

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2013/CLE/GEN/FP00215

IN THE MATTER OF the Fraudulent Conveyances Act
AND IN THE MATTER OF the Registration of Records Act
BETWEEN

RICARDO F. PRATT

(In his capacity as Administrator of the Estate of Ruel Pratt)

Plaintiff

AND

CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH

(formerly known as Credit Suisse, Cayman Islands Branch)

1stDefendant

AND

GINN-LA CONDUIT LENDER, INC.

2ndDefendant

AND

STEWART GUARANTY COMPANY

3rdDefendant

AND

GINN-LA WEST END LTD., LLLP

4thDefendant

AND

LRA-OBB LIMITED

(formerly known as Ginn-La OBB, Limited)

5thDefendant

AND

GERALD M. JOHNSTON

6thDefendant

AND

ST GEORGE RIVIERE

7thDefendant
AND
RIVIERE & ASSOCIATES, LIMITED
8thDefendant
ALLEN & COMPANY, INC.
9thDefendant
AND CREDIT SUISSE SECURITIES (USA) LLC
10thDefendant

BEFORE:

The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES:

Mr Ricardo F. Pratt, Pro se

Mr Brian Moree Q.C. and Mr Samuel Rahming and
Ms Kelly Ingraham for the defendants

HEARING DATES:

2 December 2013; 23 June 2014

RULING

Gray Evans, J

1. This is an application on behalf of the third defendant, Stewart Title Guaranty Company, to strike out the plaintiff's claim against the third defendant.
2. This action was commenced by a specially indorsed writ of summons on 21 May 2013 by the plaintiff, Ricardo Pratt, in his capacity as Administrator of the Estate of Ruel Pratt, against several defendants, seeking a plethora of relief in relation to his purported ownership of the land hereinafter described.
3. The third defendant, Stewart Title Guaranty Company, a title insurance company incorporated in Texas and registered as a foreign company in The Bahamas, entered an appearance on 21 June 2013 and, now applies by summons filed 5 July 2013 pursuant to Rules of the Supreme Court ("RSC") Order 18 rule 19(1) and/or under the inherent jurisdiction of the court to strike out the plaintiff's claim against the third defendant.

4. By the time the third defendant's summons came on for hearing on 2 December 2013, the plaintiff had, on 16 September 2013, filed an amended writ of summons and statement of claim.

5. Consequently, the third defendant's application was treated as an application to strike out the amended statement of claim as against the third defendant.

6. Order 18 rule 19(1)(b), (c) and (d) which provide that the Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the grounds that: (a) it discloses no reasonable cause of action; (b) it is scandalous, frivolous or vexatious; (c) it tends to prejudice, embarrass or delay the fair trial of this action; and or (d) it is otherwise an abuse of the process of the Court. No evidence is admissible on an application under this ground. (See RSC Order 18 rule 19(2)).

7. It is well established that the power to strike out a statement of claim under RSC Order 18 rule 19(1) is a summary power and should be exercised only in plain and obvious cases.

8. "A "reasonable cause of action" has been defined as "a cause of action with some chance of success when only the allegations in the pleadings are considered": *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688).

9. In that case, Lord Pearson at page 696 opined that

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."

10. His Lordship continued:

"An application for the statement of claim to be struck out under this rule sub-paragraph (a), is made at a very early stage, as in this case, 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."

11. The question to be asked, said Lord Pearson, is: "Does this statement of claim disclose an alleged cause of action which has some chance of success?"

12. Or, as Salmon, L.J. said at page 651 in the case of *Nagle v Feilden* [1966] 2 Q.B. 633:

"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."

13. Consequently, so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a judge the mere fact that the case is weak and not likely to succeed, is no ground for striking it out as disclosing no reasonable cause of action. (See *Moore v. Lawson* 31 TLR 418 C.A.) (1979 English Rules, paragraph 18/19/5).

14. By the words "frivolous or vexatious" are meant cases which are obviously frivolous or vexatious or obviously unsustainable, per Lindley L.J. in *Att-Gen of Duchy of Lancaster v L & N W Ry* p1892] 2 Ch 274 at 277. The pleading must be "so clearly frivolous that to put it forward would be an abuse of the process of the court" (per Jeune P in *Young v Holloway* [1895] P. 87 at 90. The expression "frivolous or vexatious" includes proceedings which are an abuse of the process (see *E.T. Mailen Ltd v Robertson* [1974] I.C.R. 72 cited with approval in *Ashmore v British Coal Corp* [1990] 2 Q.B. 338 [1990] 2 All ER 981, C.A.). See English Supreme Court Practice note 18/19/...

