

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Cle/gen/01494/2017

BETWEEN:

ATLANTIS HOLDINGS BAHAMAS LIMITED

Plaintiff

AND

**MONIQUE BELINDA TAYLOR
d/b/a/ TAYLOR MONIQUE BELINDA**

Defendant

Before: The Honourable Mr. Justice Gregory Hilton

Appearances: Camille Cleare for Plaintiff

Alton Mckenzie for Defendant

Hearing Dates: 19th February

Civil Law – Trespass – Access over Right-of-way – Whether Right-of-way public or private – Injunction – Determination of High Water Mark on Beach – Summary Judgement –Strike Out of Defence

DECISION

1. The Plaintiff company is the owner of a hotel resort property which includes the Paradise Island Beach Club, and the Ocean Club Estates beach Club situated on Paradise Island in the Bahamas. The resort's property encompasses Land on Cabbage Beach extending to the High Water Mark.
2. The Plaintiff, since its purchase of the property in 2006, has allowed access to Cabbage Beach over its land by the public – restricted to “Leisure and Recreational purposes” – at certain designated access pathways; and has erected signage at the entrances of the access pathways with the following words:

“Access to this property is limited to those authorised, from time to time, by the owner and may be used solely for personal recreational purposes. Vending or other solicitation on the property, or traverse of the property to other property for such purpose, is strictly prohibited unless specifically authorised by the owner.”
3. The Defendant is a beach Vendor and the president of the Cabbage Beach Business Owners Association “CBBOA” and has a Business license from the Bahamas Government from 2012 to conduct business as a vendor on Cabbage Beach renting chairs and umbrellas and selling souvenirs, soft drinks and snacks.
4. The Defendant has from 2012 utilised various “Access Pathways” over the Plaintiff's land to access the Cabbage Beach to conduct her vending business, which the Plaintiff has objected to, and the Plaintiff has on several occasions had the police remove the Defendant and her goods/wares from the property and the beach.
5. The Plaintiff has contended that the Defendant has set up her vending business on the Plaintiff's property on Cabbage beach above the High Water Mark; while the Defendant has

contended that her vending business on Cabbage Beach is set up and conducted below the High Water Mark on the Beach.

6. The Plaintiff has also contended that the Defendant does not have the right to use the "Access Pathway" (which is the Plaintiff's private property) for the purpose of setting up and conducting her vending business on Cabbage Beach; while the Defendant has contended that the "Access Pathway" is a public access pathway which she has a right to use to gain access to Cabbage Beach to conduct her business.
7. The Plaintiff filed a Writ of Summons on 19th December 2017 and the Statement of Claim was settled as follows:

STATEMENT OF CLAIM

- [1]. The Plaintiff company is and was at all material times the owner in fee simple and entitled to possession of 38.543 acres situate on Paradise Island, which includes the Ocean Club Estates Beach Club and a public access path to Cabbage beach, near the Paradise Island Beach Club, with frontage along Cabbage Beach up to the High-Water mark (hereinafter referred to as "the premises")
- [2]. The Defendant is and was at all material times a citizen and/or resident of the Commonwealth aforesaid and a member of the Cabbage beach Business Owners Association and the Cabbage Beach Hair braiders Association.
- [3]. At all material times the Plaintiff restricted access to the premises by erecting and maintaining signs located *inter alia* on the access path to Cabbage Beach, which state as follows:

“ATLANTIS
PARADISE ISLAND, BAHAMAS.
PRIVATE PROPERTY
AUTHORIZED ACCESS ONLY
Conditions of Beach Access

Access to the property is limited to those authorized, from time to time, by the Owner and may be used solely for personal recreational purposes. Vending or other solicitation on the property or traverse of the property to other property for such purposes, is strictly prohibited unless specifically authorized by Owner. All entering the property shall do so at their own risk, and while on the property shall be required to observe the requests and instructions of security personnel posted by Owner. In particular, the following rules shall be observed:

- Persons under the age of 16 years shall be escorted by an adult (over the age of 21 years) at all times.
- No loud music or other behaviour which may be or become a nuisance or an annoyance to the owner or their invitees.
- No alcoholic beverages to be consumed by, or be in the possession of a minor.
- Persons entering the property may be subject to search and/or questioning to monitor compliance with the rules of access.

The owner reserves the right to deny, limit, or terminate access at any time.”

- [4]. The Defendant is and was never authorized or permitted by AHBL, it's servants or agents to use the premises to vend, solicit or otherwise beset its guests, patrons, employees, licencees or invitees or to traverse the premises to access other property for such purposes.

- [5]. On or about 9th December, 2017, the Defendant entered onto the premises without the licence or consent of AHBL and erected a make shift stall on the premises, particularly on Cabbage Beach at the foot of the Cabbage Beach access steps, in the vicinity of the Paradise Island Beach Club and near the Ocean Club Estates Beach Club.
- [6]. At such time the Defendant was accompanied by two other persons, one being a female and the other a male who gave his name as 'Angelo'. The Defendant displayed drinks, packaged food and jewelry on the makeshift stall for the purpose or intention of vending to the patrons, licencees and/or invitees of AHBL.
- [7]. On or about 11th December, 2017, the Defendant entered onto the premises again, without the license or consent of AHBL, and erected a make shift stall on the premises, particularly on Cabbage Beach in the vicinity of the Ocean Club Estates Beach Club.
- [8]. At such time Defendant displayed a variety of bottled drinks on the makeshift stall for the purpose or intention of vending to the patrons, licencees and/or invites of AHBL.
- [9]. The Defendant is a trespasser on the land.
- [10]. By entering onto the land as referred to above, the Defendant has caused the Plaintiff to suffer loss and damage.

