

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-00736

BETWEEN

JOHN ALEXANDER

(The Legal Personal Representative of the Estate of Issac Alexander also called
Cleophus Alexander who died on the 19th November, 1960)

Claimant

AND

PHILLIP ALEXANDER

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES

Mr. Persad-Maharaj, attorney-at-law on behalf of the Claimant
Ms. Francis, attorney-at-law on behalf of the Defendant

REASONS

Introduction

1. In these proceedings, the Claimant moved the court to set aside a vesting order, which had been made by the High Court in HCA #3195 of 1989, on the ground that the order was obtained by fraud¹.
2. The Claimant also sought a declaration that the Defendant had obtained the ownership of the subject land by fraud².

¹ These proceedings were instituted by a Claim Form and Statement of Case filed on the 23rd February, 2012.

² The subject lands are described in the Claim Form: that parcel of land situated in the Ward of La Brea and Guapo in the land of Trinidad comprising 11 Acres 3 Roods and 37 Perches be the same more or less delineated and coloured pink in the plan attached to and described in Volume 421 Folio 339 and bounded on the North by Salazar Trace, on the South by Crown lands,

3. In response, the defendant filed a counterclaim seeking a declaration that he, the defendant was the owner of the subject lands.
4. On the 20th October, 2017, I dismissed the claim and entered judgment for the defendant on the counterclaim. My reasons for so doing are set out below.

Facts

1. The Claimant, John Alexander (now deceased) and the defendant, Phillip Alexander (also deceased) had been descendants of the late Phillip Alexander who had also been known as “Ban”.
2. Ban, prior to his death in 1935 had been the registered owner of 11 acres of the subject lands, which may be found in the Ward of La Brea and Guapo.
3. Ban was the father of five children: Freddy, Isaac, Shadrack, Peepain and Sophia. All five children had been born in the mid-1800s, and are now deceased.³
4. Isaac was the father of three sons: Unias, Murray and John, the Claimant, while Shadrack was the father of seven children, one of whom was Phillip, the defendant in these proceedings. Shadrack entered the land in the 1930s and constructed a dwelling house. It was disputed whether he did so pursuant to Isaac’s permission.
5. There was, however, no dispute, that Ban died intestate. None of his five children attempted to apply for letters of administration of his estate. However, Isaac, one of the five children of Ban and the father of the Claimant executed a will naming, as his executor, Unias, the half-brother of the Claimant. Unias died without having obtained a grant of probate. Even so, in 1979, the Claimant applied for and obtained letters of Administration with the will

on the East by a reserve seven and half links wide along the Western bank of a river and by lands petitioned for by A. Thomas and on the West by lands petitioned for by J. Hyland and by Crown lands.

³ A diagram depicting the family tree, with Ban, as the patriarch was tendered into evidence by consent marked “A”.

annexed in respect of his father's estate. By virtue of this will, two-thirds of the property would have been invested in the Claimant.

6. The Defendant, Phillip Alexander emigrated to England in the 1950's and returned to Trinidad in the mid-80s. Then, in 1989, the Defendant applied to the High Court for a vesting order under the *Real Property Ordinance*.⁴ On the 18th March, 1991, an order was made in favour of the Defendant by Justice Zainool Hosein, as he then was.⁵ Pursuant to the order of Justice Hosein, a Certificate of Title was issued on the 15th July, 1992 in the sole name of the late defendant Phillip Alexander. He subsequently conveyed two portions of the property to his children.

7. Nineteen years later, on 15th August, 2011 the claimant (now deceased) caused a pre-action protocol letter, to be sent to the Defendant. In that letter, Learned Counsel, Mr. Persad-Maharaj contended that the Defendant had made false declarations, had deliberately misled the Court, and had obtained an order that the Defendant was the sole owner of the property.⁶

8. By the pre-action protocol letter, learned Attorney at Law for the Claimant contended that following the death of the patriarch, in 1935, the Claimant's father, the late Cleophus Alexander, also called, Isaac Alexander,

*".....was given responsibility and took charge of the said lands..."*⁷

9. Learned Counsel contended as well that the late Cleophus Alexander invited the late Shadrack Alexander

*"....to build a house and live on a portion of lands..."*⁸

⁴ Real Property Ordinance Laws of Trinidad and Tobago Chap.27 No.11

⁵ The Order of Justice Hosein was part of the Agreed Bundle tendered into evidence by consent and marked "B"

⁶ See the pre-action protocol letter exhibited as No.12 the Witness Statement filed on behalf of the Claimant on 23rd February, 2012.

⁷ See the pre-action protocol letter exhibited as No. 12 to the Witness Statement of the Claimant

⁸ Ibid

10. At paragraph 31 of his Witness Statement, the Claimant explained his delay in seeking to set aside the order of Justice Hosein by alleging that it was only in 2011, that, his tenant Vernon Noel told him that he (Mr. Noel) had been served with Court documents including the Certificate of Title, by which the defendant became the sole owner.
11. For his part, the Defendant has denied the allegation of fraud, firstly by way of the pre-action protocol letter, which was dated 27th October, 2011 and sent by his Attorney at Law, Ms. Lisa Francis to Mr. Persad-Maharaj, Attorney at Law for the Claimant and later by his Defence and Counter Claim filed herein on the 27th March, 2012⁹.

Issues

12. The main issue which arose in these proceedings was whether the Defendant, the late Phillip Alexander had obtained the vesting order, by fraud.
13. The resolution of the above issue depended on whether the Claimant had succeeded in proving that the Claimant deliberately misled or concealed facts from the Court, which granted the vesting order, in 1989.
14. The specific issues of fact which arose were whether the claimant's father, Isaac had taken charge of the subject land, upon the death of patriarch; whether the Claimant's father had given permission to Shadrack to build a house on the land; and whether, the Defendant, being aware of these facts concealed them, while applying to the Court for a vesting order.

⁹ See Defence and Counter Claim filed 27th March, 2012 of paragraph 17.

Law and Discussion

15. A vesting order may be in favour of an applicant, who can prove that he or she enjoyed continuous undisturbed possession of the land for a period of 16 years. In 1989, vesting orders were granted by the High Court pursuant to the ***Real Property Ordinance***.¹⁰
16. The relevant provisions of the ***Real Property Ordinance*** are set out below:

“49. A person who claims that he has acquired title by possession of land under the provisions of the Ordinance may apply by summons for an order vesting the land in him for an estate in fee simple or other estate claimed. The summons shall be served on every person appearing in the Register Book to have any estate or interest on the land or in any encumbrance notified on the grant or certification of title thereto or such of them as can be found.

50. Every such summons shall be supported by one or more affidavits deposing to the facts and matters referred to in form E of the First Schedule.

51. The applicant shall also cause a copy of the summons and affidavit to be posted in a conspicuous place on the land and to be kept so posted for not less than fourteen days prior to the hearing of the application.

52. At the hearing of the application a Judge shall give directions as to any other persons to be served with summons or notice thereof, as to the mode service, as to the advertisements to be inserted in or more daily newspapers published in the Colony, as to the preparation of any plans which he may consider necessary, and as to any other relevant matters, and he shall appoint a date not less than fourteen days nor more than twelve months from the date of such hearing at or

¹⁰ Real Property Ordinance Chap. 27 No. 11

after the expiration of which he may, unless some person shall have intervened, grant the application altogether or in part.

At any time prior to granting an application a Judge may in his discretion, notwithstanding any direction previously given as to the application, dismiss the same altogether or in part if the applicant fails to comply to his satisfaction with any direction given within such time as to him seems reasonable.

54. A person claiming any estate or interest in the land in respect of which any such application is made may before the granting thereof intervene by entering an appearance to the proceedings and filing an affidavit setting out the particulars of his claim.

55. Subject as aforesaid, after the expiration of the time appointed, and after giving to the applicant and all other parties to the proceedings an opportunity of being heard, a Judge, if satisfied that the applicant has acquired a title by possession to the land, may make an order vesting the land in the applicant (or person entitled thereto) for an estate in fee simple, or other estate acquired by the applicant, free from all encumbrances appearing by the Register Book to affect the existing title which have been distinguished or extinguished by such possession and free from any easement notified as an encumbrance which has been proved to the satisfaction of the Judge to have been abandoned or extinguished.”

17. An examination of the above provisions demonstrate that safeguards had been created by the Ordinance itself. These safeguards ensure that applications for vesting orders would be brought to the attention of interested persons, before the final order is made. The safeguards constitute a shield against the possibility of fraudulent applications. Accordingly, by Section 52 of the Ordinance, the Court is required to direct that advertisements be placed in daily newspapers. Prior to making the application, the applicant is required by Section. 51 of the

Ordinance, to post a copy of the Summons on a conspicuous place on the land. The Ordinance also specifies time limits, to ensure that notices remain in place for a sufficiently long time. So that by Section 51 of the Ordinance, the notice which is posted on the land, must be left there for not less than fourteen (14) days, prior to the hearing of the application.

18. There was no allegation in these proceedings that Hosein J omitted to give these directions or comply with these safeguards.

The issue of Fraud

19. By section, 143 of the ***Real Property Act***:¹¹

“143. (b) No action for ejectment or other action for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases:-

(b) the case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud; or as against a person deriving, otherwise than as a transferee bona fide value, from or through a person so registered through fraud.

20. Accordingly, it was accepted that, the Certificate of Title, which the Defendant held could be set aside, if it had been obtained fraudulently.

21. Fraud need not be an express declaration, but may be found where there is deliberate concealment of facts. The presence of fraud in an application for a vesting order could result in the setting aside of the order, even if it had been years ago.¹² In the Privy Council decision

Visham Boodoosingh v Richard Ramnarace, Lord Brown of Eaton-under-Heyhood:

¹¹ Real Property Act Chapter 56:02

¹² See PCA No.50 of 2003, Boodoosingh v Ramnarace and CV2008-2579, see too CV2014-362, Savitri Jagdipsingh v

“18. There is no doubt that a judgment obtained by fraud can be set aside either by order made in a fresh action brought in fraud to impeach it or on appeal to the Court of Appeal by adducing fresh evidence sufficient to establish the fraud”

22. I therefore moved on to consider whether the Claimant had discharged the burden which he carried to prove that the Defendant acted fraudulently.

Resolution of Issues of Fact

23. It was accepted by learned Counsel for both parties, that proof of fraud in civil proceedings was on a balance of probabilities, but that having regard to the seriousness of the allegation of fraud, the Court would require cogent evidence in proportion with the gravity of that issue.

24. Learned Counsel, Mr. Persad-Maharaj, in the course of further written submissions¹³ quoted the words of Narine J in *Singh v Singh and Tai Chew*.¹⁴ Justice Narine (as he then was) had this to say:

“The burden of proving fraud lies on the person who alleges it. It must be distinctly alleged and distinctly proved. The standard of proof is on a balance of probabilities. However, the standard is flexible, and requires a degree of probability commensurate with the seriousness of the occasion. The more serious the allegation the more cogent is the evidence required to overcome the likelihood of what is alleged. The very gravity of an allegation of fraud is a circumstance which has to be weighted in the scale in deciding as to the balance of probabilities.”

25. It is at the heart of these proceedings, that the evidence which was presented by Phillip Alexander was fraudulent. In order to ascertain whether or not the Claimant has succeeded

Doodnath Jagdipsingh a judgment of Rajkumar J (as he then was)

¹³ Further Written Submissions filed on the 7th August, 2017.

¹⁴ HCA #538 of 1991

in proving that the Defendant deliberately misled the court: I have set out in full the affidavit on which the Defendant relied on in 1989:

“ I, Phillip Alexander of pole 11, Salazar Trace, Point Fortin, Proprietor, do solemnly and sincerely declare as follows:-

1. *I am the applicant herein and I am Sixty years of age.*
2. *That the parcel of land affected by the proceedings comprises All and Singular that piece or parcel of land situate in the Ward of La Brea and Guapo in the island of Trinidad comprising Eleven acres Three Roods and Thirty-Seven perches be the same more or less delineated and to coloured pink in the Plan attached to and described in Volume 421 Folio 339 and bounded on the North by Salazar Trace, on the South by crown lands and on the East by a reserve seven a and a half links wide along the western bank of a river and by lands petitioned for by A. Thomas and on the West by lands petitioned for by J. Hyland and by Crown Lands.*
3. *The Crown Grant relating to the parcel of land described in paragraph 2 hereinabove (hereinafter referred to as “the said parcel of land”) is registered in the name of Phillip Alexander, deceased the original Grantee and was issued to him on the 3rd day of August, 1918, The said Phillip Alexander died on the 13th September, 1935.*
4. *(a) Possession of the said parcel of land was commenced by the deceased Phillip Alexander sometime in or around the year 1918.*

(b) The said Phillip Alexander was in possession of the said parcel of land until his death on the 13th day of September, 1935 paying the rates and taxes therefor cultivating the same and reaping the profits and benefits therefrom.

(c) Upon the death of the said Phillip Alexander I went into possession of the said parcel of land and I have continued in possession of the same.

(d) The said parcel of land has been cultivated by me this declarant.

26. The Defendant was cross-examined as to the statement in his affidavit that he entered the land in 1935. The Defendant admitted that, at that time, he would have been 6 years old. In my view this, though incorrect, as a statement, did not amount to a concealing of facts, since both the Defendant's age and the alleged date of entry were stated in the affidavit. The incorrect statement would have been apparent to Hosein J, who would have been able, in his discretion, to refuse the application.
27. I also examined the affidavit, in light of the evidence of the Claimant and found that far from achieving the cogency required to prove fraud, the Claimant failed to displace the defendant's case, even on balance of probabilities.
28. By his evidence-in-chief, the Claimant testified that following the death of Ban, existing tenants paid rents first to his father and following his father's death in 1960, to him, the Claimant. Under cross-examination, the Claimant admitted that the receipts which he produced were all dated in the 1970s. It was put to him that he exercised the right of a landlord, while the Defendant was abroad in England. The Claimant was unable to resist this suggestion.

29. The Claimant alleged further that he assisted his father in cultivating short term crops and that Shadrack, the father of the Defendant, obtained the permission of Isaac, father of the Claimant, to construct a house on the land.
30. It was my view that the Claimant's case was completely destroyed in cross-examination., when the Claimant admitted that neither his Statement of Case nor his Reply contained any allegation of cultivation and that any evidence of cultivation was thereby inadmissible, as he had failed to plead it as a material fact.
31. The Claimant admitted that Shadrack built his house on the land in the 1930s prior to the Claimant's birth in 1937. The Claimant admitted that he had no personal knowledge of any permission being granted by the Claimant's father Isaac to Shadrack.
32. The prospect of permission from Isaac to Shadrack was also rendered unlikely by the fact that Shadrack entered into occupation in 1930 prior to the death of Ban, the patriarch and registered owner of the land. In such event, Isaac would have had no authority to give his permission.
33. The Claimant admitted that Isaac had never lived on the land. The Claimant admitted further that he himself had not lived on the land. When confronted with WASA receipts which bear the name Phillip Alexander, the Claimant was unable to contradict the suggestion that the first Phillip Alexander Ban had never lived on the land and could not be the holder of a WASA connection. The Claimant admitted that it was more likely that the WASA receipt was issued to the defendant, whose name was also Phillip Alexander.
34. Most importantly however, the Claimant admitted that he brought no witness to provide evidence that false declarations had been made in support of the 1989 vesting order. It was also clear that there was no evidence to suggest that the defendant deliberately misled the court in anyway.

35. It was therefore my view that on the Claimant's evidence above, the allegation of fraud, was lacking in any cogent evidence.
36. My findings on the evidence, including the lack of documentary evidence ought to be seen in the context of an apparently valid Court order which had been made many years ago. There was no allegation that Justice Hosein failed to act accordance with the *RPO*¹⁵ in directing that the advertisement be issued and that a notice be posted at a conspicuous place on the land. There was no application to intervene and there was no appeal.
37. When this is taken into consideration, together with the seriousness of an allegation of fraud, and the admissions of the Claimant under cross-examination, it was my view and I held that the Claimant had been unable to discharge the higher burden of proof which he carried. The Claim was therefore dismissed. I also held that the Defendant was entitled to the declaration sought at paragraph (c) of the Counter Claim. The Claimant was directed to pay to the Defendant the cost in respect of the Claim and the Counterclaim.

Dated this 4th day of May, 2018.

M. Dean-Armorer
Judge

¹⁵ Chap 27. No. 11