[2018] JMSC Civ. 196

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV01542

BETWEEN	**VIOLET SIMPSON**	**CLAIMANT**
AND	**WINTHROP ROCHESTER**	**DEFENDANT**

IN CHAMBERS

Mrs. Hannah Harris-Barrington and Ms. Carie Yazel for the Claimant.

Mr. Mikhail Williams instructed by Taylor Deacon & James for the Defendant.

Heard: 7th February and 19th July, 2018

Whether the claimant is entitled to declarations sought - Whether claimant entitled to injunction - Whether claimant's pleaded case and evidence support remedies sought

ANDREA PETTIGREW-COLLINS, J. (AG.)

THE CLAIM

[1] On the 10th of March 2015, the claimant filed a Fixed Date Claim Form (FDCF) supported by an affidavit. In her FDCF, she sought orders in the precise terms stated below:

a) A declaration that the claimant is owner of roadway which the claimant has built and that the defendant must desist from blocking the said driveway.

b) A declaration that the road built by the claimant on land given to her by her family does not form part of the defendant's estate but that the land forms part of the claimant's estate.

c) A mandatory interlocutory injunction against the defendant's constant interference to the claimant's access to her home.

d) Interest.

e) Costs and Attorney's costs of this claim be borne (sic) by the defendant.

f) Any further or other relief as the court shall think fit.

BACKGROUND

[2] The claimant also filed a Particulars of Claim which was later withdrawn. Permission was sought and granted for the claimant to file a second affidavit in support of her FDCF. Various applications, each supported by affidavit were filed by the claimant in this matter, some of which were struck out. On the occasion of the trial, the claimant through her Attorney-at-law intimated to the court that she was relying on her redacted affidavit filed on the 21st of September 2017. That affidavit stood as her evidence in chief. The initial affidavit filed along with the FDCF was titled as the affidavit of Hannah Harris-Barrington, yet the commencement curiously indicated that it was the affidavit of the claimant, Ms. Simpson. That document was however signed by Ms. Barrington. I have omitted reference to the superfluous material contained in the affidavit.

CLAIMANT'S EVIDENCE

[3] The following is the substance of the claimant's claim:

1) She is the owner of land in an area known as Dunder Hill in the parish of St. Elizabeth.

2) She built a road in order to access her home. This road is built on unregistered land.

3) She was given permission by certain family members in or around 1991 to construct a private road which she refers to as a right of way in order to access her house which she built on her land.

4) This road was built approximately ten years before the defendant purchased his land.

5) This road is depicted on a survey diagram prepared pursuant to a survey carried out by Mr. Patrick Hendricks, Commissioned Land Surveyor on the 27th of June 2017. That survey diagram bears Plan Examination Number

374862. The survey diagram was tendered and admitted in evidence as exhibit 4.

6) The claimant expended sums to the tune of $2,589,800 JMD to construct the road in question.

7) In or around 2004, the defendant bought land from Mr. Gurney Kenneth Simpson who is a family member of the claimant but the road is not included in the land that the defendant bought.

8) The defendant has repeatedly blocked the roadway leading to the claimant's house by placing boulders in the road. He has also placed signs indicating that the claimant should not use the road. She also said that the defendant has tied goats in the road.

9) It was not stated when her problems began, but her affidavit evidence is that as her house which she built became a picture of perfection, the defendant became "rude, obstructive, abusive, sexually vulgar and violent towards her." According to her, the defendant's conduct is borne out of jealousy because her house is picture-perfect whilst his is in an incomplete state.

[4] The claimant tendered into evidence various documents purportedly in support of her claim. These documents include six police reports and a letter to the Superintendent of Police, none of which really assists the claimant's case. She also tendered into evidence a Notice to quit, directed at the defendant which was dated the 3rd of November 2014. There were also three receipts reflecting the sums of $700,000 JMD (exhibit 5), $732,000 JMD (exhibit 6), $1,157,000 JMD (exhibit 7) representing sums said to have been spent on the construction of the road. There were also a number of photographs.

[5] During cross-examination, the claimant admitted that the road in question divides the defendant's land into 2 sections. She stated that Kenneth Simpson was in charge of the piece of land that was sold to the defendant. She also stated that Kenneth Simpson is her cousin and the son of one Izan Simpson, who is her father's cousin. She said further, that she is aware that Kenneth Simpson was granted Letters of Administration in the estate of Izan Simpson. She disagreed that the roadway in question is a part of registered property, because according to her, there is no title for the property but she also stated that she would not be surprised to find out that on the 25th of March 1981, Mr. Kenneth Simpson

received a registered title to the property through which the disputed road was built. Asked when was it that she constructed the road, the claimant said that it was around 1994 but that it was her brother Patrick who was in charge of the construction, because she was in the United States during the time of the construction. She admitted that there was a parochial road that runs from Bull Savannah to Chocolate Hole and that that road runs to the west of her property. The claimant also agreed that there were two boys under the age of 18 who resided in her household. She denied that the defendant had spoken to her about them driving her vehicle up and down the disputed road. She further denied that he had told her that if he saw them driving up and down the road again, he would put stones in the road in order to prevent them from doing so. She stated that she knew that the defendant had children staying at his home.

[6] In answer to questions put by the court, the claimant stated that the persons who gave her permission to build the road are her cousins who are the brothers and sisters of Kenneth Simpson. She named these persons as Elder Holness, Loraine Lewis, Izet Ritchie and Ruby Davis. She said that at the time they gave her permission to do so, she was not in Jamaica and that this permission was given verbally.

[7] One witness gave evidence on behalf of the claimant. The claimant had sought to tender into evidence as a hearsay document, a declaration purportedly signed by this witness as well as other persons. The defendant filed a notice to prove the authenticity of this and other documents. There was no affidavit filed in relation to this witness. Her evidence was quite short and was to the effect that she along with her four sisters, (one of whom is now deceased) gave the claimant authority to build the road in question. According to her, the property belonged to the five of them and to no one else. She was asked the following question during her examination in chief. “Was the road included in that part of the land that was sold to Mr. Winthrop Rochester?” Her response was “Yes, the road was there.” According to her she gave the claimant permission to build the road in 1992.

THE DEFENDANT'S EVIDENCE

[8] The defendant's affidavit which was filed on the 27th of March 2017 stood as his evidence in chief. His affidavit evidence is that the road in question was built on land registered at Volume 1234 Folio 364 of the Register Book of Titles. A copy of the duplicate certificate of title was exhibited and from that document it can be gleaned that the land was brought under the Registration of Titles Act on the 25th of March 1991. It is also to be noted that there is no endorsement indicating a transfer of the property to the defendant. The defendant however stated that he purchased a part of the property registered at Volume 1234 Folio 364 from Mr. Gurney Kenneth Simpson in November of 2006. The defendant also exhibited a copy survey diagram which he said was supplied to him by Mr. Gurney Kenneth Simpson. This survey diagram was prepared by D.L. Rowe on the 5th of June 1996 at the instance of Mr. Simpson. The defendant stated that the road in question which the claimant is saying was built in 1994 was indicated on the diagram as being in existence at the time of the survey. The defendant pointed out that notice of the survey was given to the secretary of the St. Elizabeth Parish Council, Mr. Gurney Simpson and Mr. Patrick Simpson and that this information is indicated on the surveyor's report.

[9] The defendant also took issue with the receipts that were admitted in evidence as exhibits 5, 6 and 7. The basis of the objection was in part that the receipts that were dated the 5th of March 1994, the 3rd of April 1994 and the 20th of April 1994 respectively are not authentic. The basis for that view are as follows:

1) Exhibits 5 and 6 reflecting payments of $700,000 and $732,000 respectively were said to have been paid by Patrick Simpson but the claimant did not mention who Patrick Simpson was.

2) The sums are exorbitant especially having regard to the fact that the sums were said to have been paid in 1994. The authenticity of exhibit 6 was also questioned on the basis that the invoice number is earlier in sequence than that of exhibit 5 yet exhibit 5 bears an earlier date.

[10] The defendant also stated that at the time of purchase of the property, he intended to subdivide it into smaller lots and he formed the view that the fact that

there was a road running through the property made it ideal for that purpose. He gave other evidence about information Mr. Kenneth Gurney Simpson had given him regarding the road. He also said he caused the survey to be carried out on the land he purchased on the 11th of October 2006. He exhibited a copy of that survey report. According to the defendant, that survey diagram confirmed that the road which runs through the property is a private road which forms part of the said property. The defendant also stated that there is no need for the claimant to travel through his land in order to gain access to her property because she has access from the parochial road which runs to the west of her property as well as via another road which runs to the north of her property. He stated that the survey diagram prepared in respect of the survey carried out on the 4th of September 2014 at his instance clearly indicates that the parochial road leading north to Chocolate Hole and south to Dunder Hill is adjacent to the land which the claimant occupies.

[11] In the cross-examination, the defendant admitted that he had placed boulders in the disputed road. He also admitted that the claimant had been using the road when he began to occupy his property. He also admitted that the police had spoken to him regarding the placement of boulders in the road. In response to a question put by the court, the defendant said that the land occupied by the claimant adjoins the parochial road which runs from Chocolate Hole to Bull Savannah. Asked by the claimant's Attorney whether that road can be driven on, his response was "yes". It was then suggested to him that the road is mountainous and a car cannot be driven on it. It was also suggested to him that there was no other road for the claimant to use to get to her home apart from the one that she built. The defendant denied those suggestions.

THE CLAIMANT'S SUBMISSIONS

[12] The claimant through her Attorney-at-law, submitted that the law regarding private nuisance is relevant to these proceedings because the defendant has placed debris and rubble in the roadway thereby obstructing the claimant's

access to her home and causing her to suffer grave inconvenience in accessing her home. It is also to be derived from the submissions that the claimant is saying that she has acquired an easement by prescription or by grant. She also stated that this easement is an easement by necessity because the claimant's property is landlocked. She made no submissions in relation to the claim of ownership which is the stratum on which her pleaded case was based.

DEFENDANT'S SUBMISSION

[13] Counsel for the defendant filed extensive submissions in the matter for which this court is grateful. It is counsel's submission that the defendant is bound by her pleadings which is her FDCF and also by her affidavits that she has filed in this matter. The defendant claimed that although the claimant has two affidavits in the matter, she has sought to rely only on her redacted affidavit filed on the 21st of September 2017. It is the defendant's submission that the claimant cannot put forward any new factual arguments, allegations, and questions for the court to decide at trial and seek new remedies without the requisite affidavit evidence. Further the claimant cannot rely on any new factual allegation without having received the court's permission to do so and further, that permission should have been received before the fact and not after, therefore the claimant cannot retroactively seek permission. In support of her submission, reliance is placed on Rule 8.9(1) and Rule 8.9A of the Civil Procedure Rules (CPR). It is the further submission that a sanction is created by the provisions of Rules 8.8, 8.9(1) and 8.9A and therefore Rules 26.7 and 26.8 are invoked.

[14] The defendant submitted in the alternative that if the court is of the view that Rule 8.9A falls outside of the ambit of Rules 26.7 and 26.8, Rule 20 is applicable and the claimant would then have required the court's permission after the first hearing in order to amend her pleadings. The defendant further submitted that the court needs to consider what constitutes "statement of case" or "pleadings" in the context of this case. The defendant cited the case of **Marvalyn Taylor-Wright v Sagicor Bank Jamaica Ltd.** [2016] JMCA Civ 38 and reproduced from

that case a quote from lord Wolfe M.R. in **Mc Philemy Times Newspapers Ltd. and others** at pages 792 to 793 to the effect that the need for extensive pleadings is reduced by the requirement that witness statements are exchanged. Therefore the witness statements along with identifying the documents being relied on, will alert the opposing side to the nature of the claim. Further, whilst such procedures reduce the need for particulars, pleadings are still required in order to determine the parameters of the case for either side, and critical in order to identify the issues to be determined and the extent of the dispute between the parties.

[15] The defendant further submitted that there is a distinction between how the court is permitted to treat with a claim brought by a Claim Form as distinct from one brought by way of a FDCF. This counsel said is because of the difference between the provisions of Rules 8.7 and 8.8. According to counsel, in the case of a Claim Form, Rule 8.8 provides for what should be contained in a Claim Form other than a FDCF but noted that although Rule 8.7(1)(b) specifically states that the remedy being sought is to be specified, it also says that specifying the remedy does not limit the power of the court to grant any other remedy to which the claimant is entitled. It is counsel's position that in the case of the FDCF, there is no such provision and there is a legitimate expectation that the orders sought in a FDCF should indicate the legal questions and the remedies being sought. Counsel cited the case of **Capital and Credit Merchant Bank Ltd. v Real Estate Board** and **Real Estate Board v Jennifer Messado and Co.** [2012] JMCA Civ 29 in support of this position**.**

[16] The defendant is therefore asking the court to disregard the claimant's submissions regarding a claim in nuisance and in support of a declaration that the claimant is entitled to an easement by necessity which were first introduced into the mix by way of submissions. I understand the defendants further submission to be that if the court takes the view that it should consider the FDCF as well as well as the affidavit/s in support of the claim as embodying the questions that the claimant wants the court to decide and the remedy which the

claimant is seeking, as well as the legal bases to the claim for that case (Rules 8.8(a) and (b), then the court still cannot grant the orders being sought by the claimant.

[17] Counsel undertook a detailed examination of the contents of the claimant's affidavits as well as the evidence which emerged from her cross-examination and concluded that the claimant's evidence does not support the orders sought. One basis for coming to this position according to the defendant's submissions is that the claimant's affidavit evidence on the face of it, grounds a claim to ownership presumably of the disputed road (albeit the evidence is weak), consistent with the orders sought in the FDCF. However, this position is inconsistent with the request that the court declares that the claimant is entitled to an order that an easement by necessity exists. Counsel posed as a relevant question that of whether or not a person who claims ownership of property can simultaneously and not in the alternative claim an easement in respect of the same property. Counsel cited the decision of Hibbert J. in **Bradley Millingen and Simone Thomas v Lisa Millingen** [2015] JMSC Civ 261 where Hibbert J. said in essence at paragraph 23 of his judgment that a man cannot claim an easement over his own land.

[18] The further submission of counsel is that the documentary evidence does not ground a claim in easement. He pointed to the survey diagram admitted in evidence as paragraph 4 which he asserted shows that the claimant's land is not landlocked as she claims. Counsel also urged the court to apply the wisdom enunciated in the Privy Council decision of **Horace Reid v Charles and another.** [1989] UK PC 24. He pointed to Lord Ackner's pronouncement at page 6 of the judgment that:

> *"Mr. James Guthrie in his able submissions on behalf of Mr. Reid, emphasized to their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanor of the witnesses, it is important for him to check that impression against contemporary documents where they exist against the pleaded case and against*

the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an after-thought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses."

[19] Counsel also proffered that the claimant's other documentary evidence tend to support a claim for ownership and not an easement. He pointed to the Notice to Quit which was served on the defendant as well as her receipts which were referred to earlier. Counsel also asserted that the provisions of Section 48(g) of The Judicature (Supreme Court) Act does not assist the claimant's case as she has not "properly" brought forward a claim for an easement. He directed the court's attention to the case of **Roxanne Peart v Shameer Thomas and others** [2017] JMSC Civ 60 and posited that that case is distinguishable from the instant case because in **Roxanne Peart,** the pleaded case, the witness statements and the proven facts supported a cause of action which was not pleaded whereas in the instant case, the primary as well as the secondary evidence (although insubstantial), support a case for ownership and therefore neither by virtue of her pleadings or the evidence does the claimant's claim support an order that she is entitled to be granted a declaration that an easement exists.

[20] As it relates to ownership of the property, counsel pointed to the claimant's evidence in cross-examination and posited in essence thatit does not support her claim to ownership. He further asked the court to assign very little if any weight to the claimant's receipts which purport to establish that she paid sums in excess of 2 million JMD for construction of the road. As intimated before, these receipts were admitted in evidence despite the protestations of counsel for the defendant. Counsel also pointed to the fact that the defendant had served on the claimant a Notice to Prove the authenticity of certain documents that were exhibited to the claimant's affidavit in support of her case. These documents included the receipts in question. Counsel's submission is that the claimant has failed to prove the authenticity of those documents. Therefore counsel contends, in circumstances where there was a reasonable basis for the defendant's claim that the receipts were inauthentic, (the basis having been set out in the defendant's

affidavit in response to the claim) the claimant's failure to prove the authenticity of the documents should result in the court drawing an adverse inference from that failure.

[21] It was also the submission of counsel for the defendant that the claimant is not entitled to the injunction sought. He observed that in the first place, the injunction sought is not interlocutory in nature because if granted, it would determine the respective rights of the parties. He pointed to the relevant statutory framework relating to the grant of an injunction i.e. section 48(a)-(g) of the Judicature Supreme Court Act and observed that the essence of those provisions is that a claimant seeking equitable relief must demonstrate an entitlement to such relief and that a defendant is entitled to rely on any defence which would defeat a claim in equity. He further stated that upon the determination that any such equitable defence is meritorious, the court may grant any relief to a defendant against a claimant relating to or connected with the original subject matter of the claim. It is the defendant's further submission that the claimant has failed to prove her entitlement to the equitable relief sought because she has established neither a legal nor equitable right which warrants protection. Counsel pointed the court to dicta in **Siskina v Distos Compania Naviera SA** [1979] AC 210. He also directed the court to the Jamaican case of **Wild Harbour Jamaica Limited v MBJ Airports Limited** SCCA No. 2009 HCV 02553 delivered on the 2nd of June 2009 in which the decision in the **Siskina** was referred to and applied.

[22] Counsel also observed that the court permitted the claimant to call who he termed a surprise witness. His submission is that the position adopted by the court "borders dangerously close to the realms of an unfair trial if one were to abide by the case of **Olgar James-Reid v Stephen Clarke and David Davis** Claim No. 1004 of 2001 decided on the 5th of October 2007. He however observed that the evidence of that witness could not reasonably have impacted the decision of the court. Counsel further said the witness was allowed to give evidence, as the evidence it was assumed that the witness would give, would be

with a view to establish the providence of a particular document in respect of which a Notice to Prove was filed.

[23] Counsel asserted that the defendant's case is unchallenged. He pointed to the Certificate of Title as well as the 1996 and the 2006 survey diagrams earlier mentioned. He also pointed to the defendant's affidavit evidence which he stated was intended only to rebut the claimant's claim for injunctive relief. It is the defendant's view that ownership of the property occupied by the defendant is not being disputed by the claimant. Further the claimant has not disputed that Mr. Gurney Kenneth Simpson obtained Letters of Administration.

THE ISSUES

[24] The issues arising for determination in this claim are:

i) Whether the claimant complied with the requirements of Rule 8 in seeking remedies for nuisance and a declaration that an easement exists and if she failed to do so, whether that failure is fatal to her claim in this regard.

ii) Whether the claimant has established a basis for a declaration that she is the owner of the disputed roadway.

iii) Whether the claimant is entitled to an injunction.

THE LAW AND ANALYSIS

WHETHER CLAIMANT COMPLIED WITH REQUIREMENTS OF RULE 8

[25] Rules 8.8(a) and (b) of the Civil Procedure Rules (CPR) which deals with the contents of the FDCF provide:

> Where the claimant uses form 2, the claim form must state:
> *a) the question which the claimant wants the court to decide; or*
>
> *b) the remedy which the claimant is seeking and the legal basis for the claim to that remedy.*

Rule 8.9 speaks to the claimant's duty to set out the case and provide:

> *1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*
> *2) Such statement must be as short as practicable*
> *3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers necessary to his or her case.*
> *4) ….*
> *5) ….*

Rule 8.9A addresses the consequence of not setting out the case provides:

> *The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.*

[26] In order to resolve the issues, the court must address the question of whether the claimant's pleadings are such that the court is able to give proper consideration to the claimant's request for an order that she is entitled to remedies for nuisance and/or a declaration that an easement by necessity exists. The claimant's pleaded case and the evidence on which she has placed reliance seems to be based on a claim to ownership of the disputed road. Therefore, although there were no submissions made, the court is bound to consider whether the claimant owns the road in question and ultimately whether she is entitled to an injunction.

[27] In the case of **Marvalyn Taylor-Wright,** the claimant/appellant appealed the decision of Sykes J (as he then was) in which he granted summary judgment to the claimant. The defendant/respondent had been sued on a promissory note and in relation to other debts due to the claimant. The defendant claimed that the promissory note on which she was sued was a fraudulent document. She in fact admitted to executing another promissory note bearing a different date but argued that she owed no liability to the claimant in respect of this other note since the execution of this note was not completed. She also admitted borrowing the principal sum in respect of which she was sued. Summary judgment was granted partly on the basis of a finding by the learned judge that there was no serious challenge to the allegations in certain paragraphs in the claimant's Particulars of Claim which had set out other bases on which the monies were owed, separate and apart from the reliance on the promissory note that the

claimant said was fraudulent and which was the document on which she had been sued.

[28] On appeal, the defendant's argument was that summary judgment should not have been entered because the defendant had challenges to the claim, the veracity of which could not be determined without a trial. One of the bases for this contention was that the learned judge had relied on documents not pleaded in order to have given judgment as he did. Phillips JA examined the provisions of Rule 2.4, 8.9 and 8.9 A and at paragraph 62 of her judgment, cited dictum in the case of **McPhilemy** which was cited by Counsel Mr. Williams which is as follows.

> *"The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now being exchanged. In the majority of proceedings, identification of the documents upon which a party relies together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."*

[29] Phillips JA also cited Morrison JA in **Capital and Credit Merchant Bank Limited** at page 142:

> *"I would accept these statements as being equally applicable to a case commenced by Fixed Date Claim Form supported by affidavits. In my view, firstly, the pleader is required to set out a short statement of the material facts relied on in support of the remedy sought, sufficient to reveal the legal basis for the claim, but not the legal consequence which may flow from those facts. Secondly, once the Claim Form itself is in compliance with the rules, full details of the claim maybe supplied by the affidavit or affidavits filed in support of it (together with any accompanying documents upon which the claimant relies), provided that the documentation, taken all together, is sufficient to enable the defendant to appreciate the nature of the case against him, and the court to identify the issues to be decided. "*

[30] Phillips JA stated at paragraph 66 of her judgment that:

> *"the effect of the CPR and the principles deemed from the cases are that: (i) any claimant must include, in the claim form, particulars of claim or reply statements of all the facts on which he/she intends to rely; (ii) a claimant must annex or*

> *identify documents in the claim form, particulars of claim or reply which is considered necessary for the case; and (iii) a claimant is precluded from relying on any allegation or factual argument which is not set out in the particulars of claim or reply but which could have been set out there, unless the court grants such permission and the allegations or factual arguments contained therein should not be lengthy."*

[31] Ultimately the Court of Appeal found that the claimant having based its claim on the promissory note in relation to which the defendant had joined issue, the learned judge should not have granted judgment on the basis of the contents of the letter of commitment which had not been pleaded neither in the particulars of claim nor in the reply. Further, that no amendment had been granted to the claim form or particulars of claim enabling the claimant to rely on it. Further, the court found that the learned judges' finding that a claim to money had and received could be established from the contents of the particulars was not an approach open to him on the pleadings.

[32] The Court of Appeal further agreed with the defendant's Attorney-at-Law's categorization of the judge's act as dissecting "the respondent's statement of case in a manner that artificially created a legal platform unrelated to the 27th of July promissory note" and that the "dissection created other claims to which the appellant had no obligation to respond and was therefore never given the opportunity to respond to" (paragraph 71 of the judgment). It is to be noted that the decision of the Court of Appeal was subsequently overturned by the Judicial Committee of the Privy Council but the final decision ultimately does not affect much of the dicta relating to the need for evidence to conform with the pleadings. The decision was overturned partly on the basis that the bank's pleaded case was not solely dependent on the 27th of July promissory note and that there was evidence to support the granting of summary judgment to the bank because the triable issue then identified, even if resolved in favour of the defendant, would not have changed the outcome of the case. Further, the board determined that the court is not in a summary judgment application confined to the parties' statemen of case.

[33] The question which arises is whether the claimant in fact failed to set out in her FDCF the legal questions and the remedies being sought and if so, whether this failure is fatal to her claim.

[34] In the **Real Estate Board** case, the question arose as to whether the doctrine embodied in the phrase "trustee de son tort" was sufficiently pleaded. On behalf of the **Real Estate Board,** Dr. Barnett argued that the court should resist a purely formalistic approach to pleadings and should look not just at the claim form but at all the material filed in support of the claim. Morrison JA said at paragraph 138:

> *"The formal requirements of the rules are that a fixed date claim form must state, among other things, the question which the claimant wants the court to decide, or the remedy which the claimant is seeking and the legal basis for the claim to that remedy; and where the claim is being made under an enactment, what that enactment is (Rule 8.8(a),(b) and (c)). Under the rubric, " Claimant's duty to set out case", Rule 8.9(1) requires the claimant to include in the claim form or in the particulars of claim a statement of all the facts on which he relies on Rule 8.9.(2) stipulates that "such statement must be as short as practicable".*

[35] Based on the foregoing, it would not be incorrect to say as Counsel submitted that there is a legitimate expectation that the orders sought in a FDCF should indicate the legal questions and the remedies being sought. However, based on the pronouncement of Morrison JA, if the essence of the claimant's case can be garnered from the FDCF, and the affidavit/s filed in support of the claim, this court would be required to give full consideration to the merits of the claim.

[36] Mr. Williams' contention that the claimant is bound by her pleadings is therefore correct. If the claimant did not raise in her pleadings that she was bringing a claim in nuisance and/or a claim that she is entitled to an order that an easement by necessity exists then she could not properly have raised those matters for the first time in submissions. The omission in this instance is particularly egregious as the question of an easement was clearly raised for the first time in submissions. As to whether or not a claim in nuisance was raised in the pleadings is arguable. The claimant did not specifically use the word 'nuisance'.

[37] This court does not agree that a sanction is created by virtue of the provisions of Rules 8.8, 8.9(1) and 8.9A in circumstances where a claimant fails to include the

legal or factual basis of the claim in the statement of case or affidavit in support of the case. Therefore the rules relating to application for relief from sanctions (Rule 26.8) is not applicable to this case. It is agreed however that a claimant who fails to set out a statement of the material facts being relied on and the remedy being claimed would need to seek an amendment to the statement of case to include such matters. Amendments may be sought to a statement of case in keeping with the provisions of Rule 20. The fact is, that no amendment has been sought in the present case.

[38] An examination of the claimant's FDCF together with her affidavit filed on the 21st of September 2017 and all supporting documents exhibited to her affidavit revealed that the claimant's case was mounted on the basis that she owns the road, having constructed it with the permission of those whom she viewed as owning the land.

WHETHER CLAIMANT HAS ESTABLISHED THAT AN EASEMENT EXISTS

[39] The question posed by counsel in essence is whether one can simultaneously claim ownership of property and claim an easement in relation to the same property instead of bringing a claim in the alternative for an easement. Although no clarity was given to the matter by the claimant in terms of whether these were raised as claims in the alternative, I am prepared to construe the claimant's case as a claim in the alternative; that is to say that the claimant is asking the court to say that she owns the road in question but if the court finds that she is not the owner of the road in question, then the court should consider whether the claimant is entitled to a declaration that whether by virtue of prescriptive right or by necessity or otherwise an easement exists over the land owned by the defendant.

[40] However, there is nothing in the pleadings, the affidavit evidence, the documentary evidence or the viva voce evidence given by the claimant's witness that in any way remotely supports a case for any declaration that an easement exists over the land. There is absolutely nothing in the pleadings or the evidence

that could even remotely establish that (a) dominant and a servient tenement exist or (b) the easement is for the purpose of accommodating the dominant tenement. The defendant also would not have seen the need to respond with any defence to meet the claimant's case in that regard based on the absence of pleadings.

WHETHER CLAIM IN NUISANCE ESTABLISHED

[41] As to whether the claimant is entitled to a declaration that the defendant created a nuisance, there is no declaration or order sought requesting that the court should order the defendant to abate a nuisance. Neither is there anything in the FDCF which states specifically that the defendant's conduct amounts to a nuisance. The claimant did not specifically use the word 'nuisance' in paragraph C of the FDCF. The order sought is for a mandatory interlocutory injunction against the defendant's constant interference to the claimant's access to her home. She however alleged in her affidavit that the defendant repeatedly blocked the roadway leading to her house by placing boulders and debris in the road and that he has tied goats in the road. Are these allegations capable of giving rise to a claim in nuisance?

[42] Nuisance is defined as a condition or activity which unduly interferes with the use or enjoyment of land (paragraph 20-01 **Clerk & Linsell on Torts 22nd Edition**). Usually the persons entitled to bring a claim in private nuisance are persons in possession or occupation of the land affected by the nuisance. It is the claimant who has made submissions alleging nuisance on the part of the defendant.

[43] The acts complained of are more akin to trespass since the acts are direct as opposed to a consequential infringement. In order to establish trespass, the claimant would as with nuisance, have to prove that the land in question is in her possession. Trespass must be brought at the instance of the person in possession (paragraph 19-10 of **Clerk & Linsell on Torts**). Possession of course denotes occupation and/or physical control, and varying degrees of physical control may suffice depending on the use to which the land is put but a

person cannot properly be in possession jointly with the true owner where that person is seeking to maintain a claim against the true owner of property. In any event, the claimant's pleaded case and evidence cannot support a claim in trespass.

WHETHER CLAIMANT HAS ESTABLISHED THAT SHE IS THE OWNER OF THE ROADWAY

[44] The foregoing brings me to the question of whether or not the claimant has established the basis for a declaration that she is the owner of the roadway which she claims she built or whether the roadway forms part of the defendant's land. He who allege must prove. The claimant's evidence is that she was given permission to build the road in question in or around 1991 and that this permission was given to her by family members. In cross-examination it was revealed that this permission was given orally. It is also her evidence that she expended sums in excess of $2,000,000.00 JMD to build the road. It is trite law that an interest in land cannot be given orally. In any event she has not asserted that she was given a gift of the land neither has she sought to assert a claim by way of adverse possession in respect of the portion of land on which the road is built. There would in fact be no basis for such a claim as the claimant's evidence is that she built her road some ten years before the defendant bought the land.

[45] The undisputed evidence from the defendant is that he bought the land in November of 2006 from Mr. Gurney Kenneth Simpson. The documentary evidence in the form of the duplicate Certificate of Title registered at Volume 1234 Folio 364 of the Register Book of Titles shows that Mr. Gurney Kenneth Simpson is registered as the owner in fee simple. In fact he brought the land under the Registration of Titles Act on the 25th of March 1991. It is to be observed that there is no documentary evidence that the land was transferred to the defendant. The claimant has not however disputed the defendant's assertion that he bought the land. At least she has not disputed that he owns the land on either side of the road which she said she constructed.

[46] The duplicate Certificate of Title and a survey diagram prepared pursuant to a survey done on the 21st of June 2016 and which was admitted in evidence as exhibit 4 at the instance of the claimant, show that the road in question and the lands on either side of the road are all encompassed in the land registered at Volume 1234 Folio 364.

[47] It may be noted at this juncture that the defendant disputed the claimant's assertion that she caused the road to be built in 1994. The court in this instance is bound to have regard to the documents produced in evidence and to check the impressions garnered from the demeanour of the witnesses against the "contemporary documents where they exist" in accordance with the guidance provided by Lord Ackner in **Horrace Reid** (supra)**.** The defendant's affidavit evidence is that at the time of the purchase of the land from Mr. Simpson, he was supplied with a survey diagram provided by D.L. Rowe and that that survey was conducted on the 5th of June 1996. As the defendant also pointed out in his affidavit evidence, this survey diagram does not indicate the presence of the road which the claimant said was built in 1994. In the face of the documentary evidence, this court feels bound to reject the claimant's evidence that the road was built in 1994. In any event nothing turns in my view on whether the road was built in 1994 or at sometime thereafter.

WHETHER THE CLAIMANT IS ENTITLED TO AN INJUNCTION

[48] Section 48 of the Judicature Supreme Court Act empowers the court to grant any remedy where the court determines that a party is entitled to any equitable estate or right or to any relief founded upon such right. An injunction is one such remedy which a court will grant where the party/parties appear to be entitled to the remedy.

In the **Siskina,** Lord Diplock observed at page 256 that:

> *"….. **A right to obtain an** interlocutory **injunction is not a cause of action.** It cannot stand on its own. **It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of***

> ***the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.*** *It is granted to preserve the status quo pending ascertainment by the court of the rights of the parties and* ***the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."***

[49] In applying the reasoning in the **Siskina,** Rattray J. held in the **Wild Harbour** at paragraph 15 that:

> *"(15) This Court is a Court of Pleadings. Nowhere on the face of [the] Claim Form or the Particulars of Claim has a cause of action been alleged or pleaded.* ***Without a cause of action, the relief sought cannot be granted.*** *It follows that if no cause of action has been pleaded, there is no serious issue to be tried. My view in this regard is reinforced by the inability of the Claimant to show any legal right it has, for which it has sought protection…."*

[50] In determining whether or not the injunction should be granted, this court accepts the submission of counsel for the defendant that the claimant is not entitled to the injunction sought or to any injunction as she has failed to put forward a cause of action deserving of the grant of an injunction.

SUBSIDIARY MATTERS

[51] Although nothing in my view turns on this fact, the claimant's claim that her property is landlocked is not borne out by the documentary evidence. All the survey diagrams that featured in this case and in particular the survey diagram tendered and admitted as evidence as exhibit 4 on the claimant's case, indicates that there is a parochial road which runs from Dunderhill to Chocolate Hole which adjoins the claimant's land.

[52] Although not necessary to a disposition of this matter, I will briefly address Mr. William's submission that the court wrongly admitted into evidence the claimant's receipts in relation to her purported expenditure towards the construction of the road and that the court also wrongly permitted the claimant to call a 'surprise' witness.

[53] It is correct that the defendant had filed and served a notice to prove the authenticity of certain documents including the three receipts exhibits 5,6 and 7

as well as the document purportedly signed by this 'surprise' witness and other persons declaring that they had given permission to the claimant to construct the road. By filing and serving notice in compliance with Rule 28.19, it cannot be disputed that the defendant cannot be deemed to have admitted the authenticity of the documents in question. The claimant would therefore be required to prove the authenticity of these documents. It is not the same thing in my view to say that on that basis the documents are not admissible in evidence. There must be some other basis for refusing admission. It seems to be the accepted practice that documents are exhibited to affidavits as required by Rule 8.9(3) without the party filing a notice to tender into evidence obvious hear-say documents.

[54] Counsel for the defendant's position is that when this course is adopted, the consequence is that the other side is unable to respond by counter notice. I do not necessarily share that view. Section 31E of the Evidence Act does not in my understanding necessarily require formal notification although I would readily say that formal notification is desirable. Such notification would be for example by way of a notice to tender into evidence hearsay documents. It is arguable that by exhibiting the document to affidavit, a party gives notice to the other side of an intention to rely on that document so exhibited. Therefore it would in my view be open to the other party to indicate an objection whether by the filing of a notice of objection or otherwise. The court ultimately took the view that it would determine what if any weight would be assigned to the receipts in question. The receipts do not in my view assist the claimant's case.

[55] As indicated before, the documentary evidence in the way of the 1996 survey diagram clearly contradicts the claimant's assertion that the road was built in 1994 and much doubt is therefore cast on the authenticity of these receipts. Additionally, in the absence of providing further and credible evidence in proof of the authenticity of the receipts as requested by the defendant and in light of the reasons put forward by the defendant in paragraph 6 of his affidavit for disputing the authenticity of those documents, there is even further basis for assigning little weight to them.

[56] I now address the matter of the giving of evidence by witness Ms. Lorraine Lewis. The defendant sought to have had the claimant prove the authenticity of a document previously referred to. Ms. Lorraine Lewis was one of four persons who purportedly executed the document. The witness was not permitted to give any evidence other than that which the document revealed which is that she gave permission to the claimant to build the disputed road. The witness did not in fact speak to the execution of the document. Whatever else she attempted to say was not permitted by the court. The court did make it clear that her evidence would have had to be limited to matters having to do with the document purportedly executed in part by her. It is true that the witness did not provide a witness statement or a witness summary. Ultimately her evidence did absolutely no harm to the defendant's case and there was therefore no issue or basis for any concern that the witness might have been allowed to "range large in oral evidence" (Mangatal J in **Olga James-Reid v Stephen Clarke and David Davis** (earlier referred to) thereby potentially taking the defendant by surprise.

CONCLUSION

[57] In all the circumstances, the claimant is not entitled to the declarations nor the injunction sought in her FDCF. She is further not entitled to the declaration requested for the first time through submissions, that she has acquired an easement by way of the disputed private road which she claimed that she built in order to access her home.

[58] Costs of the proceedings are awarded to the defendant to be taxed if not agreed.