PARTICULARS OF LOSS AND DAMAGE

1. The value of the property so diminished by the acts of trespass of the Defendant.
2. In the alternative, the market value of rental income to the Plaintiff for the duration of the acts of trespass.
3. Exemplary Damages on the basis that the acts of the Defendant were done with a view to make a profit.

[11]. The Defendant threatens and intends, unless restrained by the Honourable Court, to continue and repeat the wrongful acts above complained of.

[12]. The Plaintiff is entitled to interest at such rate and for such period as to the court may seem just pursuant to the Civil Award of Interest Act.

AND The Plaintiff claims:-

- (1) A declaration that the Defendant is not entitled to enter, use or traverse upon the premises.
- (2) An injunction restraining the Defendant whether by herself or by her servants or agents from entering, using or traversing across the premises.
- (3) Damages for trespass;
- (4) Exemplary damages;
- (5) Costs;
- (6) Further or other relief.

8. The Plaintiff also filed an ex-parte Summons on 19th December 2017 supported by two affidavits seeking an Interlocutory Injunction against the Defendant, which this court granted in a written ruling dated 21st December 2017.
9. The Defendant, having been served with the Writ of Summons and Order granting the interlocutory injunction to the Plaintiff, filed an appearance on 28th December 2017 and a summons on 4th January 2018 supported by the Affidavit of the Defendant seeking to set aside the Interlocutory Injunction and other reliefs.
10. The Court heard the Defendant's summons and gave a written ruling on 13th February 2018 refusing to set aside the Interlocutory Injunction. Paragraphs 8-15 of the ruling are set out below:
 - “8. With respect to the reliefs sought by the Defendant in her summons filed on 4th January 2018 the Court for reasons to be delivered in writing shortly declines to set aside the interlocutory injunction granted on 19th December 2017 and the injunction will remain until determination of the trial as the court does not accept that any material non-disclosure was made by the Plaintiff in its ex parte application. .
 9. The Court accepts that the Defendant has a licence to operate her business on Cabbage Beach, however, not where this abuts the Plaintiff's property above the high water mark.
 10. The court finds that the two real issues which must be determined in this action are:

- 1) Whether the 'Access Way' from the road to Cabbage Beach (which traverses the Plaintiff's land) is
 - (a) a Public Access way over which the Defendant has a right to utilise; or
 - (b) A Private Access Way owned by the Plaintiff who have the right to allow and/or restrict persons using the access way under conditions set by the Plaintiff.
 - 2) Verification of where the high water mark is on that part of Cabbage Beach which abuts the Plaintiff's property; and consequently whether or not the foot of the "Access Way" on the beach is above or below the high water mark.
11. The Court is of the view that there can be no successful challenge of the right of the Defendant to use Cabbage Beach below the high water mark as contained in her licence to vend on the beach by the Bahamas Government.
 12. The first issue is a purely legal one a determination can be made on written submissions which I now direct to be provided on or before 28th February 2018.

13. With respect to the verification of the High Water Mark on Cabbage Beach I direct to be provided with an expert surveyor report which plots the mean – high water mark on the part of Cabbage Beach which abuts the Plaintiff's property.
 14. The Court also directs that once the Defendant has filed a Defence, and the court is provided with the items specified at paragraphs 12 and 13 above; the hearing and determination of the issues the court has identified will allow a final conclusion and determination of this matter.
 15. The matters claimed in paragraph 3 and 4 of the Defendant's Summons be adjourned pending determination of items specified at paragraphs 12 and 13 above."
11. The Defendant filed a Defence and counter claim on April 2018 settled in the following term:

DEFENCE AND COUNTERCLAIM

- (1). (a) The Defendant admits paragraph 1 of the Statement of Claim, save and except that the conveyance of 31st August 2006 does not include a "public access path to Cabbage Beach". It speaks of "access rights" which are specific to neighbouring property owners on Paradise Island and are granted in separate Indentures listed and specified in the conveyance of 31st August 2006. The public access paths to Cabbage

Beach are historic right of ways which the public have enjoyed since before Paradise Island was opened in 1962.

- (b) The Plaintiff's property has well-defined property boundary with stakes which in some place is about 20 feet from the high water mark. The boundary is not on the high water mark.
- (2). Paragraph 2 of the Statement of Claim is admitted.
 - (3). The Defendant neither admits nor denies paragraph 3 of the Statement of Claim; and avers that the Defendant as a member of the public has a right to use the public access path to the beach. The public have been using these access paths to Cabbage Beach since before Paradise Island was opened in 1962 and would have acquired prescriptive right by virtue of the Prescriptive Act; Chapter 158. The Plaintiff recently (2012) purported to put up the signage in order to frustrate the beach vendors whom the Plaintiff finds as competing with it for the tourist business on the beach. The Bahamian public have been using the public access path to Cabbage Beach since before 1962 when Paradise Island was opened. The said signage has never been effective in this regard as the public continues to use the access path to Cabbage Beach.
 - (4). The Defendant denies paragraph 4 of the Statement of Claim and avers that the right of public access to Cabbage Beach was never the Plaintiff's to grant and therefore the Defendant does not require authorization or permission by Atlantis Holdings Bahamas Limited to use the public access path to Cabbage Beach and to use Cabbage Beach.

- (5). The Defendant denies that she entered onto the Plaintiff's premises and erected a make shift stall on it, and avers that she was on Cabbage beach to conduct her vending business having been properly authorized to do so by the Government. The Defendant further avers that the foot of the Cabbage Beach access steps is not on the Plaintiff's property as the Plaintiff's property has a clearly defined boundary that is in some place about twenty (20) feet before the high water mark.
- (6). The Defendant neither denies nor admits paragraph 6 of the Statement of Claim and avers that she has a right to vend to any and all persons on the beach who choose to patronize her business having been duly and properly authorized and licensed to do so .
- (7). The Defendant repeats paragraphs 4 and 5 above in response to paragraph 7 of the Plaintiff's Statement of Claim.
- (8). Paragraph 9 of the Statement of Claim is denied. The Defendant is duly and properly authorized to conduct her vending business on Cabbage Beach and as a member of the public has a right to use the historic right of ways that provide access to Cabbage Beach over Paradise Island.

COUNTERCLAIM

- (9). The Defendants repeats paragraph 1 to 9.
- (10). By an Order filed on 21 December 2017 in Action Number Cle/gen/0001494, the Defendant (whether acting directly or through her employees and or agents or otherwise was prohibited and restrained from entering, accessing or using the Plaintiff's

property on Paradise Island for the purpose of vending, soliciting, approaching and/or beseeching patrons, employees and/or guests on the Plaintiff's property, inclusive of Cabbage Beach and the access pathways thereto.

- (11). The Defendant was thereby restrained from conducting her legitimate and properly authorized business on Cabbage Beach.
- (12). By reason of the aforesaid, the Defendant has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

- (i.) Loss of Income
- (ii.) Damage to rental articles (Chairs, umbrellas, etc.)

AND THE DEFENDANT CLAIMS:-

- (a) A Declaration that Cabbage Beach is a public Beach;
- (b) A Declaration that the Defendant, as a member of the public, has a right to use the right of ways that provide access to Cabbage Beach over Paradise Island;
- (c) An Order restraining the Plaintiff, whether by itself, its servants or agents from harassing, interfering with, and/or preventing the Defendant conducting business of Cabbage Beach, Paradise Island.
- (d) Damages for Loss of Income;
- (e) Costs of Damaged chairs and

- (f) Exemplary Damages;
 - (g) Interests;
 - (h) Costs;
 - (i) Such further or other relief as the Court deems just.
12. On 28th June 2018 the Plaintiff filed a summons seeking an order for summary judgement pursuant to Order 14 rule 1 of Rules of the Supreme Court (RSC) and also for an order that the Defence and Counter claim be struck out pursuant to Order 18 Rule 19 (1) (a), (b) and (d) (RSC). The summons was supported by the Affidavit of Edward Fields filed 28th June 2018.
 13. The Plaintiff also filed a PLAN prepared by CHEE-A-TOW COMPANY LIMITED (A licenced surveyor in the Bahamas) on 15th October 2018 which detailed the mean High Water Mark where the Plaintiff's property abuts Cabbage Beach.
 14. The Defendant filed an affidavit on 8th February 2019 along with two additional affidavits sworn by Randy Kendal Rolle and Marsha Ezra Newymour respectively contesting the reliefs sought by the Plaintiff.
 15. At the hearing on 19th February 2019 each party relied of their respective affidavits and none of the affiants were cross-examined. Each party also relied on written submissions (with authorities) provided to the court and briefly augmented orally at the hearing.

THE EVIDENCE

16. The Plaintiff relies upon the affidavit of Edward Fields who is the Senior Vice President of the Plaintiff Company responsible for Public Affairs and the General Manager of Ocean Club Estates

on Paradise island; And has been employed with the Atlantis group of companies for 20 years.

