COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Side
2019/CLE/gen/FP/00093

BETWEEN

JOHN W. RUSSELL
(in his capacity as Administrator
Of the Estate of William Russell)
Plaintiff

AND

BAHAMAS AGRICULTURAL AND INDUSTRIAL CORPORATION
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Edmund Russell for the Plaintiff

Ms. Kenria Smith for the Defendant

HEARING DATE: February 11, 2021

RULING

Hanna-Adderley, J

This is an application by the Defendant to strike out the Writ of Summons filed in this Action.

Introduction

1. The Writ of Summons endorsed with a Statement of Claim was filed on April 29, 2019. The Defendant by way of a Summons filed October 9, 2019 seeks an Order pursuant to Order 18, Rule 19 (1)(a)(b) and (d) of the Rules of the Supreme Court 1978 ("**RSC**") and/or under the inherent jurisdiction of the Court that the Writ of Summons filed herein be dismissed against the Defendant on the ground that the Plaintiff's claim discloses no reasonable cause of action, is frivolous and vexatious and is an abuse of the process of the Court as the action is a land matter and is brought incorrectly.
2. The application is supported by the Affidavit of Monique Millar filed December 7, 2020.

3. The Defendant relies on its Submissions dated December 7, 2020 in support of its application.
4. The Plaintiff opposes the Defendant's application and relies on Skeleton Arguments filed July 13, 2020.
5. It is noted that the Civil Procedure Rules 2022 ("**CPR**") have now come into effect and that Part 26 rule 26.3 (1) (b) and (c) contain almost identical provisions to Order 18 r 19 of the RSC.

Statement of Facts

The Pleaded Case

6. In the Statement of Claim the Plaintiff claims to be the owner in fee simple of 180.0 acres situate at South Riding Point in Grand Bahama ("**the property**") by virtue of being the alleged heir-at-law of William Russell to whom the Crown granted the William Russell Tract on January 17, 1827 recorded in the Registry of Records in Book L1 at page 257.
7. He claims that all or part of that same tract was leased by Crown to the Defendant who subsequently subleased it to Statoil South Riding Point, LLC by lease dated sometime in 2013.
8. He is therefore claiming, among other things, that the Defendant knowingly practiced deceit on Statoil in granting the lease, and is interfering with his property rights. He claims an order for possession, damages, and an injunction prohibiting the Defendant from continuing to do anything with or on the property.
9. As he states in paragraph 11 of the Statement of Claim "the Plaintiff brings this action to assert his ownership of the 180.0 acre William Russell Tract (or portions thereof)..."

The Evidence

10. Ms. Monique Miller stated, in part, that the Defendant is a public authority, that the Plaintiff claims fraud but that he does not specifically plead fraud pursuant to Order 18 r 12 of the RSC. That the claim is brought outside of the Limitation period pursuant to Section 16 (3) and 41 (1) (a) of the Limitation Act.

Submissions

11. Ms. Kenria Smith of the Attorney General's Office, Counsel for the Defendant, submitted in part, that:

    (1) That this action is an abuse of the process of the Court.

(2) That allegations of fraud must be clear and express and pleaded separately from and before any other allegations even where they are based on similar lines of argument (Order 18 Rule 12 of the RSC). The Plaintiff states that there was a forged document in 2013 but he does not exhibit the documents. He lays out particulars of deceit but he does not particularize knowledge on the part of anyone at Bahamas Development Corporation that support his claim in deceit. The Writ of Summons ought to be struck pursuant to Order 18 Rule 19 of the RSC. That on the face of the pleadings the Plaintiff's action is frivolous, vexatious and an abuse of the process of the Court pursuant to Order 18 r 19.

(3) That the Plaintiff had notice of the occupation of the property as far back as 1981 when Burmah Oil, a predecessor of Statoil, had oil tanks on the land. That the Plaintiff has slept on any rights he thinks that he may have had as the limitation for recovery of land would have ended in and around 1993. The Plaintiff instituted proceedings in the Supreme Court on April 29, 2019. There is no cause of action on the face of the pleadings.

(4) That the proceedings are hopeless and doomed to failure and the claim amounts to an abuse of the process of the Court.

(5) That the Plaintiff makes reference to trespass in his Submissions but he has not pleaded trespass.

12. Ms. Smith referred the Court to the following authorities:

(1)Nassau Cruises Ltd. v Bahamas Hotel Catering and Allied Workers Union [2000] BHS J. No. 248 1996 No. 789;

(2) McEneaney and others v Ulster Bank Ireland Ltd. and others [2015]EWHC 3173;

(3) Girten v Andreu [1988] BHS J. No. 164;

(4) Riches v DPP [1973] 2 All E R p. 935;

(5) Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16;

(6) In the Quieting Petition of Eleuthera Land Company Limited 2012/CLE/qui/00579; and

(7) Bennerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties [2018] UKPC 27.

