

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO: CV 2007-04455**

**BETWEEN**

**ISLAM BAKSH**

**CLAIMANT**

**AND**

**KEN BUTCHER**

**DEFENDANT**



**JUDGMENT**

**Before the Honourable Madam Justice C. Pemberton**

**Appearances:**

For the Claimant: Mr G. Raphael

For the Defendant: Ms S. Indarsingh instructed by Ms R. Bholai

[1] This action is set against the rolling landscape of Cunupia, a highly scenic part of Central Trinidad. The parties to this action are and/or were landowners there. In 1961 Mr Baksh, the Claimant together with his deceased wife acquired two parcels, one five acres and the other two acres. He and his family have cultivated the land from 1963. Mr Butcher acquired his twelve acre parcel in 2001. A point of interest is that Mr Baksh acquired his land under the “old law” system of Conveyancing, by way of deed from his vendors. Mr Butcher acquired his land by way of Certificate of Title under the Registered Conveyancing system.

[2] Sometime between 2001 and 2005, Mr Butcher sought to subdivide and develop his lands. Mr Butcher applied for and obtained outline planning permission from the Town and Country Planning Division to do so. The permission from the Town and Country Planning Division, allowed Mr Butcher to develop twelve plots – eight residential and four agricultural in nature. Mr Butcher commenced work and continued until Mr Baksh brought these proceedings. During the development period as well, Mr Butcher sold the residential plots to diverse persons. Mr Butcher assures this court that he no longer holds the title to the disputed area. I should say that the Court made a visit to the area as part of the Case Management process and viewed the disputed area with a *spes* that the parties might have been inclined to settle the matter without the need of a trial. The parties opted to go to trial.

[3] **MR BAKSH'S CLAIM**

I have stated that Mr Baksh is the legal and lawful owner of property situate in Cunupia, which is to be affected by this decision. I have stated that Mr Baksh and his family have cultivated the land since 1963. Mr Baksh gave a historical account of the state of the road and its alleged use until 2005. He stated that since 1963 he has been passing over the lands now forming part of the lands bought by Mr Butcher, (“the Butcher lands”) by foot, bison cart and by motor vehicle. That pathway or track as it is referred to in the Statement of Claim is one “now measuring 15 feet wide” and was therein referred to as “the access road” which leads from Boy Cato Road to the north and runs in a southern direction to Mr Baksh’s two parcels of land. Mr Baksh informed the court that he cultivated *inter alia* sugar cane, vegetables, bodi and sorrel which until 2005, he sold at the market in San Juan. In times past, when the area was foot track from Boy Cato Road, people used that way to get to a spring on El Carmen Estate, which is south of his lands. He himself used the footpath from 1963 to 1965 and used the way as a bison track when he acquired the animal in 1965 to get to his lands from Boy Cato Road.

- [4] In or around 1969, the residents of the area, including Mr Baksh, developed the access road by bulldozing, cleaning and draining it. They placed cylinders across the way, killed the grass growing there and later spread approximately 50 yards of gravel. Mr Baksh managed to secure the adjoining landowners' permission in writing to use their lands to obtain the required width for an access road. The relevant landowners were Mr Ramkhalawan, Mr Frankie Dindial and Yellow Meadow Farm. The last correspondence was in 1989. All in all, Mr Baksh, his family and his predecessors in title have for a full period of sixteen years and more enjoyed this access as of right without interruption or hindrance from anyone. Mr Baksh bases his claim on **Section 2** of the **PRESCRIPTION ORDINANCE Chap. 5 No. 8 (THE PRESCRIPTION ORDINANCE)**.
- [5] Mr Baksh further informed that he retained the services of a licenced Land Surveyor Mr C Brazil to carry out a survey of the access way, which was completed on or about 19<sup>th</sup> September 1989. Mr Baksh stated that he and others continued to maintain the road, filling potholes when they developed and sprayed the grass with weedicides.
- [6] Sometime in 2005, Mr Butcher began depositing gravel at the intersection of the access road and Boy Cato Road. Mr Baksh claimed that he visited Mr Butcher at his home at Chin Chin Las Lomas to show him the documents and to ascertain what he intended to do about the access road. Mr Butcher told Mr Baksh that he visited the Town and Country Planning Division and that he had not seen any road there and that the access road was his property. Mr Butcher continued to develop the area by digging a trench across the access road and placed concrete blocks across the road which hindered any entrance or egress onto the road and in particular prevented Mr Baksh from accessing his lands.
- [7] This discovery caused Mr Baksh to visit Mr Butcher again. Mr Baksh did not receive any comfort so he instructed his Attorney-at-Law to put his concerns in writing and requested Mr Butcher to remove the wall which he caused to be placed along the access road. This elicited no response from Mr Butcher.

[8] Mr Baksh removed his matter to the court seeking the following relief:

1. *A Declaration that Mr Baksh is entitled to a right of way for himself, his servants, his agents, his heirs and assigns tenants and licencees in common with all others over the access road.*
2. *An injunction restraining Mr Butcher whether by himself his servants and/or agents and/or workmen from preventing Mr Baksh his servants, agents, heirs assigns tenants and licencees from using the said access road.*
3. *An order compelling the Defendant to remove the row of concrete blocks or wall which he has placed across the said access road.*
4. *Damages for wrongfully obstructing the said access road.*
5. *Costs*
6. *Further and or other relief.*

[9] **MR BUTCHER'S DEFENCE**

In essence, Mr Butcher denies that Mr Baksh has any or any reasonable claim to a right of way or access over his lands. Mr Butcher contends that in the absence of any survey plans attached to Mr Baksh's deeds, the lands described in those deeds are not the or any portion of lands which lie to the north of his lands, (being the lands belonging to Mr Baksh). Mr Butcher is unaware of Mr Baksh's claims of his and others' passing and re-passing whether by foot, bison or motor vehicle over any path or right of way referred to as "the access road" leading from Boy Cato Road to the north and running south to Mr Baksh's two parcels of land since 1963, or of Mr Baksh's cultivation of crops for sale in the San Juan market up until 2005.

[10] Mr Butcher is further unaware of any passageway used by people to get to a spring which is situated on El Carmen Estate, which is south of Mr Baksh's five acre parcel of land and of all the activities which took place on the land sometime in 1969 with respect to the development of the access road. Mr Butcher states that in 2001, when he acquired the ten acre parcel of land to the present time, (2007 the date of the filing of

the action) there was no evidence of any roadway or pathway from his lands to the other lands. Prior to purchasing he inspected all of the lands and did not observe any road or pathway extending from the lands which Mr Baksh purports to “own to the north” of his lands. Based on the topography of the land, there can be no roadway beyond the lands belonging to Yellow Meadow Farms, lands lying to the south of Mr Baksh’s lands which could have facilitated a roadway or passageway. The lands south of the Yellow Meadow Farms lands were water logged “making access thereto impossible”.

