IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Application No BBCV2016/002
BB Civil Appeal No 10 of 2005

BETWEEN

AARON TRUSS **APPLICANT**

AND

WINDSOR PLAZA LIMITED **RESPONDENT**

Before the Honourables - **Mr Justice Nelson**
Mr Justice Anderson
Mme Justice Rajnauth-Lee

Appearances

Mr Bryan L Weekes for the Applicant

Mr Garth St EW Patterson, QC and Mr Bartlett Morgan for the Respondent

REASONS
of
The Honourable Justices Nelson, Anderson and Rajnauth-Lee
Delivered by
The Honourable Mr Justice Nelson
on the 27th day of May, 2016

[1] On April 27, 2016 this Court heard the application for special leave to appeal by the Applicant, Mr. Aaron Truss (hereinafter referred to as 'Mr. Truss') and dismissed it with costs. The Court now gives its reasons for that order.

[2] By a specially indorsed writ filed on July 21, 2008 Windsor Plaza Limited (hereinafter referred to as 'Windsor') sued Mr. Truss in trespass seeking, *inter alia*, damages and injunctive relief. Windsor alleged that Mr. Truss had on or about October 31, 2006 wrongfully entered upon its property, removed and destroyed a gate hoarding and stone wall. Goodridge J. granted an interim injunction on November 5, 2008 restraining any further entry by Mr. Truss on Windsor's premises until after judgment in the action or further order.

[3] On October 31, 2012 Mr. Truss filed a re-re-amended Defence and Counterclaim (hereinafter referred to as 'the Defence and Counterclaim' or 'the Counterclaim'). In his Defence, Mr. Truss stated that he had a right of way over Windsor's property which arises by virtue of an express reservation in a 1906 deed of conveyance or in the alternative, by way of long and uninterrupted user for over 40 years. Mr Truss' Counterclaim repeated his Defence and further pleaded that in 2008 Windsor altered or interfered with his use of the alleged right of way, thereby entitling him to damages in nuisance.

[4] By way of re-amended Reply and Defence to Counterclaim (hereinafter referred to as 'the Reply and Defence') filed on January 24, 2013 Windsor admitted the express reservation of a right of way in the 1906 deed but denied that the right of way related to Mr. Truss' property, Astrid. In the alternative, Windsor pleaded that it purchased its property on October 28, 2005 and the root of title is traceable to a 1944 deed between Vonglatz and Windsor Hotel Limited which made no mention of the right of way reserved in the 1906 deed. Thus Windsor was a *bona fide* purchaser for value without notice of any right of way created over its property. Windsor also contended that any alleged right of way had been extinguished by implied release or abandonment by virtue of:

(i) non-user for a period in excess of 30 years;

(ii) the erection of a fence across the northern entrance by Mr. Truss and/or his predecessors in title which made the right of way impassable;

(iii) the erection of a wall across the southern entrance by Windsor's predecessor in title which made the right of way impassable to vehicular traffic;

(iv) the enclosure by Mr. Truss of a private road continuing to the north of the alleged right of way which rendered the right of way inaccessible; and/or

(v) an express release of the alleged right of way by deed dated November 14, 1927 made between Frances Mary Hall and Umberto Joseph Parravicino wherein the parties agreed to erect a fence in order to screen off the outhouses of the Windsor Hotel from the view of neighbouring properties.

[5] By a notice filed on August 21, 2004 Mr. Truss applied for the following orders pursuant to Parts 15, 25 and 26 of the CPR 2008

"1. Dismissing the Re-amended Defence to Counterclaim filed herein by the Claimant on the 24th day of January, 2013 and its claim for damages filed herein on the 21st day of July, 2008;

2. Declaring that the owner or owners of the property known as "Astrid" and which is situate at Hastings in the parish of Christ Church in this Island currently he and his wife is or 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. Mandating that the Claimant do re-instate the said Right of Way to the condition which it was in prior to its being altered by the Claimant;

4. An Order enjoining the Claimant or its agents from in any manner obstructing the Defendant and its agents from the lawful use of the said right of way;

5. Damages for nuisance to be assessed;

6. That the Court do assess the costs of this application."

[6] The basis of the application for these orders as set out in the body of the application was that Windsor had "no reasonable prospect of successfully defending the Defendant's counterclaim filed herein and as a consequence it has no reasonable prospect of successfully prosecuting it (sic) claim for damages for trespass …"

[7] The thrust of the application was that Windsor's Reply and Defence grounded on (i) non-existence of the alleged right of way (ii) abandonment by non-user, release by express agreement or acts of Mr. Truss and/or Windsor's predecessor in title and (iii) *bona fide* purchaser for value without notice of the alleged right of way, had no reasonable prospect of success. Mr. Truss would therefore be entitled to judgment on his Counterclaim which sought damages for the wrongful disturbance or alteration of the alleged right of way and incorporated his Defence to the claim of trespass, namely that he was entitled to a right of way over Windsor's property. In substance, if not in form, the meaning and effect of the application was that Windsor had no answer to the claim for a right of way over its property.

[8] As such, the application stated at paragraphs 3 and 4 that:

"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 affected the use of the right of way.

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

[9] Based on the totality of the pleadings and the language of the application itself, it is evident that the real issue between the parties is the existence of the alleged right of way. The frontal line of attack as contained in the application is that Windsor's Reply and Defence to Mr. Truss' Counterclaim for nuisance has no prospect of success at the trial. As such, the application has an almost singular focus, namely the entry of judgment on Mr. Truss' Counterclaim in nuisance. No separate issue is raised as to the viability of the Windsor's cause of action in trespass. The application suggests that Mr, Truss' Defence, as pleaded, would also have the consequential effect of defeating Windsor's claim. Thus the application as couched, does not suggest a two-pronged attack that is geared to the entry of summary judgment on both Windsor's claim in trespass and on Mr. Truss' Counterclaim.

[10] Against that background, it was not surprising that the learned judge, Reifer J in her judgment treated the application before her as being solely 'a Notice of Application for Summary Judgment under CPR 2008 Part 15 … pursuant to a Counterclaim filed herein.'[1] Thus the learned judge treated the issue of the existence of the alleged right of way as being an application for a summary remedy under CPR 2008 Part 15 relating to Mr. Truss' Counterclaim in nuisance only. In dismissing the application, the learned trial judge explained the basis for her decision as follows:

> 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

[1] No. 1196 of 2008, unreported (delivered on September 18, 2015) at [1].

> 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.
>
> This makes it entirely unsuited for Summary Judgment. These are matters/issues that should go to trial.[2]"

[12] The learned trial judge also accepted that the likelihood that there might be evidence in the possession of an uncooperative third party or Mr. Truss himself in support of Windsor's defence was a significant reason why this case should not be disposed of without a trial.

Appeal to the Court of Appeal

[13] On October 8, 2015 Mr. Truss sought leave of the Court of Appeal to appeal against the dismissal of his application for summary judgment. The Court of Appeal (Gibson CJ, Mason and Burgess JJA) dismissed the application orally on December 10, 2015 and gave its written reasons in a judgment dated April 18, 2016. The Court remained unconvinced that Mr. Truss had any real prospect of showing that Reifer J wrongly exercised her discretion in dismissing the application for summary judgment.

The application for special leave

[14] On January 19, 2016 Mr. Truss filed an application in this Court seeking an order for special leave to file an appeal against the decision of the Court of Appeal refusing him leave to appeal against the dismissal of his summary judgment application. Mr. Truss submits that the court erred by applying the wrong test to his application for leave, relying on the realistic prospect of success, when all he had to show was that he had an arguable case. He also argues that the court and the learned trial judge erred in law in refusing summary judgment given that Windsor's defence of abandonment is not supported by any evidence, there is overwhelming evidence which points to the existence of a right of way, there is no evidence of trespass and the issue

[2] ibid at [24] – [25].

of a *bona fide* purchaser for value without notice is a purely legal argument; all of which points in favour of dispensing with a full trial.

The First Jurisdiction Point: Lane v Esdaile

[15] Before this Court, Windsor has taken two jurisdiction points. The first point was based on the principle in *Lane v Esdaile.*[3] Windsor contends that an order of the Court of Appeal refusing leave to appeal was not open to challenge in this Court. In *Mohan v Persaud*[4] this Court accepted the principle in *Lane v Esdaile*, subject to an important qualification, namely that section 8 of the Caribbean Court of Justice Act of Guyana[5] (which is almost identical to its Barbadian legislative counterpart) reserved an unlimited residual discretion to hear matters, even those covered by that principle, where necessary to prevent a miscarriage of justice. On the facts of the present application, there can be no suggestion that the *Mohan* exception has been satisfied. It can hardly be contended that sending this case to trial would for the reasons given by the learned judge and the Court of Appeal occasion any miscarriage of justice to the parties. In any event, no such submission was advanced before this Court. This brings us to the second, and more compelling jurisdiction point raised by Windsor.

The Second Jurisdiction Point: Roseal v Challis

[16] Windsor contends that pursuant to section 54(1)(c) of the Supreme Court of Judicature Act[6] no appeal lay to the Court of Appeal and consequently to this Court in respect of an order of a High Court judge giving unconditional leave to defend an action. In this regard it expressly relies on the decision of this Court in *Roseal v Challis.*[7]

[17] Counsel for Mr. Truss emphasized that there are two claims in play: (i) the Counterclaim in nuisance and (ii) Windsor's claim in trespass. Counsel

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[3] [1891] A.C. 210.
[4] [2012] CCJ 8 (AJ).
[5] Section 8 of the Caribbean Court of Justice Act, Cap. 3:07 of the Laws of Guyana states: "Subject to section 7, an appeal shall lie to the Court with the special leave of the Court from any decisions of the Court of Appeal from any civil or criminal matter.
Section 8 of the Caribbean Court of Justice Act, CAP 117 of the Laws of Barbados states: "Subject to section 7, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal in any civil or criminal matter.
[6] Cap. 117A of the Laws of Barbados
[7] [2012] CCJ 7(AJ); (2012) 81 WIR 51.

agreed that there could be no appeal against the decision of Reifer J so far as it related to his Counterclaim once it was caught by section 54(1)(c) of the Act. However, in so far as Mr. Truss did not succeed in preventing Windsor from proceeding with its claim for trespass "as a consequence", as prayed for in his application for summary judgment, there was no bar to an appeal with leave of the Court of Appeal pursuant to section 54(1)(g) of the Act. The reasoning is that an order allowing a claimant to proceed to trial on his claim did not come within the prohibition against appeals from orders giving unconditional leave to defend an action.

Counsel ultimately conceded that the learned judge did not consider that she was dealing with an application for a summary remedy on the Counterclaim and Windsor's claim for trespass as separate applications as evident from the very first paragraph of her decision.

[18] In *Roseal v Challis* (supra) this Court adverted to the origin of section 54(1)(c) of the Act which lay in the Supreme Court of Judicature (Consolidation) Act 1925 (UK) section 31(1)(c). This Court summarised the effect of these legislative provisions as follows:

> Therefore, although interlocutory orders or judgments can generally be appealed only *with leave* of either the first instance court or the Court of Appeal, a party appealing an order *refusing* unconditional leave to defend has an 'absolute' right of appeal *without leave* because such an order is deemed **not** to be an interlocutory order under s 31(2) of the UK Act and s 54(2) of the Barbados Act. No appeal lies, however, from an order *granting* unconditional leave despite its interlocutory nature because the general right of appeal in respect of interlocutory orders in s 31(1)(g) (UK) or s 54(1)(g) (Barbados) must be read subject to s 31(1)(c)[4] (UK) or s 54(1)(c) (Barbados).[8]

[19] In *Roseal*, this Court also indicated that the order on the summary remedy had to be examined to see whether conditions were being imposed on the grant of leave or whether directions were being given for the further conduct of the proceedings. In this regard, it is to be noted that the power of the Court

[8] ibid (n 7) at [30].

under Part 15.2 of the CPR is to give summary judgment against a party "on the whole of the claim or on a particular issue."

[20] The decision and order of Reifer J constitute an order that the parties go to trial on the issue of whether there is an existing right of way over Windsor's property. To that extent, the effect of the order is to give the parties unconditional leave to go to trial and ventilate that issue. Section 54(1)(c) of the Act therefore is a bar to appealing a refusal of a summary remedy on that issue. Once the judge makes an unconditional order on a Part 15 application to go to trial on an issue, it matters not that the issue arises as part of a claim or a defence to a claim. Section 54(1)(c) bars any appeal against the judge's order. Accordingly, there was no jurisdiction in the Court of Appeal or in this Court to entertain an appeal against the decision and order of Reifer J.

[21] This Court therefore, for the reasons given in this judgment, affirms the decision of the Court of Appeal. The application for special leave to appeal to this Court is dismissed with costs to be paid to Windsor to be agreed or assessed.

/s/ R. Nelson

The Hon Mr Justice R Nelson

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee