COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2016/CLE/gen/1272

BETWEEN

BERNARD L MILLER

1st Plaintiff

AND

CARLTON MILLER

2nd Plaintiff

AND

IVAN ROLLE

1st Defendant

AND

THE PRIME MINISTER

2nd Defendant

AND

THE ATTORNEY GENERAL

3rd Defendant

Before the Hon. Mr. Justice Ian R. Winder

Appearances: Carlton Martin with Kelsey Munroe for the Plaintiffs

Khalil Parker with Roberta Quant for the 1st Defendant

Franklyn Williams for the 2nd and 3rd Defendants

17 February 2017, 21 September 2017 and 2 July 2019

JUDGMENT

WINDER J

This is an application of the 1st Defendant (Ivan) by Summons dated 20 April 2017 for striking out of the claim of the 1st Plaintiff (Bernard) and the 2nd Plaintiff (Martin).

Background

Common Law Action 702/2003 – First Trial heard by Lyons J

[1.] George Rolle and Michael Rolle commenced proceedings for Assessment for Compensation under the Acquisition of Land Act with respect to 24.18 acres which had been acquired for public utility purposes associated with the Emerald Bay Resort in Exuma. By assignment dated 12 January 2001 George Rolle and Michael Rolle assigned to Ernest Nathaniel Rolle the right, as executor of the Estate of Jeremiah Clarke, to pursue and enforce the compensation and distribute the proceeds to interested persons.

[2.] John Rodriquez and Jacob Rolle were named as defendants along with the Government of The Bahamas. Bernard was also a party to the action.

[3.] By assignment dated 2 May 2002 between Ernest Nathaniel Rolle and Ivan, Nathaniel assigned (as personal representative and in his personal capacity) all his right title and interest and claim to the compensation to Ivan.

[4.] By letter dated 17 July 2003 George Rolle and Michael Rolle purported to terminate the services of Martin & Co.

[5.] In an affidavit filed 29 August 2005 A.T. Bain, swore that he gave instructions to Martin to commence the action in the name of George Rolle and Michael Rolle and by assignment dated 12 January 2001 that he assigned his right to pursue compensation to Ernest N Rolle the Executor of the estate of Jeremiah Clarke.

[6.] A notice of Appointment of Martin as attorney for the plaintiff George Rolle and Michael Rolle was filed 13 February 2006. On the same date a summons was filed to substitute Ivan as plaintiff for George and Michael Rolle.

[7.] On 16 March 2006 Lyons, J. made the order to substitute Ivan for George T. Rolle and Michael A Rolle.

[8.] By Notice of Change of Attorney filed 24 March 2006 Lockhart & Munroe became attorneys for Ivan.

[9.] Lyons J ruled in favor of the Defendants John Rodriquez and Jacob Rolle and dismissed the claim of Ivan and Bernard.

First Appeal SCCiv Appp No 58 of 2007

[10.] This was an appeal of the decision of Lyons J in CL 702/2003 by Ivan. Bernard was not a party to the appeal and Martin did not act for Ivan who was represented by other counsel. The Court of Appeal allowed the appeal, setting aside the judgment of Lyons J and entered Judgment for Ivan.

2003/CLE/qui/702 - Second Trial heard by Adderley J

[11.] The action came on for hearing before Adderley J. Adderley J determined the action in a written ruling dated 23 November 2012. The ruing of ***Adderley J*** stated:

> **66** As to the purchase of the 60,000 acres [Bernard] gave detailed evidence of the back and forth negotiations at the Palm Hotel in Exuma were he first offered $50,000.00 for 75 acres, they countered with $50,000.00 for 45 acres, he countered with $50,000 for 70 acres and they finally settled on 60 acres which was accepted. His negotiations were with Nathaniel Rolle their deceased uncle, who there and then privately consulted with George Rolle and Michael Rolle before agreeing. The [Bernard] also proffered evidence on how some of the money he paid was spent. According to him, both George and Michael Rolle always acknowledged him as the owner of the 60 acres.
>
> **67** Observing the demeanor of the witness under cross examination he persuaded the court that on a balance of probability he was telling the truth. I therefore find that the 60 acres was sold to him. However the generic terms in which the acreage was discussed during the negotiations lead me to the view that no particular acreage had been identified even though, according to the fourth defendant, he expressed his desire to have land "near to the hotel". He stated that the surveyor had informed him that the 24.112 acres was located within his 60 acres but the court does not know who the surveyor is as he was not called, nor was his survey produced. The gap could not be filled by a hand drawn estimate on an old plan by the real estate agent for the purpose of making his appraisal.
>
> **…**

> **69** [Bernard] claims to have spent in excess of $250,000.00 on two D8 tractors, a towhead and lowboy from Stallion Tractors, N.W. 58th Street, Miami, Florida to transport the equipment and that they cut the ten miles of lines to allow the survey of the Clarke estate to proceed and that Michael Rolle who actually worked for him part time after his job at the Emerald Bay Hotel was well aware of the equipment which he purchased. He asserted that every expense connected with the six or thereabouts years of research conducted in respect of the Clarke estate and the land was paid for by him. They included airfares to and from Exuma, to and from the United States and research and legal expenses engaging surveyors and the like. The Clarke estate has benefited from it.
> **…**
> **71** I have already found that [Bernard] is entitled a 10% undivided interest in the 600-acre Forbes' Tract. Since the 24.118 acres had been "cleared up" by virtue of the compulsory acquisition proceedings I find that his company is entitled to 19% of the land or as it has now been converted to money to 19% of the compensation which should be paid to [Bernard]as his company's alter ego. Accordingly [Bernard] is entitled to 29% of the compensation.
> **72** The Promoter should therefore pay the award of $1,929,201.00 to [Ivan] to avoid any doubt of strictly complying with the judgment of the Court of Appeal, but upon receipt [Ivan] shall thereupon pay and [Ivan] is hereby ordered to pay over 29% of the award to the fourth defendant.
> **73** It appears that up until this year when new attorneys intervened for [Ivan] that [Bernard] bore the costs in accordance with the services agreement. I therefore order that costs be paid by the Promoter to [Bernard] up to the date of change of attorney of [Ivan] and thereafter to both [Ivan] and [Bernard] equally. Such costs are to be taxed if not agreed.

Second Appeal - SCCivApp No 256 of 2012

[12.] Bernard appealed the decision of Adderley J. against Ivan and the Government. The appeal was allowed in its entirety and remitted to the Supreme Court on the basis that the judge assessed his own findings at a visit to the locus in quo.

Third Trial - 2003/CLE/qui/702 heard before Longley CJ

[13.] The rehearing of the matter which was heard by Adderley J was set to be heard by ***Longley CJ***. On an application for strike out, ***Longley CJ*** ruled as follows:

> This is the continuation of an application for compensation under the Acquisition of Land Act. The history is of relevance to the application now before me to strike out the claim of Bernard. The claim for compensation first came before Lyons J to strike out the claim. In deciding the issue of title, and consequently the entitlement to compensation, Lyons J determined in a

judgment dated 23 October 2007 that parties who are now before the court were the persons entitled to land and consequently the compensation. He did not however access the compensation. In event which followed, [Ivan] Ivan Rolle appealed that decision. Since he and Bernard were on the losing end of the Lyons J decision. But Bernard did not appeal. Although Lyons J had remarked in the course of the judgment that he and Ivan had similar or identical claims. The Court of Appeal set aside Lyons J's judgment and gave judgment for Ivan Rolle vesting title to the claimed land.
In subsequent proceedings before Adderley J Bernard sought to convince the court that he was a party to the appeal and was therefore entitled to prosecute his claim for compensation for his interest in the land. Adderley J appears to have found favor with that argument but in the final analysis ruled that in order to strictly comply with the judgment of the Court of Appeal compensation ought to be given to Ivan with the directive that he pay Bernard 29 percent of the compensation for his interest in the land. The Court of Appeal set aside that decision on the basis of certain irregularities committed and remitted the mate back to the Supreme Court.
The matter now comes to me for payment of compensation. Counsel for Ivan submits in limine that the claim of Bernard should be struck out. And the issues of title to the land acquired was decided by the Court of Appeal in January 2010. And that Bernard was not a party to that appeal. And to buttress the point, counsel for Ivan Rolle submitted that this court has no power to overturn or reverse the decision of the court of appeal. The argument seems formidable to me. There are generally two questions that arise under the Act on an application for compensation. One: Who owns the land and two: The amount of compensation.
To my mind the first issue was determined firstly by Lyons J and then in the Court of Appeal, 2010 in favor of Ivan. Bernard has relied on two references in the judgment of the Court of Appeal to the word appellants which clearly conflict with the fact that no appeal was filed by Bernard and there was only one appellant in the case which clearly revealed on the record was Ivan. A reference to appellants in my mind was no more than a clerical error. In any event that it is not open to this court to review or revise the decision of the court of appeal or somehow modify it and much less reverse it. At the time when the matter first arose Bernard could have sought clarification of the decision of the Court of appeal he did not. In the circumstances therefore I feel constrained to accept the submission of Mr Parker though with some reluctance. To set aside the claim of Bernard. I therefore order that the claim of Bernard be and is hereby struck out. I will now hear [Ivan]'s claim to compensation.

Third Appeal - SCCiv App 266 of 2015

[14.] Bernard attempted to appeal the decision of ***Longley CJ*** however his appeal was struck out on the basis that no leave was obtained. In the course of striking out the appeal ***Allen P***. stated:-

> In our view, the determination of entitlement to the compensation in this matter was made as long ago as 2010 when the Court of Appeal in 58 of 2007 allowed the appeal of the intended respondent and set aside the judgment of Lyons J in relation to him. Lyons J's decision that the intended appellant had no claim and struck it out was not appealed and therefore the decision stands.

The Action

[15.] Following the Court of Appeal decision, Bernard and Martin commenced this new action seeking to enforce the 2005 Agreement. The Statement of Claim seeks the following reliefs:

(1) An Order that Ivan is entitled to the said compensation for or in respect of the acquisition of the land and should the same be paid to Ivan that it be held in trust for Bernard as such beneficial owner thereof under the 2005 Agreement.

(2) Alternatively, damages for breach of trust of the 2005 agreement.

(3) An Order that the plaintiffs are entitled to trace the proceeds of the trust into the hands of Ivan and the Prime Minister.

(4) Damages for breach of agreement and negligence in failing to claim of fully claim all of the compensation in respect of the Prime Minister's acquisition of the said 24 acres of land.

(5) An Order that Ivan is estopped from denying the terms of the 2005 agreement and that he was established an agent and or trustee of Bernard under the 2005 agreement with respect to the compensation for the land.

(6) An Order that Ivan has disclaimed the said 30% of the compensation for the land acquired by the Prime Minister which had been given to him by Bernard and as a result of such disclaimer, is not entitled to it and is estopped from claiming such 30% of the compensation in respect of the said 24 acres acquired by the Prime Minister.

(7) Damages against the Prime Minister in the form of severance in respect of damages and losses suffered as a result of the acquisition of the said 24 acre, such damages to be assessed in not agreed.

(8) An order that Bernard and or Martin are entitled to the costs for services rendered in or in respect of the acquisition action or proceedings.

[16.] Ivan's Summons, dated 20 April 2017, seeks an Order pursuant to Order 18 rule 19 of the RSC, the Limitation Act and Section 33 and 50 of the Acquisition of Land Act and the inherent jurisdiction of the Court for the striking out of the Statement of Claim filed on 10 April 2017.

Analysis & Disposition

[17.] In this application Ivan purports to seek strike out relief on every ground under Order 18 rule 19. He says that the claim :

(a) Discloses no reasonable cause of action as:
- (i.) that the question of the entitlement to the compensation payable by the 3rd Defendant in Supreme Court Action 702 of 2003 has been finally determined in that action, which position was confirmed by the Court of Appeal in Civil Appeal 266 of 2015. (Ivan says that the action is an abuse of process as the question of entitlement to the compensation payable is res judicata.)
- (ii.) the 2nd Plaintiff (Martin) was not a party to the purported agreement dated 23 March 2005.
- (iii.) Section 33 of the Acquisition of Lands Act prohibits actions aimed at setting aside awards made under the acquisition of Lands Act.
- (iv.) the action is statute barred as the agreement was dated 23 March 2005.

(b) may prejudice or delay the fair hearing of the action.

(c) is frivolous and vexatious as:
- (i.) the plaintiff having been unsuccessful both at the Supreme Court and the Court of Appeal ought not to be allowed to abuse both the Defendants and the process of the Court by instituting fresh proceedings.
- (ii.) the Supreme Court having already exercised its jurisdiction with respect to claims under the Acquisition of Land Act concerning the subject land in the Ivan's favor, it is therefore functus officio.

[18.] The plaintiffs say that the entirety of the Summons is predicated upon the effort of Ivan to cover up and benefit from his wrong or wrongful conduct in these proceedings, in respect of the compensation for the acquisition of the land and in defiance of the established principle that a party cannot benefit from his wrong.

[19.] Order 18 rule 19 (1) 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..."

[20.] 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:

> **15** In 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 stuck 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"

[21.] The claim of Bernard and Martin in this new action is the enforcement of a purported agreement dated 25 March 2005. In the agreement, which appears to concern property in excess of the 24 acres the subject of the acquisition claim:

(a) Ivan purportedly agreed to join in the 2003 action on behalf of the estates of Margaret Clarke and Jeremiah Clarke to “clear up all matters of title relative to the said estates and of distributing to those family members who are entitled to share in the said estate”.
(b) Ivan agreed to be substituted as the plaintiff in the First Action in place of George Rolle and Michael Rolle.

