

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CV 2007-04053**

**BETWEEN**

**HENDRON MOSES**

**Appellant**

**AND**

**CECIL SAMPSON**

**Respondent**

**Before The Hon. Madam Justice C. Gobin**

**Appearances:**

**Ms. F. Khan for the Appellant**

**Mr. Primus for the Respondent**

**REASONS**

**Background**

1. This is essentially a boundary dispute. The Appellant is the owner of a parcel of land and the respondent is the tenant/occupier of an adjoining parcel. They share one common boundary. The claimant's eastern boundary is the defendant's western one.

**Claimant's case**

2. The claimant by his statement of case set out that he purchased his lot hereinafter called "the claimant's lot", including the encroached area in November 1995 when it was "generally unoccupied". He said that some time later but not before May 1997, the defendant entered upon a part of the

claimant's lot, took possession of it and carried out building works. This continued from time to time, despite requests for him to desist until sometime in May 2000 when he (the Defendant) completed a structure on it. The defendant abandoned the structure until 2005 when he began to occupy it.

### **Defendant's case**

3. In his defence of January 4<sup>th</sup> 2008, (which was filed out of time by a few weeks), the defendant alleged that his predecessor, an uncle Gabriel Sampson had been in possession of a lot of land "the tenanted plot" adjoining the "claimant's lot" since 1976 and Sampson had built a house on that tenanted plot. Further, the tenancy and the house were transferred to the defendant in 1979 and he had renovated the structure in 1986. At that time the claimant was not living in that area at all, he was only a visitor to the area and was not in occupation of 'the claimant's lot'.

4. The defendant specifically denied wrongfully entering the encroached area only since 1997. He denied the allegation that it was since that time that he began storing materials and eventually building a structure, part of which fell on the claimant's lot. The defendant included a counterclaim saying he renovated the house on the tenanted plot once since 1986 and that he had been in continuous and exclusive possession of the premises he occupies since 1979 as a tenant of Victoria Baptiste and her heirs. He further contended that no part of the premises he occupied fell on the claimant's lot. He said that he

never actually lived on the premises but he allowed his grandchildren to occupy it.

**Issues identified by the Court**

5. At the first case management conference I identified the following issues as they arose on the pleadings.

- (1) Whether the defendant's renovated house or any portion of it actually fell on the claimant's lot. On my suggestion sometime later, a joint survey was undertaken by the parties with a view to resolving this question. Up to the time of that first case management conference the actual location of the defendant's house had not been indicated on the survey plan which had been produced.
- (2) The second issue was whether the defendant's house which had been allegedly renovated, occupied exactly the same spot as it did since 1986, as alleged by the defendant, or whether that part of the house which encroached on the claimant's lot (if the survey confirmed that it did) was constructed between 1997 and 2000 as alleged by the claimant.

6. By notice of application dated January 15<sup>th</sup> 2008, prior to the first case management conference, the claimant sought an order for summary judgment on the basis of the failure to file the defence within the prescribed time as well as an order striking out the defence in any case as being frivolous and vexatious and as disclosing no cause of action. The time for filing the defence was eventually extended by consent on February 11<sup>th</sup> 2008. The striking out application was adjourned from time to time to await the outcome of the

survey. This was eventually produced and filed on January 7<sup>th</sup> 2009. The agreed plan showed that a small part of the defendant's house did indeed fall onto the claimant's lot. The survey therefore resolved the first issue.

7. Given that the original defence as filed clearly gave rise to the two issues that had been identified at the first case management conference, the claimant's insistence on pursuing the striking out application on the particular grounds was somewhat surprising. Even after I clearly indicated that the case was going forward, the claimant persisted. It seemed to me that the claimant was relying on over technical objections to the form of the defence with the aim of avoiding a trial on a very simple issue of fact. Nevertheless the claimant was heard on three occasions on its submissions. These indulgences were granted with a view to identifying the cause of the claimant's complaints and to resolving them with a view of proceeding to a trial on that issue. They appeared mainly to point to an alleged lack of particulars which allegedly led to embarrassment in producing a reply and defence to counterclaim.

8. Following the filing of the survey report, the defendant sought leave to amend the counterclaim to deal with the result of the survey. I considered that the fact of the survey and the confirmation of the encroachment of the defendant's building on the claimant's lot was a sufficient change in circumstances, to entertain the application for the amendment. It seemed to me that while there had been a general statement prior to the production plan,

he had been in occupation of the premises since 1979 and that he had renovated since 1986, the defendant would have been entitled to include particulars of how he came to occupy the particular area shown as the encroachment, especially since it related only a small portion of his house and not the entire building. The survey plan introduced the need to identify, for example, what part of the defendant's house fell on the encroached part of the claimant's lot and whether that part existed since the 1986 renovations. Counsel for the defendant made three attempts to formulate an amendment. On at least two occasions the claimant was allowed to fully ventilate objections. They all reverted to the failure of the claimant to condescend to particulars. Indeed Counsel for the claimant brought to my attention the request for further information by way of letter of February 29<sup>th</sup> 2009 which is annexed to the appellant's affidavit as HM 10.

9. At all times before April 29<sup>th</sup> 2009, when after several hearings, the proposed amendