In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 411

BETWEEN:

MARITA HAYWARD

Plaintiff

v

ROSINA HARDTMAN

Defendant

RULING

Date of Hearing: **26 February 2024**
Date of Ruling: **29 February 2024**

Appearances: **Richard Horseman, Terry-Lynn Griffiths, Wakefield Quin Limited for Plaintiff**

Defendant in Person

RULING of Mussenden J

Introduction

1. This matter came before me on the Defendant Ms. Hardtman's "Motion to Dismiss" dated 27 June 2023 in essence seeking an order that the Plaintiff Ms. Hayward's claims be struck out. The same "Motion to Dismiss" included a section for a counterclaim by Ms. Hardtman as against Ms. Hayward seeking certain relief. Wakefield Quin for Ms. Hayward took the "Motion to Dismiss" to be the Defence and in turn filed a Reply to the Defence and a Defence to the Counterclaim. Thereafter, directions for trial were issued and followed such that witness statements were eventually exchanged and a trial date was set.

2. Ms. Hardtman's position was that the "Motion to Dismiss" was in essence a strike-out application which should be heard before a trial of the matter and before she filed her Defence. In order to hear the strike-out application, the trial date was vacated and the time used for the hearing of the strike-out application.

Rules of the Supreme Court 1985

3. Order 18 rule 19(1) provides as follows:

"(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be; or

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

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court;

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

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

Background

4. Ms. Hayward filed a Specially Endorsed Writ of Summons issued 22 December 2022 with a Statement of Claim (the "**SOC**"). It stated that she owned and resided at the property 8 St. John's Lane ("**8 SJL**"), Pembroke. It also stated that Ms. Hardtman owned and resided at the adjacent property 10 St. John's Lane, later clarified to be 10 Twin Lane Place ("**10 TLP** "). I should note here that Twin Lane Place is a lane. It is not in dispute that both properties are very near to each other with only a distance of 4 – 5 feet between them at one point.

5. Ms. Hayward claims that at one point, the two properties were one lot and were later subdivided. She says that 8 SJL was conveyed to her on 8 July 2002. She asserted that she can establish the doctrine of lost modern grant as there had been over 20 years of "uninterrupted enjoyment of an easement" for vehicular access to 8 SJL from Twin Lane Place. She states that her family has lived in 8 SJL for more than 50 years and had access to it from St. John's Lane by walkway only and from Twin Lane Place by driveway access. For ease of convenience only, I will herein refer to Ms. Hayward's asserted claim for a right of way from 8 SJL to Twin Lane Place as the "**Disputed RoW**". I should note at this point that there appears on a Deed Plan, dated November 2007, drafted by Q-Ship Enterprises Limited (the "**QShip DP**") other rights of way as follows:
    a. A right of way leading from 8 SJL down a steep set of unmaintained stairs leading to St. John's Road (the "**Stairs RoW**"). I should note here that Ms. Hardtman states that Ms. Hayward can use the Stairs RoW to access her property from St. John's Road.
    b. A continuous right of way, as marked in yellow, along Twin Lane Drive to St John's Road. From one of the exhibited map plans (the "**Red Map Plan**"), this right of way seems also to run over a lane called St. John's Lane, which is not easily identified on other plans. Further and significantly, it appears to branch out to run along the north side of both properties 8 SJL and 10 TLP to the lane Twin Lane Place. I will herein refer to this right of way including the part where it branches out to Twin Lane Place as the "**Continuous RoW**". It is significant to note here that the Disputed RoW is on a very small part of the Continuous RoW where it passes 10 TLP. In any event, at this stage it is not clear as to who is the owner of

the Continuous RoW, although Ms. Hardtman believed that it was on the land of Lot 1A of Twin Lane Drive.

6. Ms. Hayward asserts that approximately three years after 8 SJL was conveyed to her, Ms. Hardtman's father Mr. Ross Hayward ("**Ross**") (no relation) stealthily deprived her of her use of the Disputed ROW of vehicular access to her property 8 SJL. It was also claimed that Ross interfered with the property's boundaries and right of way access. More recently, and the apparent genesis of the Writ, is that Ms. Hardtman has erected a PVC barrier (the "**Barrier**") to prevent all access to 8 SJL from Twin Lane Place other than by way of foot. Over the years, Ms. Hayward has filed three complaints with the Department of Planning about Ms. Hardtman or her father Ross's conduct in respect of the properties and the rights of way. There was also a complaint that Ross has dumped rubble and metal around the Disputed RoW such that it cannot allow vehicular access.

7. In these proceedings, during the discovery phase, Wakefield Quin made application for the discovery of the property deeds to 10 TLP (the "**Deeds**") in order to analyse them for any relevant settled rights of way. Ms. Hardtman resisted the application. I made an Order dated 8 February 2024 for Ms. Hardtman to disclose the Deeds together with any Deed plans.

8. In the hearing of the application to strike-out, by way of setting the geographical context, and not on sworn evidence, Ms. Hardtman explained that the garage of 10 Hartman was built by Ross and it extended over the property boundary onto the Continuous RoW and onto the Disputed RoW - which as stated above overlays the Continuous RoW. The Barrier is attached to the exterior garage wall of 10 TLP. Thus, it appears and was conceded in submissions by Ms. Hardtman that she erected the Barrier, not on her property of 10 TLP, but on the Continuous RoW and the Disputed RoW, on land which she explained was Lot 1A of Twin Lane Drive.

9. Thus Ms. Hayward claims for a declaration that: (i) she has established a right of way over the Disputed RoW; (ii) she be granted unobstructed vehicular access over the Disputed

RoW; and (iii) for Ms. Hardtman to remove the Barrier and all rubble and metal so that the Disputed RoW for vehicular access to 8 SJL can be restored.

The Application for Strike-Out

10. Ms. Hardtman submitted in her "Motion to Dismiss" that the case should be dismissed because of Ms. Hayward's failure to state a claim upon which relief may be granted, that claim which alleged that the location/address of the "right of way" and the doctrine of lost modern grant is assumingly through two (2) properties, namely 10 and 13A Twin Lane Place Pembroke.

11. Ms. Hardtman submitted that Ms. Hayward's case should be struck out for the following reasons:
    a. There had never been vehicular access from St. John's Road since the purchase of the two properties by the two parties;
    b. There has been limited or no vehicular access on Twin Lane Place between 10 TLP and 13 Twin Lane Place, the next property along Twin Lane Place;
    c. Other Hardtman family members who live at other properties, 9, 13 and 13A Twin Lane Place, can attest that there has been limited or no vehicular access by anyone except Ross, and since his death in 2019 by her;
    d. In a Magistrates' Court criminal case in 2011, case number 11CR00163, between Ms. Hayward and Ross, arising out of his conduct in respect of the Disputed RoW, a "no-contact judgment" came into force and "no trespassing" signs were erected by Ross;
    e. Before the Magistrates' Court case, Ms. Hayward had always asked for permission to walk through 10 TLP; and
    f. 10 TLP is not owned by Ms. Hardtman as it was owned by Ross and the estate has not been probated since his death.

12. Ms. Hardtman also submitted that as Ms. Hayward has asked for permission to use the Disputed RoW, she did not enjoy or acquired a right of way by way of lost modern grant.

She relied on the cases of *Steede v Lewis & Lewis* [2017] SC (Bda) 60 Civ and *Gleeson & Gleeson v Bell* [1994] Bda LR 8 CA where DaCosta P (Acting) stated "*Any acknowledgement that the user is permissive will be fatal to the claim. As Cheshire observed 'to ask permission is to acknowledge that no right exists' (Cheshire and Burn's Modern Law of Real Property, 14th Ed. p. 550)*". She also relied on the case of *Patel v W.H. Smith (Esiot) Ltd.* 1987 (1) WLR 853 as quoted in *Gleeson* and other Bermuda cases, for the stated principle that "*Accordingly what a party must show is that he claims the privilege, not as a thing permitted to him from time to time by the servient owner, but as a thing he has a right to do.*".

Ms. Hayward's Reply

13. Mr. Horseman submitted that Ms. Hayward's case is that she and her family have acquired right of way to her property from Twin Lane Place, that is the Disputed ROW, on the grounds that they have enjoyed uninterrupted use of a right of way which they acquired by prescription and through the doctrine of lost modern grant for well over twenty years. Thus, her case is that Ms. Hardtman unlawfully obstructed her right of way in May 2022 when she erected the Barrier which has interfered with her right of way.

Discloses no reasonable cause of action

14. Mr. Horseman submitted that the SOC clearly discloses a reasonable cause of action recognized in law under the doctrine of lost modern grant. Further, Ms. Hayward has pleaded the required facts which establishes the cause of action and her claim to a right of way. In considering this limb, the Court has to assume that the facts as pleaded are true. The same argument applied to the pleadings that Ms. Hardtman had erected the Barrier. He replied on the case of *Bentley Friendly Society v Minister of Finance* [2022] Bda LR 9 at paragraph 46 as set out below.

Scandalous, frivolous and vexatious

15. Mr. Horseman submitted that nothing disgraceful, false, malicious or defamatory is in Ms. Haywards SOC and the claim cannot be said to be obviously unsustainable as her witness

statements outline significant relevant evidence that supports the claim. Thus it was not appropriate to strike-out the claim at this juncture where there is sufficient evidence to show that the claim is not frivolous and vexatious especially when Ms. Hardtman cannot meet the high threshold to show that the claim is "obviously unsustainable". He relied on the case of *Bentley Friendly Society v Minister of Finance* [2022] Bda LR 9 at paragraph 47 as set out below.

Abuse of Process

16. Mr. Horseman submitted that the action cannot be said to be in abuse of process in any shape or form noting that Ms. Hayward has commenced the proceedings as a last resort, rather than as an abuse of the of the process of the Court. He maintained that there were various issues in dispute to be considered at trial including that Ms. Hardtman had asserted that there had been no or limited vehicular access to 8 SJL, that the erection of the Barrier by Ms. Hardtman was an act specifically designed to obstruct Ms. Hayward and her family from use of the Disputed RoW, that Ms. Hayward has asked for permission to use the Disputed RoW and that Hardtman family members had given Ms. Hayward a letter granting her permission to park on Twin Lane Place.

17. Mr. Horseman submitted that the case of *Gleeson* supported Ms. Hayward's case in respect of the doctrine of lost modern grant per da Costa P (Acting) in that Ms. Hayward satisfied all the requirements that she was a user as of right in that she could show that the "*enjoyment must not be by violence, it must not be secret, and it must not be permissive*". He argued that Ms. Hayward's witnesses showed that: (i) Ross had never objected to her and her family using the Disputed RoW and thus force was never used or required; (ii) as relates to secrecy, the Disputed RoW was being visibly used in the open; and (iii) Ms. Hayward never sought permission from Ross or Ms. Hardtman to use the Disputed RoW. Thus, he argued that it cannot be seriously disputed that that Ms. Hayward and her family had enjoyed uninterrupted access to the Disputed RoW for more than twenty (20) years.

18. Mr. Horseman relied on the case of *Michael Pearman v Terry Fray and Kendaree Fray* [2017] SC (Bda) 29 Civ where Hellman J stated at paragraph 33 the applicable test when determining whether the doctrine of lost modern grant applies:

> *"As I explained in my ruling on 8 June 2015, and as the Court of Appeal acknowledged in Lathan v Darrell and HillBDLR[1986] Bda LR 30 and Gleeson and Gleeson v BellBDLR[1994] Bda LR 8, the doctrine of lost modern grant applies in Bermuda. Having reviewed these cases, Kawaley J (as he then was) summarised the doctrine thus in Bean and Smith v FrostBDLR[2006] Bda LR 87 at para 31:*
>
> > *"So an easement such as a right of way over land may be acquired on proof of the following circumstances: (a) uninterrupted exercise of the right for more than 20 years, (b) exercise of the right of way as of right, which implies the absence of any evidence of either (i) it being impossible for the grantor to have expressly conferred a right of way, or (ii) an admission by the claimant that the grantor was entitled to grant a license during the period in question. Once these matters are proved, the law will presume that a right of way was granted expressly in a deed that has been lost."""*

Ms. Hardtman's failure to disclose the Deeds

19. Mr. Horseman submitted that Mrs. Hardtman has completely and utterly defied the Court's order and the Rules of the Supreme Court in that she has refused to disclose the Deeds, stating that she is prepared to be imprisoned rather that disclose them. Thus, Mr. Horseman argues that the outright refusal to disclose the Deeds is directly relevant to the strike-out application. His position was that the disclosure might reveal further evidence that supports Ms. Haywards's case. He relied on the case of *Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited* [2005] Bda LR 12 where it was stated:

> *"There is no dispute as to the applicable principles of law. Where the application to strike-out on the basis that the Statement of Claim discloses no reasonable cause of action (Order 18 Rule 19(a)), it is permissible only to look at the pleading. But where the application is also under Order 18 Rule 19(b) and (d), that the claim is frivolous or vexatious or is an abuse of the process of the court, affidavit evidence is admissible. Three citations of authority are sufficient to show the court's approach. In Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick[1999] EWCA Civ 1247, at page 17 of the transcript Auld LJ said: 'It is trite law that the power to strike-out a claim under Order RSC Order 18 Rule 19, or in the inherent jurisdiction of the court, should only be exercised in plain and obvious cases. That is particularly so where there are issues as to material, primary facts and the inferences to be drawn from them, and where there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike-out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action*

> *consistently with his pleading and the possible facts of the matter when they are known..... There may be more scope for an early summary judicial dismissal of a claim where the evidence relied upon by the Plaintiff can properly be characterised as shadowy, or where the story told in the pleadings is a myth and has no substantial foundation. See eg Lawrence and Lord Norreys (1890) 15 Appeal Cases 210 per Lord Herschell at pages 219–220." (Emphasis added)*

20. Mr. Horseman submitted that the fact that disclosure has not yet taken place is another factor why the action should not be struck out as there is a realistic prospect that such disclosure may assist the plaintiff in proving her case. Further, Mr. Horseman submitted that Mrs. Hardtman cannot refuse to comply with orders of the Court and then ask the Court to exercise the draconian power to strike-out the claim.

The Law on Strike-out

21. In *Bentley Friendly Society v Minister of Finance* [2022] Bda LR 9, I set out the principles to be applied in a strike-out application. In paragraph 46 I stated:

> *"20. The White Book (1999 edition) provides at 18/19/10:*
>
> > *"A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): ..."""*

22. In *Bentley*, at paragraph 47, I also set out the law on scandalous, frivolous and vexatious where I stated:

> *Scandalous*
> *21. A complaint that a pleading is 'scandalous' necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.*
>
> *Frivolous and Vexatious*
> *22. Justice Meerabux in The Performing Rights Society v Bermuda Cablevision Limited 1992 No. 573 at page 31 considered the meaning of 'frivolous' and 'vexatious':*

> *"...It is pertinent to mention that the words "frivolous or vexatious" mean cases which are obviously frivolous or vexatious or obviously unsustainable.*

Analysis on the Strike-out Application

23. I note that Ms. Hardtman's application to strike-out was not based on the principles of strike-out but on her assessment of the evidence and her intended defence. In any event, it is still necessary to consider the application based on the strike-out principles.

24. I refuse the application to strike-out the matter for several reasons.

25. First, in my view, in following the principles I referred to in *Bentley*, the pleadings set out a reasonable cause of action with some chance of success when only the allegations in the pleadings are considered. The SOC sets out the background of the matter and how the claimed right of the Disputed ROW arose, namely by way of the doctrine of lost modern grant. The SOC clearly raises some questions fit to be decided by the Court. If the "Motion to Dismiss" was considered the Defence, as Wakefield Quin took it to be, then it consists of bare denials of a right of way on the basis that permission was always given to Ms. Hayward to use the disputed ROW. This does not undermine the positon that there is a cause of action with some chance of success. In any event, Ms. Hardtman indicated that she had not yet filed a Defence which then leaves the SOC as the only pleading on which I can properly consider at this stage. I find no assistance in Ms. Hardtman's Counterclaim section of the "Motion to Dismiss".

26. Second, in my view, again in following the principles I referred to in *Bentley,* the claim is not scandalous as the pleadings are not grossly disgraceful, false, malicious or defamatory. To that point, the pleadings and the evidence lays out Ms. Hayward's case in a manner that does not amount to scandalous and at this stage they are not improper. Further, the claim is not obviously frivolous or vexatious or obviously unsustainable. Ms. Hayward has set out her claim and her grounds for asserting her rights. Ms. Hardtman has admitted that she did cause the Barrier to be erected thus denying Ms. Hayward use of the Disputed RoW.

27. Fourth, I agree with Mr. Horseman that as disclosure has not taken place it would be inappropriate to strike-out the matter at this stage. To that point, the outright refusal of Ms. Hardtman to refuse to comply with the Order of the Court to disclose the Deeds, which would on the face of the claim be relevant in this case, causes me to reject the application to strike-out the case. It may very well be that the disclosure will be of some assistance to the Court one way or the other.

Disclosure of the Deeds

28. Mr. Horseman submitted that Ms. Hardtman's defiance of the Order of the Court to disclose the Deeds should now be met with an Unless Order. He relied on the case of *Smith v Brown & Brown* [2014] SC Bda 92 Civ where Hellman J made an Unless Order for judgment in the sum of $151,031.50 for the Defendant's refusal to give disclosure. Kawaley CJ, in refusing to set aside the judgment entered pursuant to the Unless Order, stated as follows:

> *"7. The basis on which that Order was made was clearly not by reference to the merits of any defence which the Defendants might have. It was made to enforce respect for the orders of this Court. So having been made subject to such an Order, if the Defendants had any genuine difficulties with complying with it as opposed to being motivated to wilfully flout the Order of the Court, one would have expected that they would have instructed their attorneys before the expiration of the 14 days to either:*
>
> *(a) seek some indulgence from the Plaintiff's attorneys; and*
>
> *(b) in the absence of receiving a consensual extension of time for complying with the Order, to apply to Court for an extension of time.*
>
> *8. It appears based upon all the material before the Court that they took neither step."*

29. Thus, Mr. Horseman submits that the Court should make an Unless Order that unless Ms. Hardtman complies with the Order to disclose the Deeds by a certain date then judgment be entered in favour of Ms. Hayward with the grant of a declaration that the Plaintiff has established the right of way with the ancillary order to give effect to the declaration that Ms, Hardtman is restrained from taking any steps to interfere with the Plaintiff's right of

way and further that Ms. Hardtman be ordered to remove immediately the Barrier she erected in May 2022.

30. In my view, I take an extremely dim view of the positon by Mrs. Hardtman to defy the Order of the Court. Without imprisonment being mentioned by anyone in these proceedings, Ms. Hardtman staked out her position on more than one occasion that she would rather be imprisoned than disclose the Deeds. Whilst there is no application before the Court to imprison Ms. Hardtman and the Court itself has not considered such an action at this stage, the liberty or the loss thereof of the individual is a serious matter and not to be taken lightly by anyone.

31. I am satisfied that I should make an Unless Order in respect of the position taken by Ms. Hardtman not to disclose the Deeds. However, I am cautious about the extent of declarations as sought by Mr. Horseman given the question and uncertainty of who actually owns the land where the Continuous ROW and the Disputed ROW are located. Thus, I will make an Unless Order that unless Ms. Hartman complies with the Order to disclose the Deeds within 14 days of the date of this Ruling, that:
    a. Ms. Hardtman is ordered to remove the barrier that she erected within 21 days of the date of this Order;
    b. Ms. Hardtman is ordered to remove the metal and rubble from the area of the Disputed RoW in order to allow vehicular access to, on and along the Disputed RoW within 21 days of the date of this Order;
    c. Ms. Hardtman is restrained from taking any steps to interfere with the use of the Disputed RoW by Ms. Hayward and other residents of and visitors to 8 SJL; and
    d. There be liberty to apply generally and in respect of any declarations sought once any further relevant evidence is produced in respect of ownership of the land on which the Continuous RoW and the Disputed RoW are located.

Conclusion and Costs

32. For the reasons set out above:
    a. I refuse Ms. Hardtman's application to strike-out the case; and

b. I grant Ms. Hayward's application for an Unless Order.

33. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that:

a. In respect of the strike-out application, costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis, to be taxed by the Registrar if not agreed; and

b. In respect of the disclosure applications, costs shall follow the event in favour of the Plaintiff against the Defendant on an indemnity basis to be paid forthwith, to be taxed by the Registrar if not agreed.

Settlement

34. The Court is empowered by Order 1A Rule 4(f) to assist the parties in settling the whole or part of the case. I have encouraged the parties who have been neighbors for decades and likely to be so for more decades to come to settle the matter without the need for more costs and stressful relationships, especially in light of the fact that the houses are only several feet apart. Both children and adults are likely to co-exist on the two properties, and it would be beneficial to all that such co-existence occurs without dispute, ill-will or grudge but with neighbourly joy and friendship. There seems to be merit in the parties having discussions amongst themselves, with assistance as necessary, and even with the owner of Lot 1A to devise a plan in light of the geographical layout to allow for pedestrian and vehicular access as well as parking to the benefit of the parties.

Dated 29 February 2024

HON. MR. JUSTICE LARRY MUSSENDEN
CHIEF JUSTICE OF THE SUPREME COURT