13. Mr. Edmund Russell Counsel for the Defendant submitted, in part, that:

(1) The Crown Grant to William Russell dated January 17, 1827 was lodged for recording on microfilm in Book L.1 at page 257 first in time and pursuant to Section 10 of the Registration of Records Act it cannot be defeated by the alleged unrecorded Crown Lease to BAIC and relates to the property.

(2) By an unrecorded Crown Lease dated March 13, 1981 ("**the Crown Lease**") the Crown allegedly leased the property to The Bahamas Development Corporation, which is the alleged predecessor in title of BAIC.

(3) That the 1827 William Russell Crown Grant takes priority over the alleged Crown Lease and the unrecorded Indenture of Lease dated October 21, 2009 and made between BAIC and Statoil South Riding Point, LLC and cannot be defeated by the Crown Lease or by other subsequent alleged Lease.

(4) That the disposition of the property to Statoil was in any event made with intent to defraud.

(5) That the late William Russell entered into exclusive possession and occupation of the property as the owner with the paper title and remained in exclusive possession of the property until his death.

(6) That BAIC never had the intention to possess the property nor acquire a title to the property by adverse possession, but claims to have a documentary title being a Crown Lease. It was never in exclusive possession and sole occupation of the property, which vested in a Justice of the Supreme Court after the death of the late William Russell and the property was not fenced in on all sides by BAIC and is bounded on the South by the Sea at the high water mark and contains a harbour and waterway.

(7) That this is the action for the recovery of land which was commenced in accordance with Section 30 of the Limitation Act, 1995 and that the Plaintiff's Statement of Claim is not frivolous, vexatious nor an abuse of the process of the Court and the Defendant's Summons ought to be dismissed.

14. Mr. Russell referred the Court to the following authorities:

(1) Oceania Heights Limited v Willard Clarke Enterprises Limited & Others (Bahamas) [2013] UKPC 3; and

(2) JA Pye (Oxford) Ltd & Ors v Graham & Anor [2002] UKHL 30.

Issues

15. The issues to be determined by the Court in this application are (1) whether this is a clear and obvious case where it is possible to say, at this interlocutory stage and before full discovery, that a particular allegation set out in the statement of claim is incapable of proof and that there is no need for a trial and (2) whether the Plaintiff's claim is statute barred.

Analysis and Conclusion

The Law

16. Order 18 Rule 19 of the RSC provides as follows:

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any 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 or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

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

(2) No evidence shall be admissible on an application under paragraph (1) (a)."

17. In **St. George and others v. Hayward and others** [2008] 5 BHS J. No. 5 per Adderley J, as he then was, summarized the law as follows:

"The Law

Amendments and Strike out Applications

13. As submitted by counsel for the plaintiffs the court should exercise its discretion to strike out an action only in plain and obvious cases and the corollary of that is, provided it does not cause undue prejudice to the other parties, it should allow amendments unless there would be no reasonable cause of action even with the amendments.

Particularly Central to that also is that causes of action not pleaded in the Originating Summons cannot be added in the points of claim. This principle was highlighted in **Re Lundie Brothers Ltd.** [1965] I W.L.R. 1051…"

18. In **PLC Bettas Limited v Hong Kong and Shanghai Banking Corporation Limited and HSBC Bank SCCiv App No. 312 of 2013,** cited by Mr. Russell, Allen P., with whom Conteh JA and Adderley JA agreed, held that the power to strike out is a draconian remedy

which should be employed only in clear and obvious cases where it is possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof.

19. The principal was reinforced obiter by the Privy Council in **Ingraham & Ors v. Glinton & Anor (The Bahamas)** [2006] UKPC 40 (24 July 2006) at [9] where Lord Brown of Eaton-under-Heywood] speaking for the panel (Lords Rodger of Earlsferry, Steyn, Walker of Gestingthorpe and Carswell) said at [9] in reference to the appeal before them from The Bahamas:

    "Having noted that the main issue on the appeal was whether the Chief Justice had jurisdiction under Order 18, Rule 19 to summarily strike out the disputed paragraphs, the Court correctly reminded itself that the strike out power is to be exercised only in "plain and obvious" cases"

20. Guidance on how this rule should be applied is set out by **Osadabey, JA** in **Hamby v Hermitage Estates Ltd SCCiv App No. 21 of 2008** and also by **Auld, LJ** in **Electra Private Equity Partners v KPMG Peat Marwick (a firm) & Ors [2001] 1 BCLC 589**. Osadabey, JA states in **Hamby**:

    "It is well settled that the jurisdiction to strike out is to be used sparingly and limited to plain and obvious cases where there is no need for a trial. There is no doubt that the exercise of that jurisdiction may deprive a party of the examination and cross examination of witnesses which can change the result of a case." At page 613 of **Electra Private Equity Partners**, Auld LJ stated: "It is trite law that the power to strike out a claim under RSC Ord.18, r.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 when 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. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits. See **Goodson v Grierson [1908]**

1 KB 761, CA, per Fletcher Moulton LJ at 764-5 and Buckley LJ at 766; **Wenlock v Moloney**, per Sellers LJ at 1242G-1243D and Danckwerts LJ at 1244B ([1965] 1 WLR 1238); and **Torras v Al Sabah & others(unreported) 21 March 1997 CA**, per Saville LJ. There may be more scope for early summary judicial dismissal of a claim where the evidence relied on 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"; see eg **Lawrance v Lord Norreys (1890) 15 App Cas 210**, per Lord Herschell at 219-220. However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in **McDonald's Corporation v Steel [1995] 3 All ER 615, [1995] EMLR 527, CA**, Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f of the former report, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof."

21. The Statement of Claim is plainly pleaded. That the Plaintiff claims to be the heir-at-law and true owner of the subject property since 1827; the facts as we know them at this stage do not disclose how BDC, predecessor to BAIC, became vested with the title; the claim is that neither BDC nor BAIC has no right title or interest to the property and cannot lease it to anyone. The Defendant cannot say that it is taken by surprise by the Plaintiff's claim.
22. In applying Order 18 r 19 (a) of the RSC (Rule 26.3 (1) (b) of the CPR) the Statement of Claim should be read on its face without consideration of evidence and the statements should therefore be taken as prima facie true. If all of the allegations in the Statement of Claim were taken to be true on principle, the Statement of Claim should not be struck. The case has not yet reached the stage where the necessary evidence can be taken so that a determination can be made on the evidence. The Court at this stage is only required to determine if the pleadings disclose a reasonable cause of action with some chance of success or raises some question fit to be decided by this Court. As established by **Hamby v Hermitage Estates Ltd**. (supra), **Electra Private Equity Partners** (supra) and other

cases mentioned above this is not a plain and obvious case where there is no need for a trial. Therefore, having considered the Statement of Claim I find that the Statement of Claim does disclose a reasonable cause of action and/or raises some question fit to be decided by this Court.

23. Allegations in a pleading are scandalous if they impute dishonesty, bad faith or other misconduct against another party or anyone else and they are immaterial or irrelevant. Whether a pleading is frivolous or vexatious depends "on all the circumstances of the case; the categories are not closed and the considerations of public policy and the interest of justice may be very material." **See Ashmore v British Coal Corp [1990] 2 QB. 338**. Having carefully considered the Statement of Claim I have concluded that there is nothing contained in it which supports the Defendant's contention that the Statement of Claim is scandalous, frivolous or vexatious.

24. The Defendant contends in its Summons that this action by the Plaintiff is an abuse of the process of the Court. This ground confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appears to be an abuse of the process of the Court. This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (**Commentary at 18/19/18 on page 352 of the Supreme Court Practice 1, 1999 Castro v Murrary (1875) 10 Ex. 213**). Having determined that the Statement of Claim discloses a reasonable cause of action, that it is not scandalous, frivolous or vexatious I have concluded that the action is not an abuse of the process of the Court.

25. In summary, having already determined that the pleadings do disclose issues fit to be tried and after considering the relevant case law, and the submissions of Counsel, I find that the instant action is clearly not a proper case to strike out the Plaintiff's action as against the Defendant under Order 18 r 19 of the RSC (or Part 26.3 of the CPR).

26. However, using its **inherent jurisdiction** the court can have regard to evidence.

27. The Defendant argues that the Plaintiff's claim is bound to fail because his claim to the land has been made outside the limitation period. It claims that the Governor General on behalf of the Crown as landowner granted a lease dated March 13, 1981 to the BAIC.

28. On the evidence so far the Crown made a grant to Mr. William Russell in 1827. The Governor General, presumably on behalf of the Crown as landowner although it is not expressly so stated, granted a Lease to the BAIC on 13 March 1981. There is no evidence to show how the Crown was able to lease the same land to the BAIC if the Russell Grant is valid.

29. No doubt this will become clear with the disclosure of more evidence. However, at this stage this among other things reinforces the argument that it is not an obvious case for strike out of the statement of claim .

30. For all the above reasons I dismiss the application to strike out.

Costs

31. Costs are usually in the discretion of the Court and I see no reason to depart from the usual costs order. Therefore, costs are awarded to the Plaintiff to be paid by the Defendant to be taxed if not agreed at the conclusion of the trial.

32. I apologize profusely for the delay in the delivery of this Ruling.

Dated the 2nd day of August, 2023

Petra M. Hanna-Adderley
Judge