15. "Abuse of the process of the court" connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppressed in the process of litigation (see *Castro v Murray* (1875) 10 Ex 213).

16. In his amended statement of claim at paragraphs 1 and 2 thereof, Mr Pratt, in his capacity as Administrator of the Estate of the late Ruel Pratt, pleads that he is:

"The owner in unencumbered fee simple in possession of all that tract of land containing by admeasurement 960.0 acres more or less (but by more modern survey methods contains 1,150.0 acres more or less) ("the John Bootle Tract") and originally granted by a Crown Grant to John Bootle his heirs and assigns dated 15 December 1818 and recorded in the registry of Records in volume L.1 at page 193 ("the Crown Grant") and commencing at Bootle Point in the vicinity of Bootle Bay on the western end of the Island of Grand Bahama and John Bootle Tract...

"the owner in unencumbered fee simple in possession of the freehold estate and the equity of redemption in All That tract of land containing by admeasurement 179.71 acres more or less and 28.59 acres more or less ("the property") and being a portion of the John Bootle Tract situate in the vicinity of West End, Grand Bahama..."

17. The plaintiff alleges that sometime between 2005 and 2008 the eighth and ninth defendants, Allen & Company, Inc. and Riviere & Associates, Limited, respectively, committed a trespass upon the aforesaid land when they, by their employees, servants or agents, Gerry Johnston and St George Riviere, entered thereupon for the purpose of surveying portions thereof and subsequently preparing boundary surveys and or survey plans and setting boundary markers without his permission, knowledge or consent, thereby wrongfully interfering with his possession and quiet use and enjoyment thereof. (See paragraphs 31-37; 41-42; 49-50; 84-85 of the amended statement of claim).

18. The plaintiff alleges further, that the third defendant relied on those survey plans when issuing title insurance policies with respect to the said land, having done so, is likewise guilty of trespass. In that regard, the plaintiff pleads at paragraph 96 of his amended statement of claim as follows:

"Stewart Title, for its pecuniary benefit and with no right title or interest in the property and without the permission or knowledge, and at the expense of the plaintiff, relied on the purported "Boundary Survey of Grand Bahama Hotel Co. Tract" and a purported "Conveyance-Mortgage Survey...prepared by its employees or agents, Riviere & Associates or Allen & Co....to issue its Policy of Title Insurance in respect of portions of the property and or the John Bootle Tract, and Stewart Title and...Riviere & Associates or Allen & Co. thereby wrongfully interfered with the plaintiff's possession use and enjoyment of the property and caused the plaintiff to suffer pecuniary loss and damages."

19. In addition to the foregoing, the amended statement of claim also included allegations of fraudulent conveyances; particulars of fraud (although it is not always clear against whom such fraud is alleged); unconscionable bargains resulting from undue influence; deprivation of property without compensation; unlawfully obtained certificates of title; trespass and adverse possession.

20. The plaintiff also claims, inter alia, damages against the defendants, including the third defendant, for trespass, wrongful interference with his possession, loss of use and enjoyment, and conversion of his property, the subject of this action.

21. From the foregoing, it is clear that those are all causes of action and, assuming that those allegations are true, I am not able to say that the plaintiff's case against the third defendant as pleaded discloses no reasonable cause of action and is certain to fail.

22. I am, therefore, not minded to strike out the plaintiff's claim on the "no reasonable cause of action" ground.

23. While no evidence is admissible on the "no reasonable cause of action ground" (rule 19(1)(a)), evidence is admissible on the other grounds and in that connection, the third defendant relies on the affidavits of Jennifer Jones, the third defendant's National Transaction Specialist, and Don Wade, the third defendant's Senior Underwriting Counsel, filed on 26 July 2013 and 5 July 2014 respectively.

24. The plaintiff opposes the third defendant's application and also applied by summons filed 25 September 2013 for, inter alia, an order (i) that certain parts of the affidavit of Jennifer Jones be struck out; and (ii) that Ms Jones attend court for the purpose of being cross-examined.

25. Specifically, the plaintiff complains that Ms Jones' avers that the third defendant "issued in favour of the fifth defendant four title insurance policies in respect of four plots of land which are the subject-matter of the action", whereas only three of the copies of policies exhibited to her affidavit related to the property, the subject of this action.

26. Counsel for the third defendant conceded the point and sought to assure the Court and the defendant that the reference to the fourth policy was in error and not intended to mislead or deceive the court, as contended by Mr Pratt.

27. Having examined the copies of the policies exhibited to Ms Jones' affidavit and having reviewed the plaintiff's amended statement of claim it is clear that only the policies at exhibits 2, 3 and 4 of the Jones' affidavit, and identified as Parcel 60-B, 20-B and 20-A, relate to the land, the subject of the plaintiff's claim, and that the policy relating to Parcel 3A, at exhibit 1 of Ms Jones' affidavit, does not.

28. I, therefore, accepted counsel for the third defendant's submission that the reference to four, instead of three, policies as relating to the land the subject of this action was in error and not intended to mislead the Court and I refused to strike out paragraph 7 of Ms Jones' affidavit.

29. It is not disputed that this Court, in an appropriate situation, has the discretion to order a deponent to be cross-examined on his affidavit in interlocutory proceedings. However, I agree with counsel for the third defendant that this is not an appropriate case to make an order for cross-examination and, in the exercise of my discretion, I refused the plaintiff's application to cross-examine Ms Jones on that affidavit.

30. In her said affidavit Ms Jones, confirms that the third defendant issued the aforesaid policies of title insurance and that the policies contain the following statements:

"The Company [the third defendant] hereby acknowledges that the lands described in Schedule A are the same lands described in the survey prepared by Riviere & Associates and Allen & Company, Inc., dated [...], however the Company does not insure the accuracy or completeness of said survey." [Parcels 60-B and 20-B].

The company hereby insures the insured that said land is the same as that delineated on a survey prepared by Riviere & Associates, and Allen & Company, Inc., dated [...], However the company does not insure the accuracy or completeness of said survey." [Parcel 20A].

31. In her said affidavit Ms Jones points out that although the plaintiff alleges that Messrs Johnston and Riviere acted as agents for the third defendant, he provides no particulars in respect to that allegation. In any event, Ms Jones deposes that "in fact, there is no agency

relationship between the third defendant on the one hand and either Mr Johnston or Mr Riviere on the other hand and further, as stated by the plaintiff at paragraphs 8 of the amended statement of claim, Mr Johnston is an employee of Allen & Company, Inc., while Mr Riviere is the President of Riviere & Associates.

32. According to Ms Jones, no representative of the third defendant was ever physically present on any of the property which is the subject-matter of this action. She avers further that in the ordinary course of its business, the third defendant would not retain a surveyor to survey the property in respect of which title insurance is issued, as such surveyor would be retained by the purchaser.

33. In his said affidavit filed 5 July 2014 Mr Wade, avers, inter alia, that the surveyors were engaged and paid for by the purchaser in respect of the work carried out and relating to the surveys in this case and, accordingly, they were not agents or employees of the third defendant.

34. In opposition to the third defendant's application and in support of his own, the plaintiff relies on his four affidavits filed 3 September 2013, 5 September 2013, 27 November 2013, and 17 June 2014. The plaintiff also relies on four bundles of skeleton arguments filed respectively on 28 November 2013, 2 December 2013, 17 June 2014 and 23 June 2014; and four bundles of authorities filed respectively on 5 September 2013, 29 November 2013, 2 December 2013 and 23 June 2014.

35. As indicated, the plaintiff's complaint against the third defendant as set out in the amended statement of claim and his said affidavits is that the Sixth, Seventh, Eighth and Ninth defendants, as the employees servants or agents of, inter alia, the third defendant, trespassed onto portions of the property that was identified on survey plans as Parcel 60-B and Parcel 20-B and Parcel 20-A Tract 1, of which the plaintiff claims to be "the owner with the paper title in possession", and cut boundary lines, set survey markers and surveyed and prepared boundary survey plans without his knowledge or consent, thereby wrongfully interfering with his possession and quiet use and enjoyment thereof.

36. Further, that because the third defendant, who does not claim to have any title to or interest in the said land, and who does not claim to have entered onto the property under the authority of Ginn-La West End, Limited, relied on those survey plans when issuing the aforesaid title insurance policies, the surveyors and their companies must have been the servants, employees or agents of the third defendant; and since its servants, employees or agents were guilty of trespass, then the third defendant is also guilty of trespass.

37. On the other hand, the third defendant contends that neither Mr Johnston nor Mr Riviere nor the companies with whom they are employed or represent, Allen & Company, Inc. and Riviere & Associates, are employees, servants or agents of the third defendant. Therefore, the third defendant says this action against it is embarrassing, scandalous, frivolous and or vexatious and or otherwise an abuse of the process of the Court and should be struck out.

38. Counsel for the third defendant also argues that another reason the third defendant says the case against it is abusive is because it is prolix and that it is embarrassing in the sense that third defendant does not know the case it has to meet because the pleading is not sufficiently clear.

39. In support of the third defendant's contentions, counsel for the third defendant makes the following observations and or submissions:

- 1) Although the plaintiff alleges throughout the amended statement of claim that Messrs. Johnston and Riviere acted as employees servants or agents of the third defendant and also that Allen & Company and Riviere & Associates acted as

employees, servants or agents of the third defendant, he has not provided any particulars in respect of such allegations.

- 2) On the plaintiff's own case (paragraphs 8 and 9 of the amended statement of claim), Mr Johnston is an employee of Allen & Company, Inc. (a company incorporated in Florida) and not an employee of the third defendant. Further, Mr Riviere is the president of Riviere & Associates, a company incorporated in The Bahamas, and also not an employee of the third defendant.
- 3) Pursuant to paragraph 11 of the Jones affidavit "[n]o representative of the third defendant was ever physically present on any of the property which is the subject matter of this action. Further, in the ordinary course of its business, the third defendant would not retain a surveyor to survey the property in respect of which title insurance is issued. Rather, the surveyor would be retained by the purchaser." Pursuant to paragraph 12 of the Wade Affidavit, the surveyors were engaged and paid for by the purchaser in respect of the work carried out relating to the surveys in this case and, accordingly, they were not agents or employees of the third defendant.
- 4) Pursuant to section 2(1) of the Employment Act, 'employee' means any person who has entered into or works under (or, in the case of a contract has been terminated, worked under) a contract of employment whether it is a contract of service or apprenticeship". Further, "contract of employment means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing.
- 5) A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done. (Salmond on the Law of Torts, 17th edition, 1977, para 174).
- 6) Anyone who wishes to hold an employer vicariously liable must prove the offender was his employee, that he committed a tort and that he committed it in the course of his employment. Tort Law, B.S Markensinis and S.F. Deakin, 3rd edition, 1994, page 497.
- 7) Based on the amended statement of claim and the affidavits filed in support of the third defendant's summons, neither Mr Johnston nor Mr Riviere is or ever was an employee or servant of the third defendant. Accordingly, they could not have committed any tort in the course of their employment or service for the third defendant, thereby making the third defendant vicariously liable for their actions.
- 8) Agents are of two kinds, distinguishable as employees/servants and independent contractors. When the agent is an independent contractor his employer is not, in general, answerable for the torts either of the contractor himself or of his servants. Salmond on the Law of Torts, 17th edition, 1977, para 174. The learned authors of Clerk & Lindsell on Torts 20th edition, 2010, at paragraph 6-56 put it this way:

"if the employer has employed an independent contractor to do work on his behalf the general rule is that the employer is not responsible for any tort committed by the contractor in the course of the execution of the work and in this respect the employees of the contractor, whilst acting as such, stand in the same position as their employer, so that the employer of the contractor is not liable for the torts committed by the contractor's employees."
- 9) It is well established as a general rule of English and Bahamian law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants, even though these acts are done in carrying

out the work for his benefit under the contract.” Honeywill and Stein, Limited v Larkin Brothers (London’s Commercial Photographers), Limited [1934] 1 KB 191.

- 10) While both employees and independent contractors may be classified as “agents”, apart from cases of fraud the category of “agent” as such has no relevance in the law of torts. Although a person may be liable for a wrong which he has authorized or subsequently ratified, it is largely a matter of indifference whether the actual wrongdoer in these cases is described as an “agent”. Accordingly, with the exception of fraud cases, there are no special rules in the law of tort peculiar to “principal and agent”. Clerk & Lindsell on Torts, 20th edition, 2010, paragraph 6-79.
- 11) Even if an agency relationship existed between the third defendant as principal on the one hand and either Mr Johnston, Allen & Company Inc, Mr Riviere or Riviere & Associates as agents on the other hand, which is denied (see paragraph 24 of the November skeletons, the third defendant would not be vicariously liable for any torts committed by or on behalf of Mr Johnston, Allen & Company Inc, Mr Riviere or Riviere & Associates. This is clearly not a case of fraud and the third defendant did not authorize or subsequently ratify any such torts.
- 12) Attached to volume 2 of the plaintiff’s skeleton arguments and written submissions (in opposition to the July summons) dated and filed on 2 December 2013 was a print-out of certain pages of the third defendant’s online virtual underwriter manual (the online manual). Paragraphs 18.4.2 of the online manual headed “Minimum Requirements’ (the “minimum requirements”) states inter alia that “[i]deally [any land survey to be used in connection with a title insurance policy] must be run to Stewart Title Guaranty Company, in order that privity be established between the surveyor and the company.”
- 13) Exhibited to the Wade affidavit is a print-out of additional pages of the online manual. The first page of the print-out headed ‘Underwriting Manual Table of Contents’ states that “[a]ll content on Virtual Underwriter is subject to the terms shown here.” When clicking on the word ‘here’ a link to the third defendant’s disclaimer pops up which states, inter alia, that Stewart Title Guaranty Company and its affiliated underwriters (collectively ‘Stewart’) does not guarantee the accuracy, adequacy or completeness of any content of Virtual Underwriter®, and you may not rely upon such content.”
- 14) As stated in paragraph 9 of the Wade Affidavit the minimum requirements are merely considerations for insuring title to a piece of property. the third defendant does not require in all cases that a purchaser or other person obtain a survey. However, if a purchaser wants the third defendant to issue a title insurance policy with specific coverage or issue certain endorsements to the title insurance policy, the third defendant may require a survey or other evidence which would satisfy an underwriter to afford the purchaser such coverage (e.g. an affidavit given by the surveyor for the purpose of authenticating a survey plan).
- 15) With regard to the note at the end of paragraph 18.40.2 of the online manual that “[t]he effect of the lack of compliance with any of the above requirements must be carefully considered”, Don Wade explains in paragraph 10 of the Wade affidavit that (i) although one or more of the minimum requirements may be missing, an underwriter can still consider insuring title to the property and (ii) in the regular course of business, an underwriter can authorize the issuance of a title insurance policy even if the third defendant is not entitled to rely on a survey.
- 16) Pursuant to paragraph 11 of the Wade affidavit, the statement in the online manual referred to in paragraph 17 above is made solely for liability purposes. If there is an error or inaccuracy in a survey, such as the failure to disclose an

encroachment, the third defendant, would have recourse against the surveyor, because the third defendant has to indemnify an insured pursuant to a covered claim under a title insurance policy. Accordingly, when underwriting a title insurance policy for a real estate transaction, the third defendant suggests (through the online manual) that the party related to the transaction which retains a surveyor to conduct a survey request the surveyor to agree that the third defendant can rely on the survey. This will allow the third defendant to have recourse against the surveyor in case that the third defendant must indemnify an insured because the insured suffers a covered loss under its/his title insurance policy due to errors or inaccuracies in the survey.

- 17) Even if the third defendant relied on the surveys in respect of parcels 20-B, 60-B, and 20-A tract 1 (which is not admitted) such reliance did not create an employment or agency relationship between the third defendant on the one hand and either Mr Johnston, Allen & Company Inc, Mr Riviere or Riviere & Associates on the other hand. The surveyors in this case were engaged and paid for by the purchaser and there was no contractual or any other relationship between the third defendant and the surveyors.
- 18) It is clear (i) that on the face of the amended statement of claim the plaintiff does not have a sustainable claim against the third defendant; (ii) when only the allegations in the amended statement of claim are considered, the plaintiff's claims against the third defendant have no chance of success; and (iii) the third defendant was improperly joined as a defendant in this action.
- 19) No further legitimate amendment can save the amended statement of claim.
- 20) All claims and or relief against the third defendant in the amended statement of claim should be struck out and the action dismissed as against the third defendant.

40. The plaintiff, of course, contends that his claim against the third defendant is not scandalous, frivolous, vexatious or otherwise an abuse of the process of the court and in response to the submissions on behalf of the third defendant, he makes the following observations and or submissions:

- 1) The third defendant issued several policies of title insurance for portions of the property without the plaintiff's knowledge or consent.
- 2) The third defendant is, therefore, a trespasser who wrongfully interfered with the plaintiff's quiet use and enjoyment of Parcel 20A Tract 1 and other portions of the property and used the plaintiff's land to receive a benefit, being the premium and fees it was paid to issue several policies of title insurance without compensating the plaintiff.
- 3) The third defendant has no right title or interest in any portion of the John Bootle Tract, but benefitted from the use of the survey of Parcel 60-B and Parcel 20-B and Parcel 20-A Tract 1 which was obtained by trespassing on the property and the third defendant cannot legitimately complain that the statement of claim and or this action which was commenced by the owner of with the paper title, is frivolous, vexatious or an abuse of the process of the Court.
- 4) The plaintiff's claims of trespass and wrongful interference as claimed in the amended statement of claim are triable issues that should not be disposed of summarily, without a trial and without pleadings and on the hearing of the defendant's application in light of the third defendant having received a financial benefit from the acts of the trespass committed by Mr Johnston and Mr Riviere, and the third defendant is misusing the process of the court to retain the proceeds it received from an illegal act.

- 5) The plaintiff should not be driven from the judgment seat as that would not solve the defendant's incurable problem, that the third defendant as a part of its ordinary course of business, required a current up-to-date survey plan prior to issuing title insurance policies, and then by using the boundary survey plan for its pecuniary benefit, the third defendant adopted the acts of its surveyors who committed the tort of trespass and is dually vicariously liable for the acts of Mr Johnston, Mr Riviere, Allen & Company and Riviere & Associates.
- 6) The third defendant has admitted that the survey plan was prepared by Riviere & Associates and Allen & Company Inc as claimed in the amended statement of claim and that the third defendant relied on those plans in preparing its title insurance policy, so the plaintiff no longer has to prove those claims.
- 7) The plaintiff is entitled to rely on the aforesaid admission and to judgment thereon, which is conclusive proof that the plaintiff's claim is not an abuse of the process.
- 8) The plaintiff as the paper title owner has the right to commence this action and the Crown Grant clearly establishes the plaintiff's title sufficient to commence this action for trespass against the third defendant who does not and this action is not groundless and is not an abuse of the process of the court.
- 9) In order to protect its processes from abuse this Court ought not to accede to the strike-out application by Stewart Title who received a benefit from using the plaintiff's land and is a trespasser that is seeking equity in this action with unclean hands.
- 10) Stewart Title admitted that the boundary survey was prepared for Stewart Title and that it was prepared by Allen & Co. and Riviere & Associates, bearing the seal and certification of Gerald Johnston and St George Riviere, who admitted that they surveyed the land, the subject of the boundary survey.
- 11) The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. To that statement of the law no objection of any sort can be taken: *Lloyd v Grace Smith & Co* (UKHL) 19 per Lord MacNaghten at page 8.
- 12) Messrs Riviere and Johnston trespassed on and surveyed the property and or the John Bootle Tract in the course of their service and for their master, Stewart Title's pecuniary benefit.
- 13) The admission by Stewart Title that the boundary survey plan was prepared by Allen & Co. and Riviere & Associates and the admission by Gerald Johnston that the survey was performed for the sole and exclusive benefit of Stewart Title and that it shall not be relied upon by any other individual or entity whomsoever, is conclusive evidence that there is privity between Stewart Title and its surveyors and borrowed servants, Gerald Johnston and St George Riviere, and its servants Allen & Company, Inc and Riviere & Associates. See *Boundary Survey*
- 14) Stewart Title is liable for the trespass of its servants acting in the course of their implied contract of service, by virtue of Stewart Title requiring that a current up to date survey be performed and which was in fact performed, as evidenced by the Surveyor's affidavit sworn by its servant, Gerald Johnston who swore that: "This affidavit is given for the purpose of authenticating the survey plan and is being relied upon by Stewart Title Guaranty Company to issue its policy of title insurance...".
- 15) It is plain and obvious that Stewart Title received the benefit of the trespass, by virtue of being paid a premium or fee for the policy of title insurance, which was issued in reliance on the survey and the boundary survey plan and which was

obtained by Stewart Title's temporary employees or servants committing the tort of trespass by wrongfully entering on to the property and the John Bootle Tract, and wrongfully interfering with the plaintiff's use and enjoyment of the property.

- 16) By using the boundary survey plan and by taking the benefit of being paid a premium or fee, Stewart Title has adopted the acts of trespass committed by its temporary employees or servants, Gerald Johnston and St George Riviere and Stewart Title is therefore liable.
- 17) Section 2(1) of The Employment Act states: "Contract of employment means a contract of service...whether express or implied, and (if it is express) whether it is oral or in writing."
- 18) A contract of service exists if these three conditions are fulfilled: (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; and (iii) the other provisions of the contract are consistent with its being a contract of service. See *Brook Street Bureau (UK) Ltd v Dacas* [2004] EWCA Civ 214 per Lord Justice Mummery at para 88.
- 19) The plaintiff contends that Johnston was both an employee of Allen & Company, Inc and a temporary employee of Stewart Title; and Riviere was both an employee of Riviere & Associates and a temporary employee of Stewart Title, when they trespassed on and surveyed the property and the John Bootle Tract. However, Stewart Title asserted control over its temporary employees by requiring that the survey be prepared to its satisfaction, therefore, both Stewart Title and Allen & Company, Inc. and Riviere & Associates who prepared the boundary survey plan are dually responsible.
- 20) By requiring that a survey be performed prior to the issuance of its policies of title insurance, Stewart Title set in motion and profited from the acts of trespass committed by Gerald Johnson and St George Riviere, who cut boundary lines, destroyed trees and removed topsoil to install boundary markers on the property and or the John Bootle Tract, therefore Stewart Title is responsible for compensating the plaintiff who was injured by the trespass and the wrongful interference with his property.
- 21) Stewart Title is liable for the acts of trespass and wrongful interference which are committed for its pecuniary benefit and which the plaintiff claims in the amended statement of claim clearly identify. Accordingly the application by Stewart Title to strike out this action ought to be denied with costs to the plaintiff.
- 22) Stewart Title does not claim to have any documentary title nor to be in possession of the property and does not claim to have entered onto the property under the authority of Ginn nor any party to this action, and when its surveyors entered onto the property and conducted a survey for the use and benefit of Stewart Title they entered as trespassers.
- 23) As part of its ordinary course of business, Stewart Title required a survey plan for the issuance of its policy of title insurance and it also had a minimum requirement that the surveyor prepare the survey plan for and in the name of Stewart Title to ensure that there was privity between the surveyor and Stewart Title.
- 24) Accordingly Stewart Title is liable for the acts of trespass committed by its servants or agents St George Riviere and Gerald M Johnston, during the course of their contract of service, including the conducting of unauthorized surveys of the plaintiff's land, as established by the running of the survey plans to Stewart Title to ensure privity as evidenced by its name being on the survey plans.

- 25) This is an action for trespass and the statement of claim is not frivolous vexatious or an abuse of the process of the court and therefore should not be struck out, in light of the material fact that the plaintiff has lost the use of land without compensation.

41. Although the court has an inherent jurisdiction to dismiss an action which is an abuse of its processes, it is also a jurisdiction which ought to be sparingly exercised and only in very exceptional cases. Moreover, "this summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action" as to do that is "to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way." Per Danckwerts LJ in the case of *Wenlock v Moloney*.

42. As indicated, the plaintiff's claim against the third defendant is in trespass and wrongful interference with his property, the subject of this action.

43. However, it is clear from the amended statement claim that the plaintiff is not the only person claiming to be the documentary title owner of the land.

44. From paragraph 13 through 29 of the amended statement of claim the plaintiff recites a number of documents, including an indenture of conveyance dated 27 April 2006 between Grand Bahama Hotel Co and Ginn-La West End, Limited, recorded in the Registry of Records in volume 9644 at pages 457 to 475; and a Certificate of Title dated 26 May 2006 granted to Ginn-La West End, Limited in Equity Action No. 511 of 2005, and recorded in volume 9697 at pages 466 to 470, whereby, at all material times, title to the land, the subject of this action, or portions thereof, appears to have been vested in entities other than the plaintiff. Indeed, the plaintiff is by this action challenging the validity of those documents and one of the reliefs being sought in the amended statement of claim is an order that he has the better documentary title and is the owner of the said property.

45. It is also clear from the documentary evidence that the third defendant in issuing the aforesaid policies of insurance relied on survey plans prepared by Allen & Company Inc and Riviere & Associates Inc which were prepared as a result of the surveys conducted by Mr Gerald Johnston and or Mr St George Riviere. (See Ms Jones' affidavit and copies of policies exhibited thereto).

46. Mr Pratt, points out that as part of its ordinary course of business, the third defendant required a survey plan for the issuance of its policies of insurance and it also had a minimum requirement that the surveyor prepare the survey plan for and in the name of the third defendant to ensure that there was privity between the surveyor and the third defendant.

47. In that regard, Mr Pratt argues that it can be inferred by the third defendant's conduct in requiring a "current-up-to-date survey satisfactory to the company" and in approving and using survey plans by the sixth through ninth defendants which were "prepared to the satisfaction" of, and relied on by, the third defendant to issue the aforesaid policies of title insurance, that there was a contract of service between the parties to provide the services.

48. Consequently, Mr Pratt argues, the third defendant is liable for the acts of trespass committed by its servants or agents, Messrs Riviere and Johnston during the course of their contract of service. Those acts, Mr Pratt contends, included conducting unauthorised surveys of his land, as established by the running of the survey plans to the third defendant to ensure privity, as evidenced by the third defendant's name on the survey plans.

49. In that regard, exhibited to Mr Pratt's 27 November 2013 affidavit are copies of plans for "boundary survey of Grand Bahama Hotel Co. Tract" prepared by Messrs Johnson and Riviere

“for”, inter alia, the third defendant. At the foot of page 1 of the said plans are two “surveyor’s affidavit” for Allen & Company and Riviere & Associates. The former is signed by Gerald M. Johnston, Affiant, and includes the following statement:

“This affidavit is given for the purpose of authenticating the survey plan and is being relied upon by Stewart Title Guaranty Company to issue its Policy of Title Insurance and by Ginn-La International Business Company Inc., Ginn-La West End, Ltd. LLLP, West End Resorts, Limited and Grand Bahama Hotel Co.

50. Having reviewed the amended statement of claim and having considered the arguments advanced by both sides on the law relating to employment and agency, as well as the affidavit evidence, which has not been tested by cross-examination, and although I cannot say, as does Mr Pratt, that this is a complex case, neither am I able to say on what is before me that it is a plain and obvious case or one that is obviously unsustainable.

51. In that regard, as I understand his claim, the plaintiff is seeking by this action to have his title confirmed and himself declared to have the better documentary title than Ginn-La West End Limited and or its predecessors and successors in title to the land the subject of this action, while also seeking to have the aforesaid conveyance and certificate to Ginn-La West End Limited “and each and every subsequent conveyance or deed” to be declared “null and void” or “void pursuant to the Fraudulent Conveyances Act”.

52. It is common ground that the third defendant, an insurance company that issues title insurance policies, has no interest, legal or beneficial, in the property, the subject of this action, or any portion thereof. It is also common ground that the entity to whom the third defendant issued the aforesaid title insurance policies appears to be a successor in title to Ginn La West End Limited.

53. Consequently, counsel for the third defendant argues that the third defendant is a stranger to the dispute over ownership to the said land and should not have been joined as a party hereto. Moreover, counsel for the third defendant pointed out, Ginn-La OBB Limited, to whom the third defendant issued the aforesaid title insurance policies, was *ex facie* the legal owner of the portions of land for which the said policies were issued, pursuant to executed and recorded conveyances.

54. I understood that submission to mean that since Ginn-La OBB Limited was *ex facie* the legal owner of the portions of land for which the third defendant issued title insurance policies, the third defendant, if it had entered the land, which it denies, whether by itself, its employees or agents, would have done so with the permission and or consent of the legal owner and would not, therefore, have been guilty of trespass.

55. It seems, then, that before the plaintiff can succeed in an action in trespass against the third defendant, he would have to have his claim as the better documentary title holder to the property for which the third defendant issued title insurance policies determined.

56. Furthermore, whether or not the sixth, seventh, eighth and ninth defendants are employees, servants or agents of the third defendant; or whether or not the sixth, seventh, eighth and ninth defendants when entering upon the land and conducting surveys thereof and preparing survey plans therefor committed a trespass against or interfered with the possession of the plaintiff’s land; and whether, the third defendant in relying on those surveys and or survey plans can be said to be vicariously liable for any torts committed by the sixth, seventh, eighth and ninth defendants, are all, in my view, questions that ought to be left for trial.

57. As opined by Lord Craighead in the case of Three Rivers District Council and others v Bank of England (No. 3) [2001] 2 All ER 513, [2001] UKHL 16 at paragraph 95:

“The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence.”

58. So, while it appears from the affidavit and documentary evidence as well as the arguments advanced on behalf of the third defendant, that the third defendant would certainly have a defence to the plaintiff’s claim, I am not prepared at this stage of the proceedings to say that the plaintiff’s claim against the third defendant is obviously unsustainable.

59. However, because, in my judgment, the plaintiff would have to have his title to the land, the subject of this action, determined before he could maintain an action in trespass against the third defendant, if at all, to allow this action against the third defendant to continue and require the third defendant at this stage of the proceedings to incur further costs defending the same before the issue regarding the plaintiff’s title to the said property is determined would, in my view, be an abuse of the process of the Court.

60. So, while I am not minded at this time to strike out the plaintiff’s claim against the third defendant, I would, in the exercise of my discretion, order that this action as against the third defendant be stayed pending a determination of the plaintiff’s claim to ownership of the said land, or further order.

61. The costs are to be in the cause.

62. Finally, I apologise to the parties and counsel for my delay in delivering this judgment and although several factors contributed thereto, suffice it to say that I take full responsibility therefor.

DELIVERED this 12th day of June A.D. 2015

Estelle G. Gray Evans
Justice