[11] Mr Butcher further contends that any passage through his lands cannot yield an access road to Mr Baksh’s lands and can take Mr Baksh only halfway up the western boundary of the Yellow Meadow Farms lands and no further. During the years 2002 to 2005 when he commenced development of the lands, he observed that the lands to the north of Yellow Meadow Farms were covered in grass over six feet in height and contained no crops as stated by Mr Baksh. As far as he was aware, no one including Mr Baksh had attempted to access the lands to the north of his lands.

[12] In 2005, Mr Baksh visited Mr Butcher at his home but brought with him no documents evidencing any alleged right of way over his lands. In fact, Mr Baksh took no further action to pursue his alleged rights until 2007 when he caused his Attorney-at-Law to write to him. During that period, 2005 to 2007, Mr Butcher alleges that he expended almost \$1million in developing his land. Since 2006, Mr Butcher has sold those lands to three different purchasers, in 2005 and 2006, two of which have homes constructed on them. Mr Butcher asserts that had Mr Baksh been using his lands as he has claimed he would have been aware of the presence of at least two of the purchasers who have homes on the land.

[13] The Mr Frankie Dindial letter to Mr Baksh did not establish or acknowledge any right of way in Mr Baksh. Mr Butcher is unaware of any other matters claimed by Mr Baksh in terms of *inter alia* Mr Baksh’s seeking assistance from the Caroni County Council or from any other persons in his efforts to establish the right of way. Even if that were so, since

2001, the road was never constructed at all and no such access road existed on the ground.

[14] Mr Butcher admits to depositing the two loads of gravel at the disputed site, but says that that was in furtherance of his approved developmental works on the land. He admits to digging a trench but says that it is on the eastern side of his lands and not on the western border upon which Mr Baksh claims his right of way. Mr Butcher demonstrated the position of the trench by way of a survey plan attached to his pleadings. He therefore denied that he blocked any alleged road constructed by Mr Baksh or deprived him of any access to his lands as contended. Further neither Mr Baksh or any one acting on his behalf has made a claim to a right of way over Mr Butcher's lands during the period 2001 to 2005. According to Mr Butcher, even if such a claim was made, that it is not a right which is enforceable at law or against him. In any event, equity would not permit Mr Baksh to enforce his rights since even if there were such a right Mr Baksh has delayed inordinately in enforcement. In addition, even if those rights existed they would as at the date of this action be extinguished.

[15] Further, Mr Butcher contends that there are shorter and easier routes to Mr Baksh's lands, as seen on the Ward Sheet, through Jankie Trace. There is another access to Mr Baksh's lands through a road known as Hilltop Drive just off Las Lomas No. 1 Road which is paved and would facilitate Mr Baksh's access to Yellow Meadow Farms without having to pass and re-pass over Mr Butcher's lands. Further if Mr Baksh's claim is correct, that the right of way exists where Mr Butcher has constructed his drain, then that drain would be positioned in the middle of Mr Butcher's land, which is not the position where Mr Baksh claims that the Caroni County Council had permission from his predecessor in title.

[16] Mr Butcher stated that he submitted and received approval from all of the relevant public authorities, the Town and Country Planning Division and the Chaguanas Borough Corporation. Further there is no evidence that the Caroni County Council or any other

entity ever pursued Mr Baksh's request for assistance for the proposed development of the alleged right of way over Mr Butcher's lands. In the premises, Mr Butcher stoutly denies Mr Baksh's rights and any reliefs which he claims are his and asked that Mr Baksh's claim be dismissed with costs.

[17] **ISSUES**

The main issues to be decided in this matter are as follows:

1. Does Mr Baksh's evidence disclose that he has a valid and enforceable easement or right of way over Mr Butcher's land?

Three necessary sub-issues are:

- a. Does the evidence disclose that the requirements of a valid easement have been satisfied?
- b. If so, is this easement or right of way saved by the **PRESCRIPTION ORDINANCE**?
- c. Can the claim under the **PRESCRIPTION ORDINANCE** be met and be defeated if the right lacks one or more of the characteristics essential to an easement?<sup>1</sup>

If I find that there is no easement, then there is nothing to protect under the **PRESCRIPTION ORDINANCE** and the matter ends there. If I find that there is an easement then I must go on to examine the other issues.

2. Is that right legally enforceable against Mr Butcher?
3. If the answer to 2 is yes, is it equitable to enforce that right at this time?

---

<sup>1</sup> See **CHESHIRE'S MODERN REAL PROPERTY 5<sup>TH</sup> ed. p 266**

I shall examine the parties' evidence in light of the issues raised and the law pertaining to these issues.

[18] **APPROACH BY THE PARTIES**

**MR BAKSH**

Both parties approached this case differently. Mr Baksh's case was that there was an access road, that there was an intention to give him an "access road" and that intention is evinced by letters to the Caroni County Council from surrounding land owners including Mr Butcher's predecessor in title. Photographs of the area showing the access road are sufficient for the court to find that there was a right of access in his favour. Even though there is no writing, deed or memorial on the Certificate of Title, the **PRESCRIPTION ORDINANCE** can be prayed in aid because of his long user. He has therefore satisfied the legal and factual requirements of a valid and enforceable easement. Mr Raphael concentrated his submissions therefore on the effects of **SECTION 45** of the **REAL PROPERTY ACT** and how the court should treat with the issue of Abandonment.

[19] **MR BUTCHER**

Ms Indarsingh identified what she termed the factor in issue as "*whether the right is capable of forming the subject matter of a grant*". In other words, was a valid and enforceable easement established in fact and in law? Ms Indarsingh was of the view that Mr Baksh had failed in his quest both on the evidential and legal bases. I shall first set out what I determine to be a statement of the law in this area.

[20] **LAW**

These are the questions of law that arise:

1. **WHAT CONSTITUTES A VALID AND ENFORCEABLE EASEMENT?**



2. **WHAT ARE THE PROVISIONS OF THE PRESCRIPTION ORDINANCE?**
3. **WHEN IS AN EASEMENT LEGALLY ENFORCEABLE AND AGAINST WHOM?**
4. **WHEN WILL EQUITY FROWN UPON THE ENFORCEMENT OF A LEGAL RIGHT?**

I shall concentrate my efforts on the first two areas.

### **1. WHAT CONSTITUTES A VALID AND ENFORCEABLE EASEMENT?**

The authors of **MEGARRY AND WADE**<sup>2</sup> start the discussion on Easements and Profits by stating that: *the common law recognised a limited number of rights which one landowner could acquire over the land of another: and these rights were called easement and profits.* These rights are recognised as “*hereditaments in themselves*”. This is important since the law is loathe to give rights over the land of another without certain and defined criteria. According to J.C.W. Wylie, “*Centuries of case law have settled the basic characteristics of an easement*”.<sup>3</sup> These are as follows:

#### **1. That there must be a dominant and servient tenement.**

Megarry and Wade states the “*Documentary evidence to identify the dominant tenement is certainly desirable in practice, but ... it is not required by law...*”.<sup>4</sup> That is clear. It means that Mr Baksh is not obligated to provide the court with documentary evidence which must identify the location of the dominant tenement. It is enough to assert that a piece of land needs to be serviced by another piece of land so as to create a right in the dominant landowner.

#### **2. The easement must accommodate the dominant tenement.**

---

<sup>2</sup> See **THE LAW OF REAL PROPERTY** by The Hon. Sir Robert Megarry and H.W.R. Wade 4<sup>th</sup> ed p. 805.

<sup>3</sup> See J.C.W. Wylie p. 123  
para. 5.06.

<sup>4</sup> See p. 807 f.n. 1 *infra*.

Again I rely on Megarry and Wade and accept the statement that the easement must **“benefit the dominant tenement as such...”**.<sup>5</sup> The right must benefit the land and **“not just the current owner of the land in his personal capacity”**.<sup>6</sup> According to Megarry and Wade *“... A right cannot exist as an easement unless it confers a benefit on the dominant tenement as such. It is not sufficient that the right should give the owner for the time being some personal advantage; the test is whether the right makes the dominant tenement a better and more convenient property. This may be done not only by improving its general utility, as by giving means of access or light, but also by benefitting some trade which is carried on the dominant tenement, at least if the trade is long established.”* Cheshire in seminal text states that an easement must *“accommodate the dominant tenement”* and must be *“connected with the normal enjoyment of the dominant tenement”*.<sup>7</sup> According to Wylie, for the right to benefit the dominant tenement, *“it must relate to the value of the land as a parcel of land e.g. by affecting its amenities or facilities”*.<sup>8</sup>

The onus of establishing an easement lies on the person who asserts its existence, in this case Mr Baksh. This is to my mind one of the crucial aspects of this case.

**3. The dominant tenement and the servient tenement must be owned or occupied by different persons.**

This is not an issue here as it is established that both Mr Baksh and Mr Butcher are the fee simple owners of their respective lands.

**4. All easements “lie in grant” that is they must be created expressly by deed or must be capable of forming the subject-matter of a grant e.g. a right of way.**

---

<sup>5</sup> See p. 807 f.n. 1 *infra*

<sup>6</sup> See p. 123 f.n. 2 *infra*. See also the locus classicus **HILL v TUPPER (1863) 2 H. & C. 121** which dealt with the difference between the grant of an easement enforceable against all of the world and a “personal or commercial advantage, not connected to the use” of the land as such.

<sup>7</sup> See **CHESHIRE AND BURN’S MODERN LAW OF REAL PROPERTY 15<sup>th</sup> ed. p. 490 - 491**

<sup>8</sup> See **THE LAND LAW OF TRINIDAD AND TOBAGO** J.C.W. Wylie 1986 Government of Trinidad and Tobago Press at p. 122

Ms Indarsingh detailed this aspect of the law in her submissions. I am grateful for the research. The right must be within the general nature of rights capable of being created as easements. The rights must be sufficiently defined and cannot be vague and uncertain. The court can have recourse to extrinsic evidence to identify the dominant tenement and the nature of the easement. Again, the right ought not to involve the expenditure of any money on the part of the servient tenement owner. The common law recognised only those rights created by deed as easements. Any right created orally or by mere writing was considered a licence. However, equity may recognise these rights as equitable easements under the principle that equity will regard as done what ought to be done. When a party is asking the court to act in its equitable jurisdiction, this request must be supported by cogent evidence. Each case is to be looked at *sui generis*.

[21] It is established that there is no express grant of an easement by deed or memorial from Mr Butcher or his predecessor to Mr Baksh. Where there is no express grant, as in this case, the law may imply the grant of an easement on certain conditions. One of those instances is an implication of an easement of necessity, where the easement was intended or where the easement falls within the **RULE IN WHELDON v BURROWS**.<sup>9</sup> Mr Baksh at best has inferred that the easement is intended and has sought to lead evidence to that effect. He gave some evidence as well as to how that “access road” was necessary for the better enjoyment of his land. He has not satisfied the evidential requirements. The court was referred to a number of authorities from which I cull the following principles:

1. An easement of necessity may arise where the dominant tenement is landlocked and unless the right of way is implied over the quasi-servient tenement, the owner of the dominant tenement cannot access his land.

---

<sup>9</sup> (1879) 12 Ch.D 31. The law recognises that easements may be implied in favour of a grantee of one part of a holding against the owner of the remainder. See **MEGARRY AND WADE p. 833**.

The land is not capable of being used by the dominant landowner as land<sup>10</sup>.

2. A right may be implied to give effect to the **common intention of the parties**.<sup>11</sup> Again this is a matter of evidence.

## [22] THE PRESCRIPTION ORDINANCE

### EASEMENTS UNDER THE PRESCRIPTION ORDINANCE

**Section 2** of the Ordinance provides, and I shall set out the relevant parts:

*“When any claim shall be made to any **right ... to any way or other easement** ...and such right ... shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of sixteen years, the right thereto shall be deemed absolute and indefeasible, **unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.**”*

The right to a way under the **Ordinance** is a presumed right if there is continued and uninterrupted user for sixteen years. Again, it is a question of evidence to be laid in court by Mr Baksh who asserts that right. The claim under this Section can be defeated if the alleged right lacks one or more of the essential characteristics of a valid easement or is a right enjoyed with the let or permission of the servient tenement owner<sup>12</sup>.

---

<sup>10</sup> See **MRA ENGINEERING LTD v TRIMSTER CO. (1988) P. & C.R. 1** “

<sup>11</sup> See **WONG v BEAUMONT PROPERTY TRUST LTD** [1964] 2 All E R 199

<sup>12</sup> See **CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY** 13<sup>th</sup> ed. p 521 where the authors refer to the case of **MOUNCEY v ISMAY (1865) 3 H & C 486**

[23] **THE REAL PROPERTY ACT SECTION 45**

I state that the court is cognisant of the provisions of Section 45 of the **REAL PROPERTY ACT**. Mr Raphael gave a concise and lucid analysis of the section and its effects on omitted easements. Whether an easement is omitted or not is a matter of evidence. One first has to establish that there is in fact a right that is **capable of being recognised as an easement** and prove that it was indeed omitted for the section to come alive. Is that the position in this case?

[24] **THE EVIDENCE**

**MR BAKSH'S EVIDENCE IN CHIEF**

By his Witness Statement filed on May 20<sup>th</sup> 2011, Mr Baksh largely repeated the contents of his pleaded case. I do not propose to repeat the facts as to the deeds of ownership, his usage of his land, the existence of "an access road" which was formerly a "foot path" and which he used to transport his produce to the market until 2005. Mr Baksh testified as to his employment at the Centeno Government Farm and that an officer at the Farm "permitted" him to remove gravel from the farm. Mr Baksh spoke to various activities that he and others, "we", undertook, such as cutting, bulldozing and draining the road area, placing cylinders in the ravine across the roadway, killing the grass growing on the road, draining the road, and other developmental works on the roadway. "We" spent "approximately \$15,000.00 on those works".

[25] Mr Baksh spoke of the many attempts for assistance with the development and maintenance of the roadway, from the Parliamentary Representative of the area and the adjoining landowners. Mr Baksh testified that "*Representatives of the Caroni County Council, Chaguanas, requested authorisation in writing from the owners of the lands adjoining the access road. These owners had however previously given us permission to develop and use the said access road and to dig drains along the sides of the road*". This was supported by letters from three land owners, one of whom was Mr Butcher's

predecessor in title Mr Frankie Dindial. Mr Baksh himself gave permission to the County Council to use part of his lands to develop the access road. A survey plan "I.B.6" shows the location of Mr Dindial's property as east of the access road.

[26] Mr Baksh admitted that the Caroni County Council did not follow up on the planned development and it was left to adjoining land owners to maintain the road over the years. He cited several users namely, Mr Dindial, the owners of Yellow Meadow Farms, Mr Hosein and his son who both eventually died and several other persons who went to the spring. We are not told the years of the Hoseins' deaths.

[27] Sometime in 2005, Mr Baksh testified that Mr Butcher deposited loads of gravel at the intersection of Boy Cato Road and "the access road", dug a trench across "the access road", placed blocks approximately three feet high across "the access road", all of this prevented *"us from gaining access to our lands through the access road."* Mr Baksh spoke of his visit with Mr Butcher on two occasions with documents to discuss the blocking of the access road. Since these discussions did not result in Mr Butcher's unblocking of the road, he caused his Attorney-at-Law to write to him requesting that he removed the wall blocking the road. Mr Butcher did not respond to the letter and he filed this action.

[28] Mr Baksh stated that he visited the lands *"recently"* and observed that the row of concrete blocks is still standing. He still is unable to access his lands through that way, which he had hoped to do and to continue to sell his produce in the San Juan market *"to help me to make ends meet and this is my only source of income apart from the pension for myself and my son Khoda Baksh"*. In response to Mr Butcher's contention, Mr Baksh denied that lands at Yellow Meadow Farms sloped so steeply into a water logged area that makes access impossible. Mr Baksh acknowledged that *"certain buildings"* went up east of the right of way but he did not know the names of the persons and in any event, those buildings did not block the right of way.

[29] Finally, in response to Mr. Butcher's contention Mr. Baksh denied that Jankie Trace provided a shorter and easier access to his lands since it leads to a swamp of about 400 feet that separates Jankie Trace from his lands. He further avers that Hilltop Drive is also unavailable to him since he would have to cut a road through lands belonging to Mr. Ramroop Jabbar and Yellow Meadow Farms.

[30] **CROSS EXAMINATION**

In the main, I would describe Mr Baksh's cross examination as uneventful in relation to the evidence necessary to establish his case. Mr Baksh confirmed that he was passing "*there*" since 1963 and that he built the access road in 1969, after he got permission to build the road from the landowners. He claimed that his lawyers had the papers to show that. He admitted that the exhibit "**I.B.7**", the letter from Yellow Meadow Farms is addressed to the Caroni County Council and not to himself. The witness became argumentative when Counsel suggested that the letter did not give him permission, but insisted that the permission was given to him. Mr Baksh further insisted that in 1968, "*we*" got "*written permission from landowners to construct the road*". Mr Baksh admitted that the Caroni County Council did not proceed with the road. He proffered that the reason for the discontinuance was "*because Butcher block the road and I had to go and stop them*".

[31] Mr Baksh admitted that the pictures which he put into evidence were taken after these proceedings had been filed and he took them when his lawyer told him to take them. He refused to accept that the road was not there in 2005. He refused to accept that in 2005, the land did not look as it looked in the pictures. He admitted though that in 2005, the land was covered in grass, but this was after some questioning by Counsel. He disputed that it was Mr Butcher who cleared the land and put the path there. He stated emphatically no; "*the whole place was bush. It was tall bush*". When it was put to Mr Baksh that no one could see a pathway before 2006 that is in 2005, he replied that the

land was open land. Mr Baksh reiterated that he passed on the land since 1963. Counsel suggested to Mr Baksh that if he was passing over Mr Butcher's land that he was passing in the centre of the land. Mr Baksh insisted that the concrete blocks placed by Mr Butcher was on the western boundary where the road was passing and disagreed that he did not know where the western boundary of the land was. He disavowed any knowledge of Mr Butcher's survey plan. In answer to the question whether he had a survey plan before he constructed the road, Mr Baksh answered that the surveyor had the plan. Mr Baksh insisted that he had three permissions to construct the road.

[32] In relation to the cashew field, Mr Baksh does not place that field on Mr Butcher's land at all. He told the court that his lands are to the north of Mr Butcher's and to the north of Yellow Meadow Farm lands. He claimed that Yellow Meadow Farm has no main access to their lands but he does not know how they get to their lands. He did not know if they use Hilltop Drive. He refused to answer the question relating to whether the Yellow Meadow Farms pass through Mr Butcher's lands. He did not know Hilltop Drive or that Mr Butcher started work on the lands since 2001. He knew that at that time the land was already cleared and that a man was cultivating the land. He did not know if it was Mr Butcher who cultivated the land from 2001 to 2005, but all he knew is that he "*block*" the road. He reiterated that he was passing there from 2001 to 2005 and asked Counsel if Mr Butcher told her otherwise. He claimed that Mr Butcher was "*a mad man*".

[33] With respect to the topography, Mr Baksh confirmed that when one arrives to the north of Mr Butcher's land, the land dips down to a steep hill with a ravine at the bottom and another steep hill coming up to his land. Counsel suggested to him that one could not drive a vehicle between Mr Butcher's land and Yellow Meadow Farms, to which he replied "*Now you cannot drive there. The whole place in bush*". When the suggestion was repeated, Mr Baksh's response was "*I do not agree. We driving there all the time*".



[34] In order to get a clearer picture, I put some questions to Mr Baksh. Mr Baksh shared with us that his son *“Khoda Baksh used to help me on the land and even during the time when I use a bison cart”* in 1969. Mr Baksh rued that his son didn’t come to give any evidence. Mr Baksh admitted that his son stopped helping him around 1973, a couple of years after he got married but he continued to farm the lands himself. He stopped farming in 2005. I asked Mr Baksh why he waited until 2007 to bring his claim. He stated that he went to talk to Mr Butcher twice and he would not clear the land. Mr Baksh further stated that he used the land for agricultural purposes, although he had the intention to he does not live on the land. When further questioned about access to the land, he said that when he bought the land there was no road but a foot path. Mr Baksh admitted to me that he does not go there now. He told me that when he bought the land there was a foot track. It passed through Mr Frankie Dindial’s land on the western boundary of that land and that is what the letter referred to. He admitted that since Mr. Butcher blocked the road he goes by foot because no vehicle can pass there now and that he actually has to pass on other people’s land.

[35] **MR BUTCHER’S EVIDENCE**

Mr Butcher’s Memorandum of Transfer describes his land as containing ten acres *“being lot J of the Madras Settlement be the same more or less delineated and coloured pink in the Diagram attached to and described in the Crown grant in Volume 34 Folio 653 and now described in Certificate of Title in Volume 3194 Folio 129 and bounded on the North by Lot No H of Battersea on the south by Boy Cato Trace reserved eighty links wide on the East by Lot K said to be Crown land and on the West by Lot No 39 occupied by Amarkhan...”*.

[36] Mr. Butcher by his Witness Statement admitted that he was unfamiliar with the lands in question prior to his purchase thereof in September 2001. He stated that prior to purchase he visited the lands with the vendor’s agent and the lands at the edge of Boy Cato Road were covered with grass more than five (5) feet tall. He also stated that

having walked through the heavy grass he located “...an unpaved footpath which led to a huge cashew field on the north western edge of the lands.”

- [37] He purchased the lands to establish an agricultural and residential development. After the sale was finalized in September 2001, he hired a surveyor, to prepare a new survey plan for his lands. It took 5 years to get the final approval from Town and Country Planning Division which was granted on or about December 2005.
- [38] Mr. Butcher claimed that during the period 2002 to 2003 whilst the application for approval was pending from Town and Country Planning Division, he began the process of clearing the land to prepare it for development into plots. He came upon a chain link fence to the north of his lands, which belonged to the parcel of land on his northern boundary, the lands of Yellow Meadow Farms (Amar Holdings Limited). In 2004 he constructed and completed an access road with a roundabout in the middle of his lands to give access to the purchasers of the agricultural plots.
- [39] He entered into agreements for sale with two persons for the agricultural portions of the lands. In 2004 another buyer purchased two acres known as Plot 11 and in 2006 he constructed his home on the parcel. In 2006 Mr. Butcher made another sale of two acres north of the ribbon development. Therefore at the time of the filing of this action Mr. Butcher was not the owner of the disputed area.
- [40] Mr. Butcher admitted that in the course of constructing a drain between the residential lots to the front of his lands and the agricultural plots, he deposited gravel and dug a trench on Lot 8 of his lands located just before the western boundary of Lot 7. The trench was constructed on the express instructions of the Drainage Department of the Ministry of Works and Development in order to drain the homes on Boy Cato Road. It was then that he received final approval for the development as evidenced by letter

dated 24<sup>th</sup> August 2006 annexed to Mr Butcher's Witness Statement and marked "K.B.3".<sup>13</sup>

[41] From the northern boundary of Yellow Meadow Farms there is a steep slope to Mr. Baksh's land which descends about 10 to 12 feet and Mr. Baksh's lands rise again on a small hill at the bottom of which is a ravine. He indicated that it would be impossible for Mr. Baksh to pass with a motor vehicle or any type of vehicle to bring and carry crops out of his land at anytime because of the steepness of the slope and the existing ravine, he having tried with his own four wheel drive vehicle to drive along the western boundary of Yellow Meadow Farms and found it impossible to do so. He further stated that there is "*...no road or even a footpath along the western boundary of Yellow Meadow Farms*". Since 2002, Yellow Meadow Farms is fenced by a chain link fence on his northern boundary and that this fence encloses the southern boundary so that Mr. Baksh cannot pass on the lands of Yellow Meadow Farms (Amar Holdings Limited) to access his lands.

[42] He referred to two other access routes that are available to Mr. Baksh, namely Hilltop Drive off the Las Lomas Road No.1. This was fully developed by the Chaguanas Borough Corporation and is available to Mr. Baksh to get access immediately to the north of his lands. Thereafter he can pass from Yellow Meadow Farms to his property. He also made reference to a road called Jankie Trace located on the Ward Sheet for the area. This road is located immediately north of Mr. Baksh's land and if developed will give him proper access to his land where he has a road reserve.

[43] Mr. Butcher averred that during 2001 to 2005 he had never observed anyone including Mr. Baksh going to use the spring on the lands of Yellow Meadow Farms or passing along his lands going to any land north of his own. During 2002 to 2003 when he cleared his lands for development he saw no evidence of any gravel or other road that Mr. Baksh claimed existed up to 2005.

---

<sup>13</sup> See the Trial Bundle of Documents, labeled and tabbed "I"

[44] **CROSS EXAMINATION**

Mr Butcher was largely unshaken on his cross examination. He reiterated his works on the land from the time he acquired it until he stopped when this action was filed. Mr Raphael questioned Mr Butcher at some length about the situation of the cashew field. Mr Butcher stated that an unpaved footpath ran through his land but he could not remember exactly where it started. He stated that the path was one human being wide, a track. He admitted that he did not speak about the cashew field in his defence but said that the cashew field is on his land on the plot now owned by a third party to whom he sold. He did clear the cashew trees to see the land but that did not mean that he destroyed them.

[45] He did not know the lay of the land or what went on there before 2001. He admitted that Mr Baksh came to his home and he showed him certain documents but he did not recall the nature of the documents. This is at odds with his stated case. Mr Butcher admitted that he did not know the exact access to Mr Baksh's lands through Hilltop Road. He did not confirm or deny that Jankie Trace leads to a big swamp.

[46] In response to questions put by the Court, Mr Butcher said that he did not go to the northern boundary of his land as it was heavily grassed. All he saw on the land was the track leading to the cashew field which went through the central portion of his lands. He could not recall seeing a track leading from Boy Cato Road to the point where they were standing when they inspected the land.

[47] **WRITTEN SUBMISSIONS**

**MR BAKSH'S POSITION**

Mr Raphael submitted that his client's evidence was that he had passed and re-passed over the access road from 1963 to 2001. This was uncontradicted by Mr Butcher save a challenge in cross examination. It is submitted that since Mr Butcher claims that he saw no one passing between 2001 and 2005 and he, Mr Butcher presented no other

evidence to contradict Mr Baksh, I should accept Mr Baksh's evidence. Mr Raphael contends that *"the photographs clearly show an access road and there has been no proper explanation by the Defendant as to the origin and development of this access road"*. Thus the court should accept Mr Baksh's evidence of his *"continued and undisturbed use of the access road for over 16 years without any consent and agreement by deed or writing and has therefore acquired the right of a legal easement"* under the **PRESCRIPTION ORDINANCE**. The fact that Mr Baksh passed and re-passed over an area for a period of in excess of sixteen years and there were photographs which clearly show an access road is sufficient.

[48] Mr. Raphael submitted that Mr. Baksh's claim for entitlement to an easement by prescription in the absence of endorsement on the Certificate of Title can be supported under **Section 45** of the **REAL PROPERTY ACT**. He submitted various authorities that provide that easements by prescription, more particularly, omitted easements, maybe recognised and enforced where the land to be affected is Registered Land and the conditions necessary for prescription were satisfied. Counsel concluded that Mr. Baksh has established that he has a valid and subsisting right/entitlement to an easement/right of way by prescription notwithstanding the fact that the easement or right of way is not registered/endorsed on the Certificate of Title in keeping with the Real Property Act. I have no issue with this exposition of the law.

[49] **MR BUTCHER'S POSITION**

Ms Indarsingh spent some of her energies on presenting to the court the legal issues concerning the requirements of a valid easement. The factor in issue was whether the right claimed by Mr Baksh is one that is capable of being the subject matter of a grant. Counsel referred the court to several cases to bolster her argument that the law did not assist. Ms Indarsingh stated that the **PRESCRIPTION ORDINANCE** could not assist Mr Baksh in the clear face of the provisions of the **REAL PROPERTY "ORDINANCE"** (now **ACT**).

[50] Further the facts and evidence led by Mr Baksh could not find favour in law for the following reasons:

- the pathway was not officially recognised by the relevant authorities;
- Mr Baksh's land is not landlocked bearing in mind the description of the parcel in Mr Baksh's title deeds;
- Mr Baksh was not present on the land during the period 2001 – 2005, a fact supported on Mr Baksh's own evidence;
- discrepancies in Mr Baksh's evidence about the alleged continuous user of the land from 1969 onwards;
- the letters from the adjoining land owners to the Caroni County Council;
- Mr Baksh's admission that he conducted no survey on Mr Butcher's land so as to establish the correct location of the alleged access road; and
- by Mr Baksh's own admission the photographs were taken after the filing of these proceedings.

[51] Ms Indarsingh urged the Court to find that Mr Butcher did not acquiesce to any rights as claimed by Mr Baksh or have had any knowledge of the existence of these rights prior to his purchase of the lands. Further Ms Indarsingh submits, in the absence of any recognition of any rights which Mr Baksh may have had on Mr Butcher's Certificate of Title, I should dismiss Mr Baksh's claim against Mr Butcher with costs to be assessed.

[52] **ANALYSIS OF EVIDENCE, LAW AND CONCLUSION.**

I have maintained that justice is best attained in land matters if left to expert evidence. There is no dearth of such skill and competence in Trinidad and Tobago yet parties display a consistent loathing to use, rely and moreover trust this evidence. That remains a mystery to me. Courts are left to grapple with *viva voce* evidence which in most cases

cannot get to the very germane issues that they are asked to adjudicate upon. The CPR mandates that the modern court deals with cases justly<sup>14</sup>. The CPR further states that the duty of the court is to identify the issues at an early stage, encourage the parties to use the most appropriate form of dispute resolution, encourage the parties to cooperate with each other in the conduct of proceedings and actively encourage and assist them to settle the whole or part of the case in terms that are fair to each of them. In addition, the court has a duty to make the appropriate use of technology<sup>15</sup>.

[53] I must say, that the court can only do so much. The CPR mandates as well that “*the parties are required to help the court in furthering the overriding objective*”.<sup>16</sup> The CPR however unfortunately does not give the power to the Court to make settlement of cases especially before an expert in a particular area, or early neutral evaluation of the issues or mediation in a matter, a mandatory step in the management process. This is one case which would have benefitted greatly from that mandatory step and having said that, I must do the best that I can in these circumstances.

[54] Litigation is structured. There must be facts asserted, evidence to prove those facts and finally the application of legal principles. Legal principles, the law does not exist and cannot be applied in a vacuum. It must be applied to facts and evidence which prove facts.

[55] **CROSS EXAMINATION**

#### **GENERAL COMMENTS**

Both gentlemen in the main proved to be good witnesses on cross examination in that they were largely unshaken from their witness statements. Having said that, did that assist Mr Baksh in proving his case? I shall be referring to his cross examination to a larger measure than to Mr Butcher’s for two reasons, the burden of proof lies on Mr

---

<sup>14</sup> See CPR Part 1.1

<sup>15</sup> See CPR Part 25.1

<sup>16</sup> See CPR Part 1.3

Baksh and I do not think that issue of credibility features significantly in this matter. Both parties were attempting to be forthright as memory served them and really tried to assist the Court. I commend and thank them. **The quality of the evidence in the sense of whether it can establish facts to prove a legal entitlement is the focus of this case.**

[56] **MR BAKSH'S EVIDENCE ANALYSIS AND EVALUATION**

I commence this part by repeating that the onus of proof is on Mr Baksh to prove his case. That proof must be on a balance of probabilities. Those requirements have not changed in the trial of civil cases.

[57] As part of the documentary case, Mr Baksh's put into evidence his Deed No. 972 of 1961 in which he became seised and possessed of the five acre four perch parcel of land. His description in the Witness Statement did not bear out the contents of the Deed. The Deed describes the parcel as "*forming part of El Carmen Estate*" and is bounded "*on the North by a Road reserved ten feet wide on the South partly by lands of Boodoo Sammy and partly by lands of Debadeen on the East by lands of the Vendor and on the West by lands of the Vendor which said parcel of land is described as coloured pink on plan **hereto** attached and marked "A"*". However the attached document displayed no plan as was referred to in the body of the deed.

[58] The second parcel of land, conveyed by Deed registered as No. 9401 of 1961, comprised a three acre parcel "*forming part of the El Carmen Estate*". That parcel's boundaries are on the North "*by a Road reserve 15 feet wide on the South and east by lands of Robert Lawrence Dookie and on the West by lands contracted to be sold to Ramcharan Lutawan, which said parcel of land is coloured pink on the plan marked "A" attached to the Deed registered as No. 7132 of 1956*". Again, no plan marked "A" was exhibited in this matter.



[59] **THE DEEDS**

At the very onset, two questions come to mind. How is the Court to treat with Mr Baksh's Deeds? What is the importance of this evidence to this case? To my mind, these deeds establish as follows:

1. That Mr Baksh is the fee simple owner of the lands described therein; and
2. That they can constitute lands to be served i.e. they can be a dominant tenement.

Thus, the first requirement of a valid easement has been satisfied.

[60] However in relation to the other essential of a valid easement that the easement is for the better enjoyment of land qua land, the deeds establish that there was a right of access to the North. However, the Court is at a disadvantage in this case by Mr Baksh's provision of these Deeds without the plans referred to in them being placed before it for consideration. How then must I assess

- (1) where the alleged right of way was or is in relation to Mr Butcher's lands? and
- (2) whether the road reserved on the Deeds provided improper and ineffective access to Mr Baksh leading the court to determine that the proper access lay over Mr Butcher's land?

[61] **THE CORRESPONDENCE FROM MR RAMKHELAWAN, MR DINDIAL AND THE YELLOW MEADOW FARMS.**

As far as the Section 2 of the **PRESCRIPTION ORDINANCE** is concerned, the provision specifically exempts from its purview any right which "*was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing...*" Therefore if

any right was made or enjoyed in that manner, it cannot be “*deemed absolute and infeasible*” since the writing or deed can speak to the true nature of the right.

[62] In this case the letters speak for themselves. It is immaterial what Mr Baksh thought they meant. Mr Dindial and Mr Ramkhalawan spoke to “*permission*” given to the Caroni County Council to use land along the boundary of their lands. In the case of Mr Ramkhalawan the permission extended “*for the purpose of digging a drain only and nothing else*” and in the case of Mr Dindial “*to construct a road on the Western side of my property located at Boy Cato Road. I have also given permission to use Twelve (12) feet along the Western Boundary of the said Property*”. These letters were written in 1989. In the instance of the Yellow Meadow Farms the letter speaks to “*the request*” from the Caroni County Council to “*construct Access road through our land*”. This permission was given subject to certain conditions, one of which was that Mr Baksh provides a strip of his land for the construction of the road. Another condition was that “*Maintenance of the above mentioned Access road from Boy Cato road to Yellow Meadow Farm’s north field must be constructed and maintained by your council*”. Since then, there is no evidence that the works were done at the sites. In any event, this last letter speaks of an access road to be constructed and maintained by the County Council. Are we to infer that as at 1989, there was no access road in existence and that the County Council was interested in seeking permission from adjoining land owners to create one? If this is the correct inference to draw from the correspondence exhibited by Mr Baksh, is it therefore correct to infer that Mr Baksh has acquired an easement by prescription in the face of these two very clear letters, part of his evidence? In any event, Mr Baksh recognised that the Caroni County Council did not pursue the project. This entire line of evidence was not useful to his case.

[63] **LACK OF WITNESSES AND THE EFFECT ON THE WEIGHT OF THE EVIDENCE LED**

Mr Baksh spoke of “*we*” in his witness statement, yet he was the only person giving evidence of this access road and the activities performed on it. I have no doubt that

these activities took place and accept that they did, but the question remained, where exactly did they take place; on what areas of the land and in furtherance of what? For instance, how much weight must I attach to the permission received from an engineer to take about 60 yards of gravel from the government controlled quarry at Valencia to place on the access road, which he and others deposited along the Boy Cato Road? Further even if Mr Baksh and others paid the trucks for transporting the gravel, and expended other sums to develop the road, how much weight can I attach to this evidence in the absence of documentary support or even testimony from the other persons comprising “we”? Mr Baksh further denied the evidence on the topography of the area. Again, he testified that Mr Butcher’s evidence was wrong, but brought nothing forward to disprove it. Where is the supporting evidence? To merely say that he “denies” the topographical evidence, to my mind is not enough.

[64] Further Mr Baksh testified that Mr Butcher’s action prevented “us” from gaining access to our lands when he blocked the access road. I ask again, who are “us”? Where are the other persons who have been similarly affected or are affected at all in the use and enjoyment of their lands as lands? Having admitted the existence of buildings and persons east of the right of way, one can infer that those persons would know that the right of way existed. Why weren’t they called as witnesses? The burden of proof remained on him and Mr Baksh did not discharge it. Those have been crucial lacunae in Mr Baksh’s case.

[65] I could not help but notice that Mr Baksh was alone in his quest. None of his neighbours or his son came to testify on his behalf. There was therefore no corroborating evidence before the court in relation to much of his testimony. I must say up front that this has affected the weight of his evidence in support of his position especially since and I repeat, he was the party with the burden to prove his case that a right of way existed over Mr Butcher’s lands and if so proved that he had not abandoned his claim as at the date of filing this matter. This absence of supporting evidence did not assist Mr Baksh’s

case since it was based in part to my mind and his saying that this access is a public right of way.

[66] **ACCESS - USE OF LAND QUA LAND**

Mr Baksh is not saying that this is **the or the only** access to his land and that without it he cannot enjoy his land as land. Mr Baksh's evidence is that he denies that Jankie Trace provides **shorter** and **easier** access to his lands. He states that Jankie Trace leads to a huge swamp. He states that the swamp separates Jankie Trace from his land. I have not seen any topographical map or plan that supports this contention.

[67] His inability to use Hilltop Drive as suggested was also cast aside since he would have had to cut a road through neighbouring lands. My concern is, that throughout this case, Mr Baksh has not been able to identify to the court the road reserved on his two deeds, one being ten feet wide and the other fifteen feet wide. Where are those two reserves and were they providing public rights of way and access in relation to Mr Butcher's lands?

[68] It maybe that he used this access to and from Boy Cato Road as it was more convenient to him, but that does not change the nature of the access as one not satisfying the requirements of a valid and enforceable easement. Further, whether this was the only factor stopping Mr Baksh from cultivating his land and continuing his sales in the San Juan market has not to my mind been established and therefore does not assist him in his quest.

[69] **THE PRESCRIPTION ORDINANCE**

Those are the difficulties with Mr Baksh's pleaded case and the evidence led in support of it. Do they together satisfy the law concerning easements? Can I say that Mr Baksh has a right to protect under the **PRESCRIPTION ORDINANCE?**

[70] Since the Ordinance does not give any special meaning to “*right of way or any easement*” for its purposes, I must take it that for a right of way or easement to be protected, it ought to conform with the requirements of law, that it is a right appurtenant to the land and to make for the better use and enjoyment of land qua land and not merely for the convenience of the landowner. It must be capable of running with the land. I shall say without reservation that this was the greatest obstacle that Mr Baksh had to cross. Did he bring evidence to show that the Court could make a positive finding that the alleged right of way was indeed over Mr Butcher’s lands and that it did and could have constituted a legally recognisable easement or right of way, capable of being protected by the **PRESCRIPTION ORDINANCE**? The answers to all of those questions are in the negative. I do not think that I need make any other comments on Mr Baksh’s evidence. I think that I have sufficiently outlined why Mr Baksh’s case could not come off the ground. I need not go any further since Mr Baksh has not in my mind discharged his evidential burden of proof.

[71] **FINDINGS**

To me the crux of this case is this: is there a valid easement which is enforceable by Mr Baksh against Mr Butcher? To determine this, I must decide whether on all of the evidence, Mr Baksh discharged his burden to satisfy me that there is a right capable of being recognised in law as an enforceable easement. If I decide that there is, as I see then all of the other issues save the issue of whether it is equitable to find for Mr Baksh must be decided in Mr Baksh’s favour. I therefore cannot follow Mr Raphael’s lead without more.

[72] This is the factual matrix of this case. In or about 1961, Mr and Mrs Baksh became seised and possessed of two parcels of land as contained in the Deeds described herein. These lands were bounded on the northern side by a road reserve. I have no evidence that the road reserve was impassable or non-existent so I must infer that the road reserve stated in the Deeds adequately serviced these properties. Mr Baksh and others

found an alternative route to their parcels stemming from the Boy Cato Road. Sometime in 1989, the Caroni County Council received permission from three landowners to develop an access road through their lands. One of these was Mr Frankie Dindial, Mr Butcher's predecessor in title; another was the owner of the lands known as Yellow Meadow Farms. Both of these land owners laid down specific conditions with respect to the laying down/construction and maintenance of the "access road". None of the landowners gave any permission or right of access to Mr Baksh. There is no evidence that any work was done by the relevant public authorities to act upon the permissions granted to them to construct and/or maintain the access road.

[73] I infer from all of the evidence that residents and landowners in the area may have used a track or pathway from Boy Cato Road to access the lands which lay to north of that road as there were wide open spaces. That access was indeed easier than the access which would have obtained to the north of those parcels. Some time, Mr Baksh and others may have formed the idea of formalising the pathway and approached the relevant authorities. They took certain steps, like securing the permission of landowners in the area. They did not advance the project. Once the area started to develop, the use of the pathway stopped. Mr Baksh is interested in reviving the efforts at development, but has had no assistance from others. His explanation was his son came to help him on the land "*not to give this evidence*". He has decided to go it alone, but cannot get over the hurdles that exist in his case.

[74] I believe that at the time that Mr Butcher made his enquiries before his purchase he did not see any access road or any semblance of the access road. Why then would the relevant authorities insist that he clear the land before permission was granted?

[75] I also believe that in 2005 Mr Baksh visited Mr Butcher to stake his claim but it cannot be denied that he let his alleged interest lie fallow until 2007. There was no sufficient explanation for that lapse in time when Mr Baksh did not enforce his alleged rights. Those issues are academic since I have found that there is no enforceable easement.

[76] The photographs which Mr Baksh relied on were of recent vintage and do not assist a case based in antiquity or continuous and apparent user.

[77] The questions of omitted easements on the Certificate of Title and abandonment do not arise as Mr Baksh has not convinced me that an easement or any other enforceable rights existed or were created since and/or were in existence at the time of the transfer of the lands to Mr Butcher.

[78] Mr Baksh was unable to make any dent in Mr Butcher's evidence that he developed the lands and sold three parcels of land over the period 2005 to 2007. In any event if there was a finding that there was a valid easement that would have run with the land so that the sales would not have affected Mr. Baksh's rights.

[79] **CONCLUSION**

I think that Mr Butcher has met and defeated Mr Baksh's claim in that all of the essentials of a valid easement have not been satisfied and therefore cannot be protected by the **PRESCRIPTION ORDINANCE**.

[80] **COSTS**

There is nothing in this case that leads me to depart from the clear application of the CPR Part 67.5. The costs must be determined on the prescribed costs scale. If there is no money claim made and the defendant is successful, costs are prescribed in the following manner: if the claim is for damages, as this is a claim for damages for trespass and the claim form does not specify an amount that is claimed, costs are prescribed as such amount as agreed between the party entitled to and the client (party) liable to (pay) such costs or if not agreed costs will be based on a sum stipulated by the court as the value of the claim. Part 67.5 gives an alternative that if the claim is not for a "monetary sum" it is to be treated as a claim for \$50,000.00 and the costs prescribed accordingly.

[81] I am inclined to allow the parties an opportunity to agree the costs and to hold my hand as to the appropriate order for costs at this time.

In the premises I now make the following order.

**ORDER**

- 1. The Claim Form and the Statement of Case filed on the 26<sup>th</sup> November 2007 by the Claimant against the Defendant be and is hereby dismissed.**
- 2. That there be a Judgment for the Defendant against the Claimant;**
- 3. That the issue of costs be informed to the court within seven (7) days of the date of this Order.**
- 4. Should there be no agreement notified to the court the costs shall be determined as if the value of the claim was \$50,000.00.**

Dated this 6<sup>th</sup> day of March 2012.

/s/ CHARMAINE PEMBERTON  
HIGH COURT JUDGE