oral response that, despite having failed to respond (due to pressure of work and understaffing) to a letter before action dated April 2, 2015 requesting undertakings corresponding to the relief sought in paragraph (3) of the Plaintiffs' Summons, the Defendant was now willing to undertake to comply with the planning conditions until trial. This was too little too late; the Plaintiffs have now made out a good arguable case for restraining any development until trial. It is self-evident that allowing the project to be completed before trial could potentially deprive the Plaintiffs of the permanent injunctive relief they seek. On the other hand I accept Mr. Simmons' submission that the relief sought under paragraph (2) of the Summons was too intrusive and not properly required.

35. The balance of convenience clearly favours granting an interim injunction in terms of paragraph (1) of the Plaintiffs' Summons. The Defendant has adduced no evidence capable of supporting a finding that he would be prejudiced by delaying the clearly intermittent development process. It is perhaps self-evident that the Department of Parks staff will be prejudiced by a further delay in establishing a proper central working base, but it is entirely unclear what timetable exists (if any) in relation to completion of the proposed works or, indeed, how great that inconvenience will be. There is no evidence of any compelling public interests which will be prejudiced if an injunction is granted.

36. There are, on the other hand, wider public interest considerations on the Plaintiffs' side. The proposed development is seemingly actively opposed by roughly 5% of the

country's population (more than 10% of all those who voted in the last election[2]), who have signed a petition. It is also a development in relation to a protected area which it is all but admitted obtained planning approval without giving the public the opportunity to comment which is required by the Bermuda National Parks Act.

37. In these circumstances the balance of convenience favours granting injunctive relief without requiring the Plaintiffs to furnish a cross-undertaking in damages. I will hear counsel as to whether an undertaking in terms of paragraph (1) of the Plaintiffs' Summons would, in light of the present Ruling, be preferred to the Court formally granting the injunctive relief to which they are entitled.

Conclusion

38. The strike out application is dismissed:

    (a) on terms that the Plaintiffs will within 28 days apply to join the Minister for Planning as 2nd Defendant unless he signifies his willingness to be bound by the findings made in the present action without being formally joined; and

    (b) without prejudice to the Defendant's right to seek further and better particulars of the Statement of Claim.

39. The Plaintiffs are entitled to an interim injunction restraining the Defendant until trial from further developing the Site.

40. I shall hear counsel if required on the terms of the final Orders and as to costs.

Dated this 28th day of August, 2015 _____
IAN R C KAWALEY CJ

[2] www.elections.gov.bm.