(c) Ivan agreed to continue the engagement with Martin's law firm and to pay him 15% of the land claimed by the estates and for Martin to have complete right of choice of such land.
(d) Bernard and Martin are said to have contributed to the transaction 5 years of research and other services provided.
(e) Ivan was said to have accepted the purchasers terms and conditions which were agreed to by George Rolle and Michael Rolle in 2001.
(f) Ivan was said to have agreed to ratify sales of 60 acres to AT Bain.
(g) Ivan was said to have agreed that Bernard was entitled to be paid the compensation due from the Bahamas Government and was to make an application "in the pending action for the said compensation to be substituted in the place of George Rolle and Michael Rolle and shall as such substituted party act according to the directions and instructions of Bernard and shall pay or cause to be paid to Bernard the said compensation".

[22.] Ivan has not in these proceedings denied that he executed the 2005 Agreement. His complaints in this application has centered on questions of Res Judicata and the Limitation Act.

[23.] In my view the limitation issue may be dealt with in a very short shrift. The claim is for breach of contract, a contract purportedly made by deed. Such a contract attracts a limitation period of 12 year from the date of any breach. Regardless of when the breach is alleged to have occurred, it was only 11 years between the date of the contract in 2005 and the date of the commencement of these proceedings in 2016.

[24.] On the question of res judicata I accept that that issue of who is entitled to compensation has been "*beaten to death*". It was the subject of 3 Supreme Court trials and 3 appeals in each case. Of the three actions, it is only the second action, heard by Adderley J., which considered the validity or otherwise of the 2005 agreement. In the course of that action, Adderley J found at paragraph 70 as follows:

> **70** [Ivan] admitted the March 2005 agreement with the fourth defendant. The question certainly came to the court's mind of whether he could understand the complexity of that agreement because of his apparent difficulty with reading but it is not a case in which, in my judgment, he can claim *non est factum*. The document which he signed was not fundamentally different from what he thought he was signing concerning the

clearing up the Clarke estate. However on the evidence Martin did not disclose material facts to him before he signed it, namely that he had been relieved of his authority by Michael and George Rolle. It was observed by the court that 13 out of the 16 paragraphs in the report deal with Martin's fees and confirming his authority to act so at the time he had Mr Rolle sign the document the question of his authority or lack thereof obviously crossed his mind. The decision not to inform Mr Rolle was deliberate. For the foregoing reason I declare the March 2005 and subsequent agreements void. However that does not vitiate the validity of the 2000 and the services agreements and the 2000 conveyance which I find valid.

[25.] The Court of Appeal however allowed that appeal and remitted the action in its entirety to be reheard. This finding therefore, of Adderley J, cited above, has been set aside. When the matter was reheard, ***Longley CJ*** struck out the action. ***Longley CJ***, at page 22 of the transcript indicated, albeit clearly obiter, that claims between the parties outside of the question of compensation ought to be dealt with by a separate action. He dealt only with the question of who was entitled to the compensation for the 24 acres acquired by the Government. Longley CJ also took the view that the question of who was entitled to compensation was settled by the First Court of Appeal decision which stated that Ivan was entitled.

[26.] I accept that the 2005 Agreement, on its face, raised numerous issues for concern. It cannot be said, however, that the 2005 Agreement has ever been the subject of an action for which an adjudication has been made.

[27.] Having regard to the principles outlined in ***West Island Properties***, it cannot therefore be said that the claim is frivolous and vexatious or an abuse of process on the grounds alleged by Ivan of res judicata and limitation.

[28.] What it clear however, on the face of the 2005 Agreement, is that whilst a benefit is identified for Martin, he is not a party to it. The parties to the agreement are only Ivan and Bernard. The rule had always been, that no stranger to a contract may sue upon it or seek to enforce it. Basic principles of privity of contract would therefore preclude Martin’s ability to maintain an action. I must therefore accede to the application to have Martin struck out of the action.

[29.] The issue of compensation having been concluded, however, any inclusion of the Prime Minister and the Attorney General in fresh litigation must be an abuse of the process of the court. I therefore, at the urging of Mr Williams, will strike out those parties. I order that the Statement of Claim be duly amended to reflect the striking out of these parties.

[30.] The Statement of Claim is to be amended within 60 days and Ivan to file a defence within a further 21 days of receipt of the amended Statement of Claim.

[31.] I will hear the parties on the question of costs by way of written submission within 28 days of this decision.

Dated the 1st day of May 2020

Ian R Winder

Justice