**BARBADOS**
**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE**
**HIGH COURT**
**CIVIL DIVISION**

**No. 1196 of 2008**

**BETWEEN:**

**WINDSOR PLAZA LTD** **Plaintiff**

**AND**

**AARON TRUSS** **Defendant**

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court**

**Dates of Hearing 2014: September 23rd**
**December 9th**
**2015: September 18th**

**Appearances:**

**Garth Patterson Q.C. and Bartlett D. Morgan of Lex Caribbean Attorneys-at-Law for the Plaintiff/Claimant**
**Bryan L. Weekes of Bryan L. Weekes & Associates Attorneys-at-Law for the Defendant/Respondent**

## DECISION

### Introduction

[1] In this matter commenced under the Rules of the Supreme Court 1982, the Defendant filed a Notice of Application for Summary Judgment under CPR 2008 Part 15 on August 21st 2014 pursuant to a Counterclaim filed herein.

[2] The substance of the Application is, *inter alia*, an Order:

> "Declaring that the owners of Astrid ... are entitled to a right of way over the private road which is set out in the Plan of Mr. J M Peterkin dated the 15th day of September, 2008 and which is described as "Right of Way 4.88m wide" for all purposes connected with that property..."

[3] The Defendant and his wife are the owners of Astrid.

[4] It is instructive to set out the grounds outlined by the Defendant upon which the Application is made:

> "1. The Claimant has no reasonable prospect of successfully defending the Defendant's counterclaim filed herein and as a consequence it has no reasonable prospect of successfully prosecuting its claim for damages for trespass, for the following reasons:
>
> a. The Claimant's Defence to the Defendant's Counterclaim for a Declaration that his property "Astrid" enjoys a right of way over its property, and its claim for damages for trespass is predicated on an argument that the said right of way was abandoned by the Defendant or his predecessors in title.
>
> i The Claimant however, has failed to plead and or disclose any evidence which would substantiate any fact which would lead to a legal conclusion of abandonment;
> ii **Halsbury's Laws of England Vol. 14** at **para 122** states: "In no case, whether the title to an easement had been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of the intention to abandon, and abandonment will not be easily inferred": **Benn v Hardigne (1993) P. & C.R. 246**. Here the right of way in question had not been used for 175 years and the Court of Appeal of England and Wales held that there was not sufficient evidence to show that the owners of the dominant property had ever evinced an intention to abandon their right.
> iii. **Halsbury's Laws of England Vol. 14** at **para 121** states further: "the extinguishment of an easement by implied release must be based upon the intention of the dominant owner. To establish abandonment the conduct of the dominant owner must have been such as to make it clear that he had, at the relevant time, a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else." The erection of fence blocking use of right of way not sufficient: **Williams v Sandy Lane (Chester) Ltd [2007] 1 P. & C.R. 27**;
> iv. **Halsbury's Laws of England Vol 14** at **para 159** states: "If the owner of the servient tenement places an obstruction across the way, the owner of the dominant tenement may, if the obstruction does not allow for easy removal, go round the obstruction so as to connect the

two parts of the way on easy side of the obstruction, and for this purpose may deviate over any part of the servient tenement provide he does so in a reasonable manner."

v. The Court will assist the dominant owner in the protection of the substituted way, even though he may still have a right to enforce the removal of the obstruction: **Selby v Nettleford (1873) 9 Ch App 111 at 114**;

2. The Claimant has no reasonable prospect of defending the Defendant's claim for damages, as the Defendant's claim is predicated on the law of nuisance which states that the obstruction by the owner of a servient tenement of a right of way is an actionable nuisance at the instance of the owner of the dominant tenement:

a. There is clear evidence of obstruction of the right of way by the Claimant which was underpinned by an injunction obtained by the Claimant which effectively prevents the Defendant from using the right of way.

3. The Claimant has no reasonable prospect of successfully succeeding in its claim for damages for trespass as the Defendant was at all material times entitled to the remedy of self-help in removing the nuisance which effected the use of the right of way.

4. There is no other reason why these issues should go to a full trial."

**The Substantive Action and Counterclaim**

[5] The substantive claim filed in July 2008 by the Plaintiff (now Claimant) Windsor Plaza Ltd is a claim that the Defendant/Respondent has trespassed on its property. In consequence, the Plaintiff/Claimant is seeking a permanent injunction to restrain the Defendant/Respondent, his servants, licensees etc from trespassing on the land of the Plaintiff/Claimant.

[6] An interim injunction was granted in November 2008 restraining the Defendant/Respondent until judgment in the substantive action or until further order.

[7] Subsequent to this the Defendant/Respondent filed his Defence and Counterclaim the gravamen of which is, that the Defendant/Respondent and his Wife are entitled to the use of the Right of Way over a portion of the Plaintiff/Claimant's property alleging that this Right of Way was reserved to the owners of the land presently owned by the Defendant/Respondent and his wife by a 1906 conveyance, this Right of Way being shown by a Plan prepared by the Defendant/Respondent's surveyor JM Peterkin dated September 2008.

[8] The Defendant/Respondent avers, for reasons outlined, that the Plaintiff/Claimant has no reasonable prospect of defending the Defendant/Respondent's Counterclaim or for that matter, proving his claim to the standard required in law.

[9] The Plaintiff/Claimant opposes the Application for reasons of law and fact grounded in a determination, firstly, of whether a Right of Way existed over the Plaintiff/Claimant's land; the issue of law as to what constitutes abandonment in law, together with the issue of fact whether there was an abandonment of such Right of way (if it existed); whether the Defendant had knowledge, actual or constructive, of its existence and the legal effect of such knowledge or lack thereof; and the legal significance of the Plaintiff/Claimant being a *bona fide* purchaser without notice.

[10] A lesser, but significant assertion of the Plaintiff/Claimant is that there is evidence in its possession of an unco-operative third party which supports the Plaintiff/Claimant's evidential position. This is relevant to the discussion and exploration of certain relevant principles by Morgan J in the case of **Lion Apparel Systems Ltd v Firebug Ltd [2008] All ER (D) 253**, where he observed, **inter alia**, that 'the courts should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact, at

the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge so as to affect the outcome of the case'.

[11] There are fundamental disputes of fact and law between these two parties, and the Plaintiff/Claimant argues that in these circumstances, this is not an appropriate matter for Summary Judgment.

**The Law**

[12] It is against this backdrop that I delve briefly into the relevant law in this matter.

[13] The Application is grounded in **Part 15.2** which sets out a two-pronged test outlined at para 15 below.

[14] It states as follows:

> "15.2 The Court may give summary judgement against a party on the whole of a claim or on a particular issue if
>
> (a) It considers that
>
> (i) The Claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) The defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) There is no other reason why the case or issue should be disposed of at a trial."

[15] The two-pronged test referred to above is firstly, the consideration of whether the Plaintiff/Claimant has a real prospect of success; and secondly, whether there is any other reason why the case or issue should be disposed of at trial.

[16] The principles regarding the meaning of "real prospect of success" have been explored and discussed extensively, particularly in the case of **Three Rivers DC v Bank of England (No. 3) [2003] 2 AC** oft cited by jurists as the "*locus classicus*" on this issue.

This case is also authority for the proposition that complex cases, this being cases calling for determinations on complex inferences of fact or cases involving mixed questions of law and fact where the law is complex, are likely to be inappropriate for Summary Judgment. See also **Blackstone's Civil Practice 2005 34.12** which submits that "if an application for summary judgment involves prolonged serious argument, the court should, as a rule, dismiss it without hearing the argument, unless it harbours doubt about the soundness of the statement of case and is satisfied that granting summary judgment would avoid the need for a trial or substantially reduce the burden of the trial."

[17] Another applicable principle is that summary judgment trials should not be allowed to turn into mini-trials.

[18] And where there are issues of fact, which if decided in the respondent's favour, would result in judgment for the respondent, it is inappropriate to enter summary judgment, even if there is substantial evidence in support of the applicant's case: **Munn v North West Water Ltd (2000); Blackstone's Civil Practice 2005 34.15.**

[19] Counsel for the Plaintiff/Claimant also referred to and applied the following cases: **Swain v Hillman [2001] 1 All ER 91 per Lord Woolf MR and Judge LJ; Lion Apparel Systems Ltd v Firebuy Ltd [2008] All ER (D) 253; Bolton Pharmaceutical Co. 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others [2006] All ER (D) 389; Munn v North West Water Ltd and another All England Official Transcripts (1997-2008) among others**.

[20] Counsel for the Plaintiff/Claimant cites the dicta of **Judge Richard Seymour Q.C.** in the case of **Royal British Legion Industries (Preston Hall) Incorporated v J Sainsbury**

**PLC and others [2002] EWHC 1540** where he dismissed an application for summary judgment:

> "I have only to decide whether the Claimant's claim is arguable... I emphasize I do not have to find any facts in relation to this application, I do not have to reach any concluded views, I have only to be satisfied that there is an arguable case which it is appropriate for the Claimant to be permitted to take to trial."

[21] On the second limb of the two-pronged Part 15 test, that is, 'no other reason why the matter should proceed to trial', the Plaintiff/Claimant is arguing that there is a very significant reason why this matter should go to trial. He cites in support Atkins Court Forms/Civil Procedure Rules 1998/Rules and Practice Directions/Part 24 Summary Judgment, which provides in a footnote to Rule 24.2 (which he submits is '*in pari materia*' to our section 15) that such a reason would include

> "(d) that there is a likelihood of there being evidence which supports the respondent but that the respondent is currently unable to adduce that evidence in his defence because it is in the possession of an uncooperative third party or the applicant himself (in which case the applicant could renew his application at a later date)."

[22] See also Blackstone's Civil Practice 2005 34.18.

[23] The Plaintiff/Claimant therefore argues that to the extent that this very situation obtains in the matter at hand, the irresistible conclusion must be that there is a significant reason why this case should be disposed of at a trial.

**Disposal**

[24] There are significant (and complex) disputes of fact and law to be determined in this matter. Specifically or primarily, there are, *inter alia*, issues of Abandonment or release of a Right of Way in which a determination of the law, an interpretation of the law and findings of fact are inextricably intertwined. There is a critical determination to be made

by the Court as to whether the Defendant/Applicant had actual and/or constructive knowledge of the Right of Way, a determination of fact and a ruling in law as to its significance and a determination of the legal effect of the Plaintiff/Claimant being a *bona fide* purchaser for value without notice.

[25] This makes it entirely unsuited for Summary Judgment. These are matters/issues that should go to trial. I am in agreement with counsel for the Plaintiff/Claimant [Respondent to this Application] that there are matters herein calling for detailed argument and mature consideration.

[26] In consequence this Application for Summary Judgment is denied with costs to the Plaintiff/Claimant.

**MARGARET A. REIFER**
Judge of the High Court