

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: CV 2201 of 2006

BETWEEN

YVONNE ORAN

- PLAINTIFF

AND

PAUL DOYLE

- 1st DEFENDANT

MILLENIUM INVESTMENTS LTD

- 2nd DEFENDANT

CRANE ESTATES LTD

- 3rd DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.

Judge of the High Court

(In Chambers)

2010: January 12

Messrs. Bryan Weekes in association with Mr. Tariq Khan for the Plaintiff

Mr. Kevin Boyce in association with Miss. Faye Finisterre of Messrs. Clarke, Gittens & Farmer for the Defendants

DECISION

- [1] **Crane-Scott J:** On March 28, 2007 the First and Third Defendants applied by Summons seeking, *inter alia*, an order pursuant to **O. 15 r. 6 (2) (a) R.S.C.** to have themselves removed as parties to the substantive action commenced by Originating Summons filed on December 7, 2006, on the ground that they were not proper or necessary parties to the action.
- [2] The application was opposed by the Plaintiff and at the hearing Counsel for the respective parties produced written submissions and legal authorities for and against the relief sought. Following legal argument the Court took time for decision.
- [3] The following documents were on the Court file and were referred to in argument:
- 1) Originating Summons filed December 7, 2006 in which the Plaintiff claimed substantive relief in the form *inter alia*, of declarations as to her entitlement to a disputed parcel of land, prohibitory and mandatory injunctions and damages for trespass;
 - 2) Affidavit-in-support of Yvonne Oran filed December 15, 2006 (hereinafter called “the first affidavit of Yvonne Oran.”);
 - 3) Affidavit-in-support of Michael Hugh Hutchinson filed December 15, 2006;
 - 4) Affidavit-in-response of William Paul Doyle filed March 9, 2007 denying the Plaintiff’s claim and claiming, *inter*

alia, rights by adverse possession over the disputed parcel of land;

- 5) Further affidavit of Yvonne Oran filed March 23, 2007;
- 6) Supplemental affidavit of William Paul Doyle filed April 27, 2007;
- 7) Third affidavit of Yvonne Oran filed June 8, 2007.

[4] **Arguments for and against the relief sought:** Counsel for the Defendants, Mr. Kevin Boyce raised 3 main grounds in support of the application for the removal of the First and Third Defendants as parties to the action. For convenience, the arguments for and against the application are summarized under the following italicized sub-headings:

[4] **(i) Relief is claimed against an unspecified Defendant:** Counsel for the Applicants submitted that while the First, Second and Third Defendants had been joined as parties in the action, the Plaintiff's Originating Summons of December 7, 2006 had only claimed relief against "the Defendant" without specifying what relief had been sought against which defendant. Further, he said, the Originating Summons had failed to identify the respective allegations which were made against each of the 3 Defendants.

[5] In response, Counsel for the Plaintiff, Mr. Weekes conceded that a typographical error had been made in the prayer for relief in the Originating Summons which had resulted in relief being claimed against "the Defendant" instead of against "the Defendants". The error, he submitted, was minor and was not in his view fatal to the Plaintiff's claim. The error, he said, could be cured by the Plaintiff

- amending its Originating Summons to refer instead to “the Defendants.”
- [6] He urged the Court to examine all the evidence which had thus far been placed before it by all parties to the action. He submitted that the affidavit evidence would disclose tortious liability on the part of all 3 Defendants, and to a lesser extent, the Third Defendant.
- [7] Counsel for the Plaintiff further submitted that the First Defendant is by his own admission, the managing director of the Second Defendant which is the fee simple owner of the property which adjoins the Plaintiff’s lands to the north.
- [8] He submitted that while the Defendants had made no admission in relation to paragraph 3 and 6 of the first affidavit of Yvonne Oran, it is the Plaintiff’s case that the First Defendant is also a director and principal of the Third Defendant and further, that the Third Defendant is also mentioned in the records of the Land Tax Department in relation to the adjoining lands of the Second Defendant which adjoined the Plaintiff’s property to the north.
- [9] All this was sufficient, he contended, to support the Plaintiff’s contention that the First and Third Defendants are proper parties to the action.
- [10] (ii) The Second Defendant is the only proper and necessary party to the substantive action: Turning to his second ground, Counsel for the Defendants submitted that the affidavit evidence viewed as a whole would show that the Plaintiff had made no specific claims against the First or the Third Defendant individually, while they had asserted no right against her.

- [11] Referring specifically to paragraph 6 of the first affidavit of Yvonne Oran, he submitted that no specific allegation had been made against the Third Defendant save that the Third Defendant is “*mentioned in the records of the Land Tax Department*” in relation to the lot of land registered in the name of the Second Defendant and which adjoined the Plaintiff’s property to the north.
- [12] Referring to various paragraphs of both affidavits of William Paul Doyle and the first, second and third affidavits of Yvonne Oran respectively, Mr. Boyce submitted that the substantive issue for determination related to a dispute between the Plaintiff and the Second Defendant concerning ownership of a parcel of land.
- [13] He contended that as the issues had been clearly joined as between the Plaintiff and the Second Defendant, the Second Defendant was the only proper and necessary party to the action. The Court, he said, should accordingly order the First and Third Defendants to cease to be parties.
- [14] In his response, Counsel for the Plaintiff, Mr. Weekes submitted that the First Defendant was a proper and necessary party to the action. It was the Plaintiff’s case, he said, that the First Defendant (as a director and agent of the Second Defendant) had ordered the acts of trespass which the Plaintiff had complained of.
- [15] Further, he contended, the affidavit evidence shows that the Plaintiff’s husband and the First Defendant had been engaged in dialogue concerning the issues and the disputed area of land which is currently before the Court.
- [16] He submitted that where an agent was a director of a company, and it was shown by the evidence that he was privy to or had ordered the

commission of a tort by the company, this would also fix the agent/director with tortious liability in his individual capacity. In support of his submission, he cited an extract from *Bowstead & Reynolds on Agency, 17th Edition* and the case of *Rainham Chemical Works v. Belvedere Fish Guano Co. (1921) 2 A.C. 465 @ 476.*

[17] He further submitted that, at this early interlocutory stage the Plaintiff had to do no more than demonstrate a cause of action against the Defendants. He urged the Court not to exercise the summary power to strike out a defendant except in the most obvious of cases.

[18] (iii) No cause of action is shown against the First and Third Defendants:

Finally, Counsel for the Defendants submitted that as William Paul Doyle had admitted in his affidavit-in-reply filed on April 27, 2007 that the boulders had been placed on the boundary of the disputed property by the Second Defendant, there was no evidence before the Court which impugned the First and Third Defendants. Consequently, he submitted that the Plaintiff's cause of action could only properly be brought against the Second Defendant. He cited the case of *Littrell v. United States of America & anor [1992] 3 All ER 218.*

[19] For his part, Counsel for the Plaintiffs, Mr. Weekes argued that it would be premature for the Court at this interlocutory stage to strike out the First Defendant having regard to the First Defendant's position as a director and principal of the Second and Third Defendants and his ability to direct or influence the actions of both defendant companies.

[20] He submitted further that even where no direct cause of action could be shown against a person, the court could nonetheless permit that person to be joined or remain as a party to the action. This was, he

said, especially so where declaratory relief had been claimed and where the presence of that party was necessary to ensure that all matters in dispute might be effectually and completely determined and adjudicated upon.

[21] In support of his submission, Mr. Weekes cited the cases of *TSB Private Bank International S.A. v. Chabra et anor* [1992] 1 W.L.R. 231 and *Meadows Indemnity Co. Ltd v. The Insurance Corporation of Ireland p.l.c.* [1989] 2 Lloyd's Rep. 298.

[22] Discussion: The Court has considered the nature of the Plaintiff's claim as disclosed in the Originating Summons together with the affidavits for and against the substantive relief claimed.

[23] As the affidavit evidence clearly shows, the Plaintiff would appear to have a subsisting cause of action in trespass and could ordinarily have filed a Writ of Summons claiming damages for trespass against the defendant (or defendants) who allegedly erected the boulder wall on her property and who have, according to paragraph 14 of her first affidavit, further evinced an intention to landscape the disputed area of land which she insists forms part of her property.

[24] It appears, however, that rather than institute an action for trespass, the Plaintiff (as she is entitled to do) elected to utilize the procedure under **O. 15 r. 16 R.S.C.** to obtain relief against the named defendants in order to settle the dispute between herself and the defendants in the form of a binding declaration of right as to her ownership of the disputed parcel of land.

[25] The power which is given to the High Court under **O. 15 r. 16 R.S.C.** to make binding declarations of right as a means of defining and settling the rights of two or more contesting parties has been discussed

- in numerous cases since it was first introduced in 1883 initially as **O. 25 r. 5** (and after 1962, as **O. 15 r. 16**) of the old English Rules. See *Guaranty Trust Company of New York v. Hannay & Company* [1915] K.B. 536;
- [26] It is accepted that the Court has jurisdiction under **O. 15 r. 16** to grant declaratory relief whether a plaintiff can show a pre-existing cause of action or not, provided that the plaintiff can establish that he has a legal interest in the subject matter of the declaration. *In Re S. (Hospital Patient: Court's Jurisdiction)* [1995] 3 W.L.R. 78.
- [27] The power is almost unlimited and confers on the Court a discretion which is very wide. It has also been described as a useful power which over the course of the last hundred years, has become more and more extensively used. See per Lord Diplock in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 @ 501.
- [28] Though wide in scope the power is subject to the limitation that the relief claimed must be something that would not be unlawful or unconstitutional or inequitable for the Court to grant, or contrary to the accepted principles upon which the Court exercises its jurisdiction. See per Bankes L.J. in *Guaranty Trust Company of New York v. Hannay & Company* [1915] K.B. 536 @ 572.
- [29] A further limitation on the scope of the power of the Court to grant a declaration under the rule is that the jurisdiction is not to be invoked to declare the law generally or to give advisory opinions. It is confined to “*declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.*” See per Lord Diplock in *Gouriet v. Union of Post Office Workers* (cited above); Also *Meadows Indemnity Co. Ltd v.*

The Insurance Corporation of Ireland p.l.c. per Lord Neill (cited above).

- [30] **Exercise of the Court's Discretion:** Having examined the nature of the Plaintiff's claim as disclosed in the Originating Summons together with the affidavits for and against the substantive relief claimed, the Court has turned to consider the application for interlocutory relief filed by the First and Third Defendants herein and the arguments and legal authorities which were submitted by Counsel for the respective parties.
- [31] Mindful of the need to ensure that all matters in dispute are effectively and completely determined and adjudicated upon at the substantive trial, the Court, in considering the application, has borne firmly in mind the cardinal principle governing parties to an action which is, that all necessary and proper parties, *but no others* should be before the Court. See *Pleadings: Principles and Practice by Sir Jack Jacob and Goldrein 1990 at p. 242.*
- [32] On the one hand, the First and Third Defendants say they are not proper or necessary parties to the action and should be struck out as the affidavits disclose that the dispute is essentially one between the Plaintiff and the Second Defendant. On the other hand, the Plaintiff argues that it is too early to say that the First and Third Defendants are not proper or necessary parties to the substantive action and that the presence of all 3 defendants is necessary to ensure that all matters in dispute are effectively and completely determined at the trial.
- [33] The Court is satisfied that the affidavits filed on behalf of the Plaintiff and the Defendants, clearly establish that "a real and present dispute"

has arisen between the parties as to the existence or extent of the legal right which the Plaintiff claims.

[34] More importantly, the Plaintiff has, in the view of the Court, also discharged the obligation which rests on her to show a real interest in the subject matter of the declaration. *Guaranty Trust Company of New York v. Hannay & Company* (cited above).

[35] Having considered the application, the Court in the exercise of its discretion under **O. 15 r. 6(2)(a)**, holds that it is just and proper that the First and Third Defendants both remain as parties to the substantive action for the following reasons:

- i) Despite the obvious typographical error which appears in the Originating Summons, the Court is of the view that the Plaintiff's several affidavits satisfactorily establish that she intends to seek declaratory relief against all (or any) of the 3 Defendants as will following the trial of the substantive action, be found to have trespassed on or in any manner interfered with the proprietary rights which she claims in the parcel of land in dispute;
- ii) the Court is also satisfied that the Plaintiff has in her affidavits satisfactorily demonstrated that all 3 Defendants are persons who are, in varying degrees, connected to the parcel of land which adjoins the Plaintiff's lands to the north and around which the dispute has arisen. In the circumstances, none of the parties, including the 3 Defendants, can at this stage of the proceedings be said to be a "*stranger to the dispute.*"

- iii) The Plaintiff's evidence on one hand is that the First Defendant is a director and principal of the Second and Third Defendants. On the other hand, although the First Defendant admits being the managing director of the Second Defendant, he has neither admitted nor denied having any connection to the Third Defendant. The exact connection between the First Defendant and the Third Defendant accordingly remains a live issue which must be resolved at the substantive trial;
- iv) Additionally, the First Defendant has neither admitted or denied the Plaintiff's assertion at paragraph 6 of her affidavit of December 15, 2006 that the Third Defendant is "*mentioned in the records of the Land Tax Department*" as having some connection to the parcel of land which bounds the Plaintiff's property to the north;
- v) Having regard to the state of the evidence, the Court is of the view that it would be premature at this stage of the proceedings to require the Third Defendant to cease being a party to the substantive action and has determined that the Third Defendant should remain a party to the proceedings to enable an effective determination to be made regarding all matters in dispute;
- vi) Turning next to the several affidavits filed by the First Defendant the Court is satisfied that the First Defendant is a person who very obviously has personal and intimate

knowledge of the many of the issues in dispute in the substantive action;

- vii) In addition, although the First Defendant has in his affidavits deposed to matters and made admissions which would seemingly shift sole responsibility for the alleged acts of trespass onto the Second Defendant, the Court does not accept Mr. Boyce's submissions that he is, as a result, no longer a proper or necessary party to the action;
- viii) The Second and Third Defendants are not natural persons and the Court is keenly aware that their acts and omissions are ultimately directed and controlled by natural persons whose presence in the action will be necessary to enable the Court to make an effective determination of the extent of their liability to the Plaintiff (if any);
- ix) The Court accepts the argument of Counsel for the Plaintiff, Mr. Weekes that if the Plaintiff were able at the trial of the substantive action, to establish that the alleged acts of trespass were directed by the First Defendant, acting as agent and director of the Second and/or Third Defendants, this might in law fix the First Defendant with tortious liability in his individual capacity for the acts complained of; See *Bowstead and Reynolds on Agency*, @ paras 9-112 and 9-117; Also *Rainham Chemical Works v. Belvedere Fish Guano Co* (cited above).

- x) In the circumstances, the First Defendant is, in the view of the Court, also a party whose presence in the action is crucial to ensure that all matters in dispute are effectually and completely determined and adjudicated upon;

[36] In accordance with its powers under **O. 18 r. 19(1)**, the Court, also finds that it is desirable to direct that the Plaintiff amend her Originating Summons to correct what is an obvious typographical error in the prayer for relief so that the Plaintiff's claim for relief will clearly be made jointly and/or severally against all 3 Defendants.

[37] **Disposal:** In the result, it is hereby ordered and directed as follows:

- 1) the application to remove the First and Third Defendants as parties to the action pursuant to **O. 15 r. 6(2)** is refused;
- 2) the Plaintiff shall, however, within 14 days, amend the prayer for relief in her Originating Summons of December 7, 2006 to more clearly indicate the fact that the relief claimed is sought jointly and/or severally against all 3 Defendants;
- 3) The Defendants may within 7 days of delivery of the amended Originating Summons, file and serve on the Plaintiff any further affidavit-in-response as they may deem necessary;
- 4) The Plaintiff may within 7 days of delivery of any further affidavit-in-response filed in accordance with paragraph 3, file and serve on the Defendants any additional affidavit as she may deem necessary;
- 5) Pleadings shall be deemed closed upon the date of service of any further affidavit(s) filed and served in accordance with paragraphs 3 and 4 above;

- 6) Thereafter the substantive action shall be set down for early hearing before a High Court Judge with an estimated time of 2 full hearing days;
- 7) The costs of the application shall be the Plaintiff's in any event and are certified fit for one attorney-at-law and shall be taxed if not agreed.

**Maureen Crane-Scott
Judge of the High Court**