EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV 143 of 2013

BETWEEN:

(1) LEON A. GEORGE

(2) GERDA G GEORGE

Respondents/Claimants

And

DANIEL HARRIGAN

Applicant/ Defendant

Appearances:

Dr. J S Archibald QC for the Applicant/Defendant
Miska Jacobs for the Claimants/Respondents

2013: 11th, December
2014: 8th January

JUDGMENT

[1] Taylor-Alexander M: This is an application for summary judgment or alternatively to strike out the claimants' statement of case brought in trespass and for an injunction. The defendant alleges that the statement of case has no prospect of succeeding alternatively that it discloses no reasonable grounds for bringing the claim. The grounds are contained in the application and

in the supporting affidavit of Daniel Harrigan filed on the 21st November 2013 and are stated to be:—

(a) At the time of the commencement of the action, on the 29 May 2013, the claimants' pleadings were factually incorrect when they pleaded that they were the administrators of the estate of Leo Alberto George deceased and two of the registered proprietors of Parcel 10, the parcel in issue; The claimants failed properly to plead that they were individually, jointly or severally entitled as individual owners or registered proprietors or otherwise entitling them, or any of them, to commence the action.

(b) In their Notice of Application for Injunction also filed on the 29 May 2013, the claimants relied on the Affidavit of the second claimant Gerda George-Frett who deposed that she was one of the claimants and one of the administrators of the estate of Leo Alberto George deceased as well as one of the registered proprietors of Parcel 10. She relied on Exhibit GF1 being a certified copy of the title to Parcel 10, which showed the claimants were administrators as aforesaid but not registered proprietors in any individual capacity by way of transmission or otherwise.

(c) No fact was pleaded to show that the claimants, or either of them, were in possession of Parcel 10 at any time and thus entitling them to bring a claim in trespass. The claim by the claimants as individuals was incompetent for these reasons. Up to the date of the application there was no pleading or otherwise to cure the defect of incompetence of the action, and as such the action brought, must fail. Additionally, the claimants' application of 29 May 2013 for an Injunction cannot survive on its own where the principal claim fails for incompetence of action and otherwise. Alternatively, the defendant states that no reasonable claim is made out against him on the pleadings.

Issues

[2] The issues for determination are centered on whether:—

a. the claimants were possessed of the legal right to institute these instant proceedings.

b. possession as a constituent elements of a claim in trespass was pleaded.

c. the pleading establish the capacity in which the claimants have sued.

Procedural History:

[3] It is noteworthy that on the 3rd of December 2013 a re-amended claim form and statement of claim were filed, after the application to strike was filed and preempting the decision of the court on the application. In the main the amendment sought to clarify the capacity in which the claimants had brought the action.

Submissions of the Defendant

[5] The application is articulated in the submissions of the defence. The claimants in their original pleadings contend that they are the owners of Parcel 10 and rely on that fact to ground their case in trespass. The defendant submits that for the claim to allege the claimants as owners is factually incorrect and the pleadings do not establish a cause of action against them personally. The pleadings referred to the land register for Parcel 10 which showed the claimants as being the executors of the estate of Leo Albert George by transmission, and not as owners. In so far as their claim is brought as executors of the estate of the deceased Leo Alberto George, both in the headings and in the pleadings are entirely deficient, as the claimants have pleaded ownership in their own right and not as executors of the deceased's estate. The defendant alleges that the claimants have issued an invalid claim and he ought not to be put through the legal trauma of defending what has been a historical principle of law.

[6] The defendant further avers that it is a fact that the claimants, neither or any of them have ever been in possession of Parcel 10. That fact is evident from the pleadings of the claimants which make no reference to their occupation. Possession is an essential element of the tort of trespass. The claim is a non-starter, not valid in law and is bound to fail. The defendant relies on Romney v Guy a decision of Georges J in case No. 157 of 1991, which the defendant says supports that conclusion. The defendant has relied on the White Book 2013 paragraph 3.42 at pages 73-74 relating to the power to strike and submits that the statement of claim should be struck out as disclosing no reasonable grounds for bringing the claim.

Submissions in response of the Claimants

[7] The claimants have responded to the submission referring to paragraph 1 of the statement of claim which they state pleads that the claimants were administrators of the estate of Leo Alberto and owners by transmission. This is in keeping with section 117 of the Registered Land Act Cap 229 which provides for transmission of title and section 118 which speaks to the effect of registration by transmission, such that an administrator is deemed to be the registered proprietor and entitled to bring a claim in his name. They rely on the affidavit of Gerda Frett filed in the proceedings which avers that on the 29th October 2007 the claimants were deeded proprietors. The pleadings are not a nullity, although the claimants concede that while the heading of the proceedings in so far as it did not state that the claimants were administrators of the deceased estate, may have been misleading.

[8] The claimants assumed possession of parcel 10 after the death of their father and after obtaining a grant of letters of administration of their father's estate, on the 29th October, 2007. By way of application under the Registered Land Ordinance and Rules their names were recorded as registered proprietors by transmission of their father's interest in Parcel 10. As administrators and/or personal representatives of the estate of the deceased the claimants represent the deceased both in regard to his real and his personal property. They have wide powers to administer the deceased's property and business affairs which include the commencement of this action, in trespass. Moreover, the claimants submit, they are the registered proprietors in common and therefore have locus standi to bring the action and to maintain the action already filed.

[9] The defendant are trespassers on the claimants' property by excavating, creating an access road over the property, placing a waterline on the said property, cutting a chain to block the access and the removal of a "no trespass" sign. The defendant's defence does not deny his use of the claimants' property as an access to his property however he alleges that he has used it as a right of way from childhood. This the claimants submit is not a defence contemplated by section 93 and 135 of the Registered Land Ordinance to allow for the creation of an acquisition or of an easement or right of way over Parcel 10.

Consideration of the submissions

[10] The application brought by the defendant is made pursuant to part 15 and part 26.3 of CPR 2000. Both of which provide the court with a powerful tools to deal with claims summarily where in the

case of part 26.3 (1) (b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim; and under part 15.2 where the court considers that the claimants have no real prospect of succeeding on the claim or on an issue.

[11] The defendant has relied on the a similarly worded provision of the White Book 2013 paragraph 3.42 at pages 73-74 relating to the power to strike. Our own 26.3 (1) (b) of CPR 2000 can be invoked as follows:—

(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that —

(a) ……

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) ……

(d) ……

The UK Practice Direction 3A relating to that provision although of little weight to the interpretation of the CPR 2000 is instructive in its illustrations of when Part 26.3 ought properly to be invoke. Although this list although not exhaustive it includes:—

(1) claims which set out no facts indicating what the claim is about, for example 'Money owed £5000',

(2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognizable claim against the defendant.

(4) A claim may fall within rule 3.4(2)(b) where it is vexatious, scurrilous or obviously ill-founded.

[12] The general reasoning of the practice direction being that an application to strike ought not to be invoked unless on the face of the pleadings the claim brought is manifestly groundless.

[13] In relation to Part 15 of the CPR a party is entitled to a grant of summary judgment under the reasoning of Swain v Hillman, [2001] 1 All ER 91, 92, of cases that are not fit for trial at all.

[14] The claimants have pleaded that they are the owners of the property. And further plead that they are the administrators of the estate of Leo George (deceased). I accept the claimants' submission that they are invested under the Registered Land Act Cap 229 and Registered Land Ordinance and Rules when registered by transmission with all of the title of the deceased owner and for the purposes of any dealing is deemed the absolute proprietor of the land. As such they are entitled to bring this action and to sue in trespass. That is palpably clear from the legislation.

[15] Although I accept that the heading of the claim may misleading in so far as it does not refer to the representative capacity in which the claimants act, This error can be corrected by a simple amendment and at this stage of the proceedings the claimants do not require leave to do so. Importantly however any misconception of the claimants' authority to bring this action is cleared immediately upon reading the claim as it establishes that as a matter of law the claimants are entitled to bring this action and to exercise the rights of owner.

[16] As to the issue of possession, counsel for the defendant concedes that the requirement speaks to actual as oppose to physical possession. Actual possession is a question of fact. See Halsbury's 9th ed Vol 45 at para 1394. It consists of an intention by the claimants to possess the land in question and the exercise of control over it. Both the pleadings and exhibit LG to which I can have regard in an application for summary judgment demonstrate the claimants exercise of their rights as owner and an acceptance by the defendant of the ownership by the claimants. I therefore find that the claimants pleadings have establish possession as an element of trespass.

[17] In the circumstances and based on my reasoning above, I dismiss the application of the defendant to strike out the claim or otherwise for summary judgment, and award the claimants their costs summarily assessed in the sum of $1500.00

V. Georgis Taylor- Alexander

High Court Master