

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/0065

BETWEEN

**CHRISTOPHER STUART
(As liquidator of North Cow Pen Rd Limited)**

Plaintiff

AND

CORNELIUS GARDINER

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Lessiah Rolle with Indy Hunter for the Plaintiff

Meryl Glinton for the Defendant

7 August 2018

JUDGMENT

WINDER, J

This is the defendant's(Gardiner's) application for striking out of the plaintiff's action on the grounds that it is disclosed no reasonable cause of action, was frivolous vexatious and an abuse of process. On 7 August 2018 I struck out the plaintiff's claim after finding that it disclosed no reasonable cause of action, was frivolous vexatious and an abuse of the court. I promised to put my reasons for so doing in writing; I briefly do so now.

1. A brief chronology of the relevant facts are as follows:

- 1967 North Cow-Pen Land Limited (NCL) commenced a quieting action No. 53 of 1967 seeking to quiet approximately 184.3 acres of property in the Western District of New Providence and known as the Alexander's Tract or the Alexandra Tract. Gardiner was one 58 adverse claimants in No 53 of 1967.
- 28Dec71 Gardiner agreed with NCL that he would convey the property which he claimed to be entitled within the Alexander Tract (the Property) to NCL and that the Property would be conveyed back to him in consideration paying some proportion of the quieting expenses.
- 21 May 76 Smith Sr J. granted a certificate of title to NCL. The judgment approving the Certificate specifically provided that the certificate was being granted subject to the agreements made between NCL and the respective adverse claimants (including Gardiner) who have conveyed their interest to NCL, *"whereby the land is to be apportioned between them as agreed and conveyances thereof be accordingly executed by NCL in favour of each of them."*
- 15 Sep 76 SA Hepburn (as President) and William Bethel (as Secretary) wrote to each adverse claimant advising that NCL had expended some \$190,000 in the quieting action. The letter indicated that Gardiner's portion of the legal and surveying expenses would be \$850.

- 17 Jan 77 Further letter by SA Hepburn urging payment and indicating that without payment the adverse claimants would not have their land returned.
- 14 Apr 78 NCL conveyed the property to Gardiner. Gardiner says he paid his proportion of the expenses for receipt of the conveyance.
- 23 Oct 78 Court granted interim injunction restraining the delivery of any conveyances until payment of expenses to NCL. On 31 October 1978 the interim injunction was extended.
- 13 Jan 84 Conveyance dated 14 April 1978 lodged for recording in the Registry of Records.
- 11 May 90 In Supreme Court action 185 of 1982, Stephen A Hepburn v North Cow-Pen Land Limited, NCL was ordered by Thorne J to be wound up and the plaintiff (Stuart) was appointed the official liquidator of NCL.
- 26 Apr 02 Gardiner conveyed the property, in equal parts to his 4 children LaPaige, Daenette, Luke and Cornelius Gardiner in equal parts. Daenete constructed a triplex on her property and LaPaige has completed the foundation for 2 fourplexes.
- 12 May 02 Conveyances of Gardiner's children lodged for record in the Registry of Records.
- 13 Aug 04 Lyons J made an order in the liquidation which provided, inter alia, (1) that the property of NCL is vested in the official liquidator and (2) that Stuart be at liberty to sell the property of the company now vested in him.
- Circa 2007 Stuart says that whilst he received documents relative to NCL he did not receive any information relative to Gardiner until approximately 2007.
- 20Jan 16 This action is commenced by Stuart seeking to take possession of the land the subject of the conveyance. Stuart claims that Gardiner did not pay his proportion of the expenses which he says were assessed by NCL at the time at \$3,057.
- Stuart says that whilst he instructed his attorneys, Collie and Collie, to commence action the action was not commenced until December 2015.

2. The action was filed by the plaintiff on 20 January 2016 seeking relief as follows:-

1. An order for possession of the land [the subject of the action];
2. An Injunction restraining Gardiner whether by himself, his servant or agent howsoever from trespassing upon the said lands;
3. A Declaration that the Conveyance dated 14th April, A.D., 1978 to the Defendant is null and void and of no legal effect.
4. Alternatively, for a Declaration that the said Conveyance dated the 14th April, A.D., 1978 is void for fraud under the provisions of the Fraudulent Conveyance Act, Chapter 150;
5. Damages for mense profits;
6. General Damages.

3. Gardiner has applied by Summons dated 7 June 2018 which prays for:

- (1) an ORDER pursuant to *R.S.C Ord. 18 r. 19* that the Writ commencing this action (or otherwise, the Statement of Claim specially indorsed therein) by struck out or amended on the grounds that the said Statement of Claim:
 - a. discloses no reasonable cause of action;
 - b. is scandalous, frivolous, or vexatious;
 - c. may prejudice, embarrass or delay the fair trial of the action; and/or
 - d. is otherwise an abuse of process.
- (2) Alternatively, an ORDER pursuant to *R.S.C Ord. 20 r. 5* that the Defendant be granted leave to amend his Defence.

AND that provision may be made for the costs of and occasioned by this application.

4. The Summons is supported by the affidavits of Samantha Bastian filed on 7 June 2018, Gardiner filed on 3 July 2018 and LaPaige Gardiner filed on 3 August 2018. Stuart has filed affidavits in response on 29 June 2018 and 16 July 2018.

5. There were essentially two (2) complaints, for which the court focused, relative to the application of Order 18 rule 19(1) of the RSC. These were:

- (1) whether the action was statute barred and the effect of the limitation act; and
- (2) the requirement for leave to commence these proceedings.

6. Order 18 rule 19 of the RSC provides that the Court:

"...may at any stage of proceedings order to be struck out or amended any pleading... 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.

In the relevant note of the Supreme Court Practice, at paragraph 18/19/15 it is provided as follows:

"Frivolous or vexatious" By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable..."

7. **Bowen L.J.**, in **Willis v. Earl of Beauchamp (1886) 11 P. 59, 63** stated that the Court has the inherent power to prevent the abuse of its legal machinery which would occur, if for no possible benefit, a party is to be dragged through litigation which must be long and expensive. The frivolous claim is reserved for cases which are obviously unsustainable. In the case of **West Island Properties Limited v. Sabre Investment Limited and others - [2012] 3 BHS J. No. 57** The Bahamas Court of Appeal has provided some guidance on the question of striking out actions under **Order 18 rule 19 (1) Allen P.**, delivering the majority decision of the Court, at paragraphs 15, 30 and 57, stated:

15In the case of **Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688**, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:

"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

...

In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in **Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark**

Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

...

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

...

30 Concerning *Order 18; rule 19(1)(d) R.S.C.*, both Bramwell B. and Blackburn J. in the cases of *Castro v. Murray* Law Rep. 10 Ex. 213;218 and *Dawkins v. Prince Edward of Saxe-Weimar* 1Q. B.D. 499;502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in *Dawkins v. Prince Edward of Saxe-Weimar* indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.

...

57 Lindley, L.J. in the leading Court of Appeal case of the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch. 274, considered a similar order which allowed pleadings to be struck out and dismissed on the ground of being frivolous and vexatious. The learned judge at page 277 said that:

"It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable"

8. Gardiner correctly identifies 4 potential claims in the Writ which Stuart asserts entitles him to 4 reliefs, these were:

- i. Breach of Contractual Agreement;
- ii. Trespass;
- iii. Non-compliance with Articles 113 and 114 of North Cowpen's Articles of Association;
- iv. Reliance upon ss. 1 and 2 of *the Fraudulent Conveyances Act*.

9. Claims for breach of contract are prohibited pursuant to Sections 5(1)(a) and (2), 16(3), and 32(1) of the *Limitation Act, 1995* which provide:

5.(1)The following actions shall not be brought after the expiry of six years from the date on which the cause of action accrued, that is to say

—

- (a) actions founded on simple contract (including quasi contract) or on tort;

...

(2) An action upon an instrument under seal shall not be brought after the expiry of twelve years from the date on which the cause of action accrued: Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

...

16. (3) No action shall be brought by any person to recover any land after the expiry of twelve years from the date on which the right of action accrued to such person or, if it first accrued to some other person through whom such person claims, to that person

...

32. (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover the proceeds of the sale of land, after the expiry of twelve years from the date when the right to receive the money accrued.

10. Gardiner also argues, that the causes of action challenging the conveyance must have accrued on 14 April 1978 when the Conveyance was given to Gardiner, at which time the requirement to pay his proportion of the expenses would have arisen and crystallized. In this case, these claims, including those for breach of contract was all barred by the time Stuart was appointed on

11 May 1990. According to *Stephenson J* in *Ronex Properties Ltd. v. John Laing Construction Ltd. et al* [1983] 1 QB 398:

"There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process."

In this case there is no allegation of any concealed fraud or any matter to show that the claim is not vexatious or an abuse of process. The conveyance was executed by the former President of NCL, Mr. Steve Hepburn, to whom Gardiner says he would have made payment. Surely then, NCL was aware of the existence of the conveyance through its President at the time it was executed. On Stuart's evidence, the information upon which he grounds his claim is based only upon that information which was provided to him by the agents of NCL and the son of the late Mr. Hepburn. Additionally, he indicates that the company's record keeping was less than ideal with "documents... not separated into individual files but were all mixed up." I am satisfied therefore that these claims, made almost 40 years after the alleged events, are frivolous and vexatious and an abuse of the process.

11. Stuart makes a claim for possession of the land and for injunctive relief with respect to the land the subject of the action. Such a claim is wholly unsustainable and must be struck out. Inasmuch as this claim may be based upon trespass, it is indubitably barred by section 5(1)(a) of *The Limitation Act, 1995*, which provides a 6-year limitation period. Further, the undisputed evidence of Gardiner was that title in the property was conveyed to his 4 children by conveyances all dated 26 April 2002 and recorded on 14 May 2002. The evidence is also that building structures have been constructed on this property by the children. It follows therefore that since 2002, Gardiner has not had possession or control of the Property. Any claim in trespass therefore, premised upon Gardiner having possession of the Property, is unsustainable

as Gardiner's possession terminated as of 26 April 2002, 13 years prior to the commencement of this claim. Such a claim in trespass is an abuse of process as the cause of action for this claim would have accrued well in excess of six years prior to the commencement of this action.

12. Gardiner argues that the claim in the Writ, in its entirety, must be struck out due to the Plaintiffs failure to obtain permission of the Court prior to commencing this action pursuant to Section 202(1)(a) of *The Companies Act*. Section 202(1)(a) of *The Companies Act* provides:

202. (1) The official liquidator may, with the approval of court, do any or all of the following –
(a) bring or defend any action, suit, or prosecution, or other legal proceedings, civil or criminal, in the name and on behalf of the company;"

Miss Ginton, on behalf of Gardiner, says that "even if the facts as pleaded give rise to a cause of action, such cause of action remains vested in North Cow-pen and is not vested in [Stuart] who, having no standing to bring this claim, has himself no reasonable cause of action against [Gardiner] in his capacity as liquidator or at all". I agree. Section 202(1) requires Stuart to have obtained the approval of the Supreme Court prior to commencing the action. Having failed to so obtain the prior approval from the Court to commence this action, Stuart proceeded without authority and the action is thereby not competent. Stuart has no capacity to pursue this claim on behalf of NCL.

13. The Court must be vigilant to prevent the improper use of its machinery. This is especially so in this case as the failure to obtain to permission or approval of the Court was a violation which, on the evidence, Stuart was aware since February 2016 in a decision given by *Frasier J* in the case of *Stuart (Liquidator of North Cow-Pen Land Limited) v. Carey-Collins and another - [2016] 1 BHS J. No. 22*. Notwithstanding the issue being raised in that case, no effort to rectify the failure to obtain Court approval has been pursued. I find that that the failure to comply with the statutory requirement constitutes an abuse of the court's process.

14. Further, and in any event, I find that the circumstances of this case do not appear to be one which leave ought to be granted if sought. NCL must be taken to have always been aware of the 1978 conveyance. As Stuart can have no interest other than through the company, the averment that he was unaware of the conveyance cannot impact the effluxion of time which has accrued since the 1978. The conveyance has been on the public record since 1984, more than 20 years before the commencement of these proceedings. One would have expected a title search to have been conducted by Stuart at the beginning of his engagement in 1990. In my view, NCL's claim is at best for the recovery of the sum of \$3,057 for Gardiner's proportion of the expenses of the quieting. The Certificate of Title was granted to NCL subject to Gardiner recovering his land which he had conveyed to NCL for the purposes of the quieting action. The judgment of *Smith Sr J* was clear and unambiguous on this issue. NCL cannot now claim to have any other interest in the property. No action has taken place by the company (and thereafter Stuart) in the ensuing 40 years and this claim to \$3,057 has long been barred. To allow the Stuart to proceed, and require Gardiner, who is now elderly, to defend himself against 40-year-old claims would be unduly prejudicial and no leave could be properly countenanced.

15. In the circumstances therefore, I struck out the action with reasonable costs to Gardiner.

Dated this 7th day of February 2019



Ian Winder

Justice