17. This affidavit gave a historical overview of the development of Paradise Island and contends that the Defendant did not have a right to access the Cabbage beach over the right – of – way traversing the Plaintiff's property for the purpose of vending on Cabbage Beach.
18. Paragraphs 4-18 of the affidavit is set out below:
 4. Paradise Island was historically known as 'Hog Island', comprising several large, privately owned tracts of land that were used for farming and accessed by boat only.
 5. The Paradise beach and Transportation Company Limited, Real Estate Act 1944 vested title in a parcel of land on both New Providence and Hog Island in Paradise Island Beach and Transportation Company Limited for the purpose of constructing the first bridge between the two islands.
 6. In 1966 Paradise Island Limited ('PIL') acquired ownership of tracts of land comprising the majority of land on Paradise Island, including the associated foreshore, and started to develop it, selling off subdivisions. This purchase was supplemented through a number of transactions culminating in 1998 by the purchase of a substantial parcel known as 'Allotment Number 8' or Burrows tract'.
 7. By an indenture of lease dated 10th April, 1967 and recorded in the Registry of Records in Book 1105 pages 179-195, PIL agreed to lease a parcel of land on Paradise Island that it owned in fee simple and

sub-lease a parcel of land comprising a causeway leading from East Bay Street on New Providence to Potter's Cay together with the bed of the sea that it held on a term of ninety nine years under an earlier indenture of lease from the Government, to Paradise Island Beach and Transportation Company Limited for a term of ninety nine years, for the purpose of permitting the premises to be used as the site of the Bridge. A copy of the aforementioned indenture of lease dated 10th April, 1967 is now shown to me and exhibited hereto marked "EF1.

8. It is also significant to note that all roads on Paradise island were established by PIL or its predecessors or successor (the Plaintiff), and remain privately owned; they have not, to date, been acquired by the Government nor have they been gazetted as public roads in accordance with the Roads Act.
9. All rights of access and use of roads on Paradise Island that are owned by PIL have arisen out of express grants of easement to purchasers of land on Paradise Island from PIL, or its successor in title, which run with such land. Such grants of easement allow PIL, and its successors in title, to retain the right to move and reconfigure the roads, as has been done from time to time in the past.
10. Also, in many cases where PIL has subsequently sold such land that it has developed on Paradise Island, it has issued a licence ("Beach Licence") to an Allotted Beach granting the landowner the right to access and use the Allotted Beach, subject to the conditions expressed in a written licence, and only in connection with their ownership of the land sold, for the duration of their ownership.

11. In the 1970's, for example, PIL developed the Paradise Island Colony Subdivision and issued beach Licences to purchasers of subdivision lots for the benefit of the owners of such Lots. The Beach license allows for the Allotted Beach to be relocated to other land owned by PIL or its successor grantor, upon notice by the Grantor to the Grantee. Up until the early 1980's the Allotted Beach was a specified area of Hartford Beach (a/k/a Cabbage Beach) accessed through the hotel known as the 'Beach Tower'. PIL however retained an absolute right to move the Allotted Beach and the access route thereto, whenever it saw fit. This right is also expressly contained in the licence, at "EF2" and is hereinafter set out for convenience as follows:

The Grantor shall have the right at any time upon giving Three (3) months notice in writing to the Grantee to substitute for the Allotted Beach any other beach and foreshore above the high water mark of the sea upon Paradise Island as the Grantor shall choose in its own absolute unfettered discretion and the beach thus substituted (hereinafter called "the substituted beach") shall as described in the said notice be deemed to be incorporated in the Second Schedule to these presents in substitution for the Allotted Beach to the intent that the substituted beach shall be deemed to have been the subject of this present licence ab initio.

12. In 1984 the Allotted Beach for landowners on Paradise Island and the access path thereto was moved or substituted by PIL to a path along the eastern boundary of a six acre parcel of land then owned by PIL and subsequently sold to A.I. Land

Bahamas Limited. The path ran along the western boundary of such 6 acre parcel with Sunrise Beach Villas.

13. In 2006, as part of a restructuring of asset holdings PIL transferred its title to substantially all of the land it then held on Paradise Island, comprising approximately 523 acres to its affiliate company, the Plaintiff company, by way of conveyance which is duly recorded at Book 9826 pages 181-219. A copy of the recorded conveyance is now shown to me and exhibited hereto marked "EF3". The Plans marked in Pink indicate the land, including roads and road reservations that were transferred.
14. As a result of the sale of the vacant six acre parcel to A.I. Land Bahamas Limited in paragraph 12 above, the Allotted Beach was again relocated in 2015 to its current location, also owned by the Plaintiff company (having been conveyed by PIL pursuant to the conveyances referred to in paragraph 13 above.)
15. The Paradise Island Tourism Development Association ('PITDA'), which is a private association comprising members representing owners and operators of residential, commercial and resort land on Paradise Island, maintains the roads and other landscaped areas owned by the Plaintiff Company on Paradise Island, and provides security to these areas, including the Allotted Beach. PITDA is privately funded by financial contributions from its members.
16. The access path and beach, the subject of this action, was first created and allowed as a permitted access way by PIL sometime in 2005. The access

path was fenced on either side and an entry gate erected at the entrance. The gate is occasionally closed and locked by PITDA security acting on instructions of the Plaintiff. In addition, there is prominent signage at the entrance to the pathway notifying the private ownership, the permitted access, and the conditions of such access, including the right of the owner (ie the Plaintiff Company) to deny or restrict access at any time. Wording on the sign includes the following statement:

Access to this property is limited to those authorized, from time to time, by the Owner and may be used solely for personal recreational purposes. Vending or other solicitation on the property, or traverse of the property to other property for such purposes, is strictly prohibited unless specifically authorized by the Owner.

17. Consequently, the public have never had access as of right to any of the roads, beaches or the foreshore up to the high water mark on Paradise Island as these lands are all privately owned by private land owners including the Plaintiff and its predecessors in title. The only access enjoyed by the general public has been by permission and at the will of private land owners.
18. It is only with the express permission granted by the Plaintiff, in its sole discretion, that the public is allowed to access the Beaches on Paradise Island, being the subject beach to this action, from any roads on Paradise Island. Such permission has always been on condition that such usage is for leisure and recreation only; vending and soliciting have been expressly forbidden other than as

specifically authorized and licenced by the landowner.”

19. The Plaintiff also relied upon the survey Plan prepared by CHEE-A-TOW COMPANY LIMITED prepared in February 2018 which detailed the High Water Mark on Cabbage Beach where it abuts the Plaintiff’s property and depicted the distance from the vegetation and bottom of the berm on the Plaintiff’s property to the High Water Mark as sixty-seven (67) feet. The Survey Plan also depicted the steps on the Plaintiff’s property and the Cabbage Beach which indicates that the bottom of the steps were above the High Water mark and consequently located on the Plaintiff’s property between the bottom of the Berm and the High Water Mark. The survey plan also depicted where beach erosion was occurring and showed damage to one portion of the steps which it indicated was caused by storm surge.
20. The Plaintiff also relied upon the several Affidavits of Lakeisha Hanna filed in support of the interlocutory injunction application which averred that the Defendant had set up her vending business on the Plaintiff’s property near the bottom of the stairs on Cabbage beach and well above the High Water Mark, clearly on the Plaintiff’s property and was trespassing.
21. The Defendant in her 2018 affidavit averred that she had a licence from 2012 from the Government to conduct business on Cabbage Beach and produced copies of her business licence and authorisation from the Bahamas Ministry of Tourism in 2017.

The Defendant also averred that as a result of the interlocutory injunction she has suffered damage to her goods and loss of earnings.
22. The Defendant’s supplemental affidavit filed on 8th February 2019 sets out her history of working on Cabbage Beach and included exhibits (Photographs) depicting the area of the steps

which she says showed that the High Water Mark on Cabbage Beach abutting the Plaintiff's property is south of the bottom of the steps and that she was not conducting her business on the Plaintiff's property.

23. Paragraph's 2-10 of her affidavit states as follows:

- “2. I have been working as a beach vendor in the area near where the Paradise Island Beach Club easement exits on to Cabbage Beach from I was a child of about 8 or 9 years old: For about 20 years.
3. My mother who is now 58 years old also worked as a beach vendor in the area from she was a child at the age of about 12 or 14 years old and she stopped working in the area in about 1994 when she relocated to the Cable Beach to work.
4. The sea at Cabbage Beach has always been rough.
5. Prior to the first set of stairs being constructed in or about 2005, at the Paradise Island Beach Club easement “Easement 3” at the end of the exit onto the Cabbage Beach, I along with other vendors and the general public accessed Cabbage Beach via Easement 3 and were able to walk straight down to the beach without the aid of stairs. However, because of the constant erosion from the rough seas over these many years, the erosion from the sea created a huge drop of almost 10 to 15 feet. Copies of pictures of the easement, stairs and the drop created by the erosion are hereto attached marked “Exhibit MT 5”, “Exhibit MT 6” and Exhibit MT 7” respectively.
6. The stairs have been reconstructed or repaired at least 12 times since 2005, sometimes having to be repaired twice per year.
7. From my experience of working at or around Easement 3, the high water mark is at or about 10 to 15 to the South of the base of present set of stairs.

8. I along with other vendors and members of the public also gained access to Cabbage Beach for more than 40 years without disturbance via other easements namely the easement in the vicinity of the RIU Hotel "Easement 1" and the easement near the Sunrise Beach Villas "Easement 2" which is now blocked off since about 2012 by the Plaintiff. Copies of pictures of easements are heretoattached marked "Exhibit MT 8".
 9. There is also another easement that was likewise frequently used by me, other vendors and the general public to access Cabbage Beach for more than 40 years, it is now located where the Plaintiff operated its laundry facilities and is now closed to the public since before 2012. Copies of pictures of the easement is hereto attached and marked "Exhibit MT 9".
 10. I along with other beach vendors have used Cabbage Beach at various different points along Cabbage Beach to sell goods to tourist and the general public undisturbed for many years prior to the interference and obstruction of access by the Plaintiff since about 2012."
24. The Defendant also relied upon the Affidavits of Marsha Neymour and Randy Rolle.

Marsha Neymour's short's affidavit avers at paragraphs 3-8 as follows:

- "3. I am employed as custodian as SC Mcpherson Primary Junior High School and I also work as beach vendor two days out of the week on Cabbage Beach.
4. I have worked as a beach vendor from I was the age of about 14.
5. At the time I would get trinkets and goods from my father who worked in the Straw

Market at Rawson Square and I would take the ferry from Woods Rodgers Wharf to Paradise Island to sell the goods on Cabbage Beach.

6. Once on Paradise Island, I along with the other beach vendors would always use the footpaths that was then by Sheraton Grand Hotel now RIU Hotel "Easement 1" or the footpath just East of Easement 1 right next to Sunrise Beach Villas "Easement 2".
 7. We also used the footpath that lead to Paradise Beach Club Easement 3 along with the footpath area near the Gulf Course now blocked off from access and used by Atlantis for its laundry facility "Easement 4".
 8. I along with the Bahamian public and tourist from I was a very young child of 14 to present have used the aforementioned easements save the ones that are now blocked to the public to access and egress from Cabbage Beach."
25. The Affidavit of Randy Rolle avers that he and his friends accessed Cabbage Beach over many decades for swimming and leisure purposes beginning in the 1960's.
- He avers that at various points in time, after the hotel developments occurred, he would use access pathways provided by hotel owners to access the beach.
- He indicated that several of the earlier access pathways have been blocked off by the owners of the various hotel properties and new access pathways have been provided although at certain points the gate erected across the pathways would be locked.

THE LAW – SUMMARY JUDGEMENT

26. The prerequisites and principles applicable in an application for summary Judgement have been concisely set out in a judgement by Charles, J. (with which I fully concur and can express is no better way) in the case of Arnette v. Farrington and Hawkins 2016/cle/gen/01229 where at pages 3 and 4 of the judgement she stated:

“Case law has expounded and crystalized the test for summary judgement as follows:

- a. The purpose of O 14 is to enable a plaintiff whose application is properly constituted to obtain summary judgement without trial, if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried: Order 14, Note 14/3-4-5 to the Supreme Court Practice 1979 and Roberts v. Plant [1895] 1 QB 597, CA.
- b. The onus is on the defendant to show that there is a triable issue; per Osadebay J (as he then was) in Bank of Nova Scotia v. Brown [1994] BHS J. No. 20. The Defendant must show cause against an application for summary judgement either by “affidavit evidence or otherwise”: Order 14 Rule, Note 14/4/3 of the Supreme Court Practice 1999.
- c. It is not enough for a defendant to simply deny a claim. Rather, the defendant must either dispute the validity of the claim in law or set up some affirmative case of his own to answer it. Indeed, the defendant must either, in his defence or affidavit opposing the summary judgement application, ‘condescend on the particulars’: Barclays Bank Plc v. Clarke [1998] BHS J. No 111 at para 8: per Dunkley J (Ag). Generally, the courts will require affidavits evidence of the defendant which sets out sufficient facts and

particulars to establish that there is in fact a triable issue. [Emphasis added]

- d. The question that the Court must ask in considering the pleaded defence and affidavit in response of the application for summary judgement is whether there is a fair or reasonable probability of the defendant having a reasonable or bona fide defence: *Banque de Paris et des Pays-Bas (Suisse) SA v. Costa de Naray* [1983] CA Bound Transcript 376; [1983] Lexis Citation 68.
- e. If the only defence is a point of law, and the Court can see that it is misconceived (or, if arguable, can be shown shortly to be unsustainable) the plaintiff is entitled to Judgement: Supreme Court Practice at 14/1/2.

That said, the common law aids in highlighting the importance of a full trial to achieve the interests of justice and therefore, the power of summary judgement should be approached as a serious step which should be used cautiously and sparingly.

The Court also recognizes that to give summary judgement against a litigant on papers without permitting him to advance his case before the hearing is a serious step but the interests of justice overall will sometimes so require. Hence, the discretion to the Court to give summary judgement.

As already reiterated, a plaintiff is entitled to summary judgement if the defendant does not have a good or viable defence or raise an issue against the claim which ought to be tried. This is also in keeping with the overriding objective of Order 31 A of our Rules which mandates judges to actively manage cases so as to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.”

27. As stated earlier the two real issues which must be determined in this action are:
- (1) Whether the “Access Way” from the road to Cabbage Beach (which traverses the Plaintiff’s land) is
 - a) A Public Access Way over which the Defendant has a right to utilise; or;
 - b) A Private Access Way owned by the Plaintiff who has the right to allow and/or restrict persons using the access way under conditions set by the Plaintiff.
 - (2) Verification of where the high water mark is on that part of Cabbage Beach which abuts the Plaintiff’s property; and consequently whether or not the foot of the “Access Way” on the beach is above or below the High Water Mark.
28. Before embarking on the specific issues referred to in para: 27 above, I think it is relevant to comment briefly on the distinction between “Public Beaches” and “Private Beaches” in the Bahamas.
29. In the Bahamas all land originally belonged to the crown. There is no Bahamian statute that specifically deals with this area of Law. However the principles of English ‘common law’ still apply in the main. Section 2 of the Declaratory Act Chapter 4 of the Statute Laws of the Bahamas provides:
- “2. The Common Law of England, in all cases where the same hath not been altered by any of the Acts or Statutes enumerated in the Schedule to this Act or by any Act.....is, and of right ought to be, in full force within The Bahamas, as the same now is in that part of Great Britain called England.”

It should be noted that The Bahamas (as a former colony) was not affected by the English Law of Property Act 1925 which amended the Laws of England with reference to the Law of Property.

30. At common Law the Crown was entitled to the foreshore adjoining tidal waters unless it passed to a subject by a grant, conveyance or possessory title. The right of the crown to the seashore is confined to what is covered by ordinary tides. Halsbury Laws of England (4th Edition) at para: 1418, in defining the foreshore and the Crown's right, states:

“By prerogative right the crown is prima facie the owner.....of the foreshore, or land between high and low water mark, the right being Limited Landmarks to the medium line of high tide between spring and neap tides.”

This is the test regardless of whether the sea abuts private or public land.

31. The Bahamas Public Parks and Public Beaches Authority Act 2014 in its interpretation section defines Public Beaches as follows:

“Public Beaches include the land where non-private land abuts the foreshore of the Commonwealth of the Bahamas extending between mean high water mark and mean low water mark.”

Unlike portions of Montague Beach, Saunders Beach and Goodmans Bay Beach (amongst others) where the foreshore is abutted by Government Land thus making them Public Beaches; Where the Plaintiff's property abuts the foreshore on Cabbage Beach, that portion of Cabbage Beach cannot be defined as public beach.

More will be said about the effects of this distinction below.

VERIFICATION OF HIGH WATER MARK (and its effect)

32. The issue of verification of where the mean high water mark is on that part of Cabbage Beach which abuts the Plaintiff's property is necessarily relevant to determine whether, where the Defendant had set up her business/stall, was above or below the mean high water mark, and thus whether or not she was trespassing on the Plaintiff's Land.
33. In the Bahamas, when surveying beach front property, qualified surveyors are guided by markers based upon a survey done by the Department of Lands and Survey's in the Last decade of the 20th century. These markers were placed in certain areas of the Islands of the Bahamas at the mean high water mark level.

Consequent upon this court's interlocutory ruling given on 13th February 2018 the Plaintiff provided an expert survey plan produced by licenced surveyors CHEE-A-TOW COMPANY LTD. which plotted the mean high water mark on that part of Cabbage Beach which abuts the Plaintiff's property. This survey plan was filed as part of the Plaintiff's evidence on 15th October 2018.
34. After review of this survey plan it is clear that the foot of the "Access Way" steps (where the Defendant had set up her business) is well above the mean high water mark and according to the plan produced, clearly within the Plaintiff's property.
35. The Defendant has sought to establish that the mean high water mark was above the "Access Way" steps by producing photographs, exhibited to her affidavit, depicting damage and sand erosion above those steps at various points in time.
36. It is the court's view that those photographs cannot override the expert's plan which the court has accepted and which has not been challenged by any other expert surveyor; Additionally the

plan produced speaks to erosion and damages being caused by storm surge at various times.

37. While the court accepts that the Defendant had a valid licence from the Government to conduct her business on Cabbage Beach; This could only be done on those parts of Cabbage beach above the high water mark abutting property owned by the Government (which would be a public beach); and not above the high water mark on property owned by the Plaintiff or other private owners (which would be a private beach) except with their consent or by their permission.

**ACCESS WAY FROM ROAD TO BEACH –
PUBLIC OR PRIVATE**

38. The Defendant has asserted that the access way traversing the Plaintiff's property from the road to Cabbage Beach is a Public Right of way as a result of long customary use by the public or long use under the Prescription Act.
39. At the hearing the Defendant resiled from reliance on the Prescription Act but maintained that the right of the public (including her) to unrestricted use of the access way was a public right in the sense that, due to the long use of it by the public, it could be deemed a public highway and relied upon her claims in clauses 3 and 4 of her filed Defence and the affidavit evidence referred to in para: 14 supra
40. The Plaintiff has submitted that the public has never had unrestricted access as of right to any of the roads, beaches or the foreshore above the high water mark on Paradise island as these lands are privately owned by the private land owners including the Plaintiff and its predecessor in title. And that the only access over the access pathways from the road to the Cabbage Beach enjoyed by the general public has been by the permission and will of the private land owners. The Plaintiff asserts that the public can only use the access pathway over

the Plaintiff's land with the permission of and subject to the conditions set by the Plaintiff.

41. The Plaintiff also submitted that in its conveyance it is expressly set out at Recital A, all of the restrictive covenants, easements and rights of way that the title is subject to. That they are all rights of specific land owners on Paradise Island and not of individuals such as the Defendant or members of the general public.
42. There is no dispute that the access way the subject matter of this case is on land owned by the Plaintiff and that it was created by the Plaintiff in 2015.
43. The evidence in both the Plaintiff's affidavits and the Defendant's affidavits disclose that at various dates in the past at least three other access ways were created by the Plaintiff or its predecessors in title which were subsequently blocked or closed off by the Plaintiff and/or its predecessors in title.
44. The evidence in the affidavits also disclose that the present access way created in 2015 has signs erected specifically outlining the conditions of use by the public and at sporadic times it is closed by a gate.
45. The Court has found instructive case of ATTORNEY – GENERAL v. ANTROBUS (1905) 2 ch 188. This was a case in which the Attorney General (on behalf of the Public) brought and action against the owner of the land upon which the famous Stonehenge Stone Structure stands seeking to have the fences erected by the owner (which blocked some of the roads and pathways leading to Stonehenge) removed. One of the issues in this case was whether the roads and pathways were public or which the public had a right of access regardless of the wishes of the owner of the property.

In that case the head note reads:

“ The General public cannot acquire by user a right to visit a public monument or other object of interest upon private property, and a trust to permit access for that purpose will not be presumed against persons who shew a clear documentary title. There can be no public right of way to such a monument or object acquired by mere user. A public highway must prima facie lead from one public place to another. A cul-de-sac may be a public highway, but the dedication of a cul-de-sac as a highway will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting, or other matters, by the public authority.”

46. At page 201 of the Judgement Farwell, J. stated:

“Now it is well settled that a public way can be created only by Act of Parliament or by dedication by the owner, and dedication is a question of intention and of title.”

At page 206 of the Judgement he stated:

“Now, the cases established that a public road is prima facie a road that leads from one public place to another public place.....there cannot prima facie be a right for the public to go to a place where the public have no right to be. But the want of a terminnsadquem is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient.”

At page 205 he gave an illustration of the position.

“If a landowner allowed the public to drive into his park to a ruined tower or chapel and to return by the same way, the inference would be plain that the ruins, not the drive, was the inducing cause.....; but if he allowed the public to drive out of another gate, and this made a convenient passage between two villages, the inference to be drawn would be less clear. If, however as in the present case, the inference is plain that the permission is to visit the stones, and for that purpose only to use the tracks, then such permission is one and indivisible, and no right of way can be established from user attributable to the permission to visit.”

Further at page 206 and 207 he stated:

“In *Bourke v. Davis* 44 Ch. D. 110, 122 Kay, J. says: But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public.....But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended. I venture to think that this expenditure of money is the important consideration, and that in such a case the land owner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road.”

47. Falwell, J. held in the case that the access to the Stonehenge circle was incident only to the permission to visit and inspect the stones, and was therefore permissive only; and, further, that the tracks to the circle are not throughfares, but lead only to the circle, where the public have no right without permission, and therefore, are not public ways.
48. In the present case the access pathway leads to the Plaintiff's private property above the high water mark and is maintained

solely at the expense of the Plaintiff who have permitted the public to use the access way purely for recreational and beaching purposes.

49. The Court finds that the access pathway created in 2015 cannot be deemed a public highway as the Defendant claims as there has not been long customary use of this access way, which was only created in 2015; And also because the Plaintiff's have, since its creation, continually exercised control of it (by having it closed off by a gate at sporadic times) and erecting signage circumscribing the conditions of its use.
50. A similar claim, seeking to deem a different access pathway from the road to Cabbage Beach, was defeated in the case of Patrick Sturup and Uric Musgrove Trustees of Cabbage Beach Business Owners Association Limited v. Island Hotel Company Limited D/B/A Atlantis Paradise Resort 2015/cle/gen/01988 where the evidence disclosed that that particular access pathway was routinely closed off by Atlantis multiple times during each year in order to prevent any claims to permanent rights of way to the general public..
51. The court finds that the use by the public of the access pathway created in 2015 by the Plaintiff was not a use with the assertion of the right by the public but rather a use with the tolerance and permission of the Plaintiff.
52. There has been no Act of Parliament making the access pathway a public road; neither has there been any dedication by the Plaintiff or its predecessor in title of it as a highway.
53. The Defendant has also raised the issue of the right of freedom of Movement contained in Article 25 of the Constitution which her counsel submits allows for the right to move freely in any part of The Bahamas and in particular on crown land including the foreshore.

Article 25 of The Constitution States:

“25. Except with his consent, no person shall be hindered in the enjoyment of his freedom of movement, and for the purposes of the Article the said freedom means the right to move freely throughout The Bahamas, the right to reside in any part thereof, the right to enter The Bahamas, the right to leave The Bahamas and immunity from expulsion therefrom.”

54. I fail to see how this can assist the Defendant as the Article 25 (2) clearly provides that it is subject to the rights and freedoms of other persons and cannot override Article 21 (1) of the Constitution which provides.

“21. (1) Except with his consent no person shall be subjected to the search of his person or his property or the entry by others on his premises.”

Conclusion

55. For the reasons stated above the court finds that at the relevant dates the Defendant had set up her business above the high water mark on the Plaintiff’s property and consequently was a trespasser.

The Court also finds that the access way the subject matter of this action is a “Private Access Way” over which the Plaintiff can set terms and conditions of its use.

As a result of the above findings the court rules that the Defendant’s Defence and counter claim are unsustainable and without merit.

56. As a result of my findings I make the following orders:

- 1) Summary Judgement is awarded to the Plaintiff pursuant to Order 14 Rule 1 of The Rules of the Supreme Court (RSC) and specifically:
 - a) A declaration that the Defendant is not entitled to enter, use or traverse upon the Plaintiff's premises;
 - b) A perpetual injunction restraining the Defendant whether by herself or her servants or agents from entering using or traversing across the premises of the Plaintiff.
 - c) Damages against the Defendant for trespass to be assessed by the Registrar.
- 2) The court also orders that the Defendant's Defence and Counter claim be struck out pursuant to Order 18 Rule 19 (1) (a), (b) and (d) RSC.
- 3) The court also awards costs of the action to be paid by the Defendant to the Plaintiff to be taxed if not agreed.

Dated this 30th day of April A.D. 2019

The Hon. Mr. Justice Gregory Hilton