IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

G0057 OF2023

BETWEEN:

SANDRA KAYE CLYATT MEEKINS

Plaintiff

AND:

(1) LESLIE HARVEY JNR/HARVEY CONSTRUCTION
(2) LORI-ANN FOLEY
(3) LESLIE HARVEY SNR

Defendants

Before: **Hon. Justice Marlene I. Carter**

Appearances: **Ms. Amelia Fosuhene, Brady Attorneys, for the Plaintiff**

Mr. John Harris, Nelsons, for the Defendants

Heard: **2 November 2023**

Draft circulated: **10 March 2024**

Decision delivered: **20 March 2024**

HEADNOTE

Civil litigation – Order 14 Rule 12 – application by defendant for Summary Judgment on Defence – whether plaintiff has a realistic prospect of success on claim

JUDGMENT

The Application

1. The Applicant's summons seeking Summary Judgment pursuant to the Grand Court Rules O. 14 r. 12, was filed on the 8th of September 2023. The summons sought the following:

> *"... an Order that there be Summary Judgment for the Applicant on her defence pursuant to Order 14 rule 12 Grand Court Rules, that the Plaintiff's claim as against the Applicant be dismissed, and that the Plaintiff do pay the Applicant's costs of the proceedings to be taxed if not agreed."*

2. The Plaintiff's claim against the Defendants is for damages for trespass and nuisance.

3. The statement of claim records that the Plaintiff is the owner of property which adjoins that of the Applicant, the Second Defendant, and her husband[1]. The Plaintiff's property is bound in part by a rock wall, commonly referred to as a slave wall. In 2022 the Applicant and her husband erected a chain link fence to surround their property. At paragraph 4 of the statement of claim, the Plaintiff states that after the fence had been erected, there was an application to the Department of Planning for permission:

> *".. to erect the 7'4" fence with barbed wire along the said property slave wall. It is noted the application for Planning permission was not sought in advance of the erection of the fence and further the application stated that the second defendants wish to have the fence in place to keep their dogs safe during construction and renovations. There was also a claim that there was trespassing from other neighbours who had vandalised and destroyed their walls."*

4. The Plaintiff objected to the application. The Applicant, through her Attorneys, wrote to the Department of Planning stating, inter alia:

> *"Last July 9 we received a letter from the owner of blocks 15E Parcel 45 requesting to leave the rockwall and vegetation along the property untouched. These have sentimental value and work as privacy screens and serve both of the properties. Our client Ms. Lori-Ann Foley agreed to comply with the request of the adjacent parcel owner and will not remove the existing rock wall and vegetation."*

5. At paragraph 6 of the statement of claim, the Plaintiff states that she would not have consented to the erection of the chain link fence against the boundary to her property if the Applicant had stated an

[1] The claim against the husband of the Applicant was struck out by Court Order on 1 June 2023.

intention to remove the wall and vegetation or to damage the wall in any way. The Plaintiff contends that:

> *"Importantly the second defendants were under no illusion that the lack of objection to the erection of the chain link fence was predicated on the agreement that there would be no damage to the wall and vegetation."*

6. The Plaintiff claims that on 17 August 2022 the Second Defendant:

> *"... permitted the first and third defendants to demolish the slave wall and cut down and remove[d] a significant amount of vegetation on the plaintiff's property."* and *"... the first and third defendants damaged another fence on the Plaintiffs Property."*

7. The first-named First Defendant is an employee of Harvey's Construction Limited. The Third Defendant is the co-owner and director of HCL and the father of the First Defendant and the Applicant.

8. The Plaintiff further claims that:

> *"In breach of the promise made to CPA the second defendants permitted the wall to be demolished and stolen. The second defendants [were] aided and abetted in their destruction of the Plaintiff's property by the first and third defendants."*

9. At paragraph 12 of the statement of claim, the Plaintiff particularized the nature of the claim against the Applicant:

> *"(a) As against the second defendants, who caused the first and third defendants to trespass upon the Plaintiffs property.*
>
> ...
>
> *(c) As against the second defendants who were aided and abetted by the first and third defendants who caused physical damage to the Plaintiffs property by demolishing the slave wall and the vegetation on her property, such damage is a private nuisance.*
>
> ...
>
> *(e) As against the first, second and third defendants who removed or permitted the removal of the stones which had made up the slave wall. Such acts constitutes an act, theft as well as act of malice and has also served to prolong the interference with the Plaintiff's rights over her property."*

The Applicant's arguments in support of the Application

10. The Applicant filed two affidavits in support of the instant application. In her first affidavit dated, 8 September 2023, the Applicant states:

> *"(10) The first time I became aware of any of the issues in the Plaintiff's claim was on 20 August 2022. At that time I was in Jamaica, representing the Cayman Islands in the Caribbean Area Squash Association Championships. On the evening of 20 August I was contacted on WhatsApp by the Cayman Marl Road news website ("CMR") in connection with a story they were writing about the alleged destruction of the wall. As I told CMR at the time, this was the first I had heard of it.*
>
> *(11) At no time was I ever informed of, or asked my permission for, any action in respect of the wall. I was entirely unaware of any intention to demolish the wall, I gave no permission for the wall to be demolished, and I had no knowledge of it after the fact until informed by CMR.*
>
> *...*
>
> *(13) At paragraph 4 to 6 of the Statement of Claim, the Plaintiff refers to a planning application for the erection of a chain-link fence. This application related solely to the boundary between the Plaintiff's property and Parcel 321. The stone wall on that boundary has not been damaged in any way.*
>
> *(14) In light of the above, I believe that the Plaintiff's claim against me has no prospects of success, or that the Plaintiff has no prospect of recovering more than nominal damages."*

11. The Applicant's second affidavit, dated 19 October 2023, clarified as follows:

> *"(3) In paragraph 13 of my First Affidavit, I stated that the planning application for the erection of a fence related solely to Parcel 321, and not to Parcel 323. Having refreshed my memory by reference to the contemporaneous documents, I wish to correct that statement.*
>
> *(4) The application related to:*
>
> *a. After the fact permission in respect of a fence which had already been erected on the border of Parcel 321; and*
>
> *b. Prospective permission for a planned fence on the border of Parcel 323.*

> *(5) In the event, permission for the fence around Parcel 323 was refused (because of conditions relating to fencing along Walkers Road) and so I did not proceed with the erection of the fence around Parcel 323."*

12. The Applicant denied that she had any involvement in, was aware of, or gave anyone permission for any works which resulted in the demolition of the wall or any resulting damage.

13. Relying on the authority of ***Easyair Ltd v Opal Telecom Ltd***[2], Counsel for the Applicant submitted that there is no realistic prospect of the Plaintiff's claim against the Applicant succeeding at trial, or of her being awarded more than nominal damages. He argued that any suggestion that the Applicant had procured the demolition of the slave wall is contradicted by the contemporaneous evidence of her WhatsApp messages that she was unaware of any issues surrounding the alleged destruction of the wall until being contacted by a local news website, after the fact. Counsel argued further that any claim based on the Applicant having given the other defendants permission to demolish the slave wall was hopeless as there is no evidence to support such a claim.

14. Counsel noted that the Applicant was not the sole owner of Parcel 323. As such, given that the First and Third Defendants are joint owners of the property and, therefore, did not require anybody's permission to enter or cross it, there is no basis for an inference that, as owner, the Applicant must have given them permission to demolish the wall.

15. Further, Counsel submitted that there was no legal basis for the pleading that the Applicant, having herself agreed not to damage the slave wall, that she was, in the circumstances of this case and of the ownership of the property, obliged, in law, to prevent others from doing so.

The Plaintiff's response to the Application

16. For the Plaintiff, it is contended that there is a good and sufficient case to have her claim against the Applicant properly considered by a court of law. The Plaintiff, in her affidavit in reply to the first affidavit of the Applicant, stated that the Second Defendant was a joint owner of the property adjoining her land, that the works being done by the First and Third Defendants were being done *"at her behest"*. The Plaintiff pointed to the Applicant's knowledge of the wall and its historical significance. She invited the Court to find that the Applicant, having given assurances to the Planning Department that the wall was not to be disturbed, that:

[2] [2009] EWHC 339

> *"Not only did the second defendant give assurance to the planning department but because of those assurances the Planning permission was granted. It was therefore incumbent upon her not only to impart the information to the other joint owners of the property that the "slave wall" and vegetation on the property were to remain untouched. It was also incumbent upon her to ensure that any other person, or contractor doing work on her land and coming onto the land that she jointly owned adhered to the assurances made expressly made by her or on her behalf or at her behest to planning."*

17. The Plaintiff submitted further:

> *"However, it is clear that the second defendant has been less than truthful in her affidavit about the assurances to planning, and it is clear that either she and her co-owners employed incompetent contractors or failed to inform them that the wall should not be removed, or failed to show them the terms [that] had been promised to planning and agreed with me."*

18. Counsel for the Plaintiff submitted that the Plaintiff's reply to the application highlights falsehoods in the application filed and the evidence in support thereof and shows that the Applicant's arguments are undermined by the evidence. In submissions to the Court, Counsel submitted that the Court should consider that while the Applicant denies any involvement in or awareness of the work done, that the planning applications for the erection of the fence were made by her and that *"she must have given permission for the work to be done. These were her contractors doing work that she had applied to planning to be done."* She countered the Applicant's assertions thus*: "If they were not her contractors then say so, if it is not her work which was being done then say so. The applicant has not."*

19. Counsel submitted that:

> *"… the entire dispute commenced because in putting up- a chain link fence based upon the planning permission applied for by Mrs. Lori Ann Foley the wall was destroyed and the stones were stolen, there was trespass to Mrs. Meekin's property and significant damage to her land and the foliage/vegetation on it."*

20. Counsel reiterated that it was the Applicant's *"duty to ensure that the work for which she had made the planning application was done in accordance with the law."*

<u>The Court's considerations</u>

21. Order 14 rule 12 of the Grand Court Rules provides, so far as is relevant:

> *"(1) Where in an action to which this rule applies a defence has been served by any defendant, that defendant may on the ground that the whole or part of the plaintiff's claim has no prospect of success or that the plaintiff has no prospect of recovering more than nominal damages, apply to the Court for the plaintiff's claim to be* dismissed and judgment entered for the defendant on the whole or part of the claim."

22. In ***Easyair Ltd v Opal Telecom Ltd,*** the court stated as follows:

> *"... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*
>
> *i) The court must consider whether the claimant has a "realistic" as opposed to "fanciful" prospect of success:* ***Swain v Hillman [2001] 1 All ER 91;***
>
> *ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable****: ED & F Man Liquid Products v Patel [2003] EXCA Civ 472 at [8]***
>
> *iii) In reaching its conclusion the court must not conduct a "minitrial":* ***Swain v Hillman***
>
> *iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents****: ED & F Man Liquid Products v Patel at [10]***
>
> *v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial:* ***Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;***
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> *vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court 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 a trial judge and so affect the outcome of the case:* ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;***

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction**: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."***

23. In **Cribb v Reid**[3] Patterson Ag. J. stated:

> *"In my view, as I have said earlier, the scope of O.14, r.12 appears to be very wide. It gives a Defendant the right to terminate proceedings against him in a summary manner by showing that the Plaintiff's claim has no prospect of success. If the Defendant is able to show that the Plaintiff's case is clearly unsustainable, then he will be entitled to judgment without the necessity of a possible long drawn out trial. If the issue raised by the defence is shown to be sufficient to finally determine the action in his favour without a full-scale trial, then in my view, an O.14, r.12 application is appropriate. These are but examples of the scope of the rule and are by no means exhaustive. The application of the procedure not only saves costs but it saves the time of the court."*

24. The Plaintiff's claim against the First and Third Defendants is not being challenged on this application. The Plaintiff maintains her claim is not only in respect of those defendants who are alleged to have been present, and themselves trespassed on the Plaintiff's property and physically caused the damage alleged. The issue for this Court to determine is whether the Plaintiff has a "realistic" as opposed to

[3] [1997] CILR N-7

"fanciful" prospect of success against the Applicant, a claim against the Applicant which is not merely arguable.

25. One of the claims against the Applicant is that because she, one of the owners of the property adjoining that of the Plaintiff, procured the approval of the Department of Planning for the erection of a chain link fence between the properties and, at the time thereof, acknowledged the existence of the slave wall and gave assurances that in the erection of the chain link fence, the wall would not be damaged or destroyed, she was legally liable when other owners of that property upon which the chain link fence was to be erected allegedly damaged the slave wall and in so doing, also trespassed upon the Claimant's property.

26. The Plaintiff was not the recipient of the assurances given concerning the wall and fence. However, the Plaintiff's case is that she did not object to the erection of the fence when these assurances were given by the Applicant. This is the nexus that is being relied upon by the Plaintiff to impute a duty on the part of the Applicant, regarding the wall. The Plaintiff has not particularised the principle of law upon which this obligation arises, given that no assurances were made to her by the Applicant. Instead, Counsel for the Plaintiff has asserted that the Applicant was under a duty to ensure that the work for which she had made the planning application was done in accordance with the law and that it was not.

27. This argument appears to conflate two different duties or obligations. Firstly, there is the Applicant's duty/obligation to ensure that the work done was completed within the specifications and approvals given by the Department of Planning for the erection of the fence. The Plaintiff cannot rely upon this duty or obligation to as the basis of a claim against the Applicant for trespass and nuisance. The private law action does not relate to the grant of planning permission.

28. Taken at its highest, it may be that the assurances could assist the Plaintiff in her action for nuisance and trespass in giving context to the actions of those who it is claimed destroyed the wall and vegetation and removed the stones after the wall had been demolished. However, without some further nexus, this, in and of itself, is not sufficient to move a claim against the Applicant. If the Applicant ran afoul of the duty/obligation imposed by the grant of planning permission to erect the fence, the Planning Department is empowered by law to itself enforce that obligation.

29. The claim against the Applicant that she caused the First and Third Defendants to trespass upon the Plaintiff's property, that she was aided and abetted by the First and Third Defendants in causing a nuisance to the Plaintiff in the demolition of the wall and destruction of vegetation and also that she permitted the removal of the stones which made up the slave wall all rest upon an assertion by the Plaintiff that the Applicant was obliged to prevent others, here the First and Third Defendants, from

acting as has been alleged and causing damage. This is the second obligation that the Plaintiff asserts rests on the shoulders of the Applicant. There is no evidence presented to support this assertion. As Counsel for the Applicant submits, if the Applicant was the sole owner of the property upon which the chain link fence was to be built, this coupled with her being the applicant for planning permission to erect the fence may have been some evidence upon which it could be inferred that she was then responsible for the actions of the First and Third Defendants.

30. The evidence that the property was owned jointly with the First and Third Defendants and another does not assist the Plaintiff in this regard. The First and Third Defendants' actions and, indeed, presence on the Applicant's and their property do not depend on the Applicant's connection to the property. As co-owners, they are, themselves, directly connected to the property. It is conspicuous that there is no assertion by the Plaintiff in the Statement of Claim that the First and Third Defendants were, at the time of the alleged demolition of the wall, involved in the erection of the chain link fence which is the matter that is more directly and particularly linked to the Applicant.

31. The Statement of Claim focuses entirely on the demolition/damage to the wall and the subsequent removal of the stones which formed the wall. Paragraph 8 of the Statement of Claim relates as follows:

> *"Notwithstanding the promise made to the Central Planning Authority by the second defendants, on 17th August 2022, the second defendants permitted the first and third defendants to demolish the slave wall and cut down and removed a significant amount of vegetation on the Plaintiff's property. The vegetation which was removed included a palm tree, papaya trees and other mature and fruit trees, a desert rose plant the list is not exhaustive. Further, the first and third defendants damaged another fence on the Plaintiffs property. The Plaintiff was working abroad at the time and had not known immediately that the second defendants had permitted the first and third defendants to destroy her property. However, she was informed by telephone later that day by another neighbour."*

32. Further at paragraph 9 of the Statement of Claim the actions of the First and Third Defendants are described thus:

> *"At the time of the damage to and removal of her property, a neighbour of the Plaintiff attempted to prevent the first and third defendants from damaging the wall and removing the property. The first and third defendants whether by themselves or through their servants or agents claimed that the property they were removing was theirs and was on their land. The police were called and due to the false claims made by the first and third defendant that the property belonged to them, the police permitted them to continue with the demolition of the*

property belonging to the Plaintiff. The property was destroyed and then removed without the Plaintiff's knowledge or consent. The information caused the Plaintiff significant distress, pain and suffering."

33. The nexus between the alleged actions of the First and Third Defendants to the Applicant based on this second obligation/duty revolving, as it does, on her having acquired planning permission for the erection of the fence is not apparent from the pleadings.

34. In **Re Omni Securities Ltd (No. 3)**[4] Smellie CJ (as he then was) noted:

"In applying this test, while one must be mindful of the cautionary words of Danckwerts L.J. in Wenlock v Moloney [referred to above] *at 1244 — expressed upon an Order 18, rule 19 application — not to usurp the position of the trial judge by embarking upon 'a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination… There nonetheless has to be some assessment of the evidence presented in support of the plaintiff's case to see whether there is a fair and reasonable probability or more than a faint possibility of success… And, contrary to the express prohibition arising upon an Order 18 application, I think 0. 14, r.13, by its terms implies some consideration of the evidence where it expressly invites a plaintiff to show cause against a defendant's application by filing and serving evidence in reply."*

35. Counsel for the Plaintiff has argued that there were inconsistencies between the Applicant's filed Defence and her assertions on affidavit. However, these do not go to the heart of the issues between the parties. The fact that the Applicant did not at first confirm that planning permission was sought for parcels 321 and 323, as well as the fact that there is some ambiguity as to whether and when the Applicant acknowledged that she knew that this was a wall with some historical significance are not matters which would lead this Court to find that an application for summary judgment should not be allowed. The factual circumstances contemplated by Lewison J in ***Easyair*** relate to matters that are pertinent to the resolution of the issues between the parties, here whether the Applicant caused, permitted, or was aided and abetted by the First and Third Defendants in the demolition of the wall as alleged by the Plaintiff. It is not every factual issue with which the court must be concerned, only such issues that are germane to the resolution of main issues with respect to the action before the court. Whether the Applicant acknowledged the existence of the slave wall does not, in this Court's view, go to the question of whether the Plaintiff has established that there is a realistic prospect of success against

[4] [1998 CILR 275]

the Applicant upon her claims relating to trespass and nuisance and whether the Applicant caused, aided or permitted the demolition of the wall and the removal of the stones thereafter.

36. The Court must be mindful that:

> "… [if] *it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success."*

37. The Plaintiff has not indicated in her affidavit in reply that there is any other evidence that she may present that would place her claim against the Applicant in any better light than as set out in her statement of claim. No submission has been advanced by the Plaintiff that there was further evidence to buttress her bare assertion that the Applicant "must have given permission for the work to be done" or that the First and Third Defendants were "her contractors doing work that she had applied to planning to be done."

38. For the reasons outlined herein, I find that the application for summary judgment by the Second Defendant on her Defence should be allowed. The Plaintiff's claim against the Second Defendant is dismissed. The Plaintiff will pay the Applicant's costs of the application to be taxed if not agreed.

Carter J.

The Hon. Justice Marlene I. Carter
Judge of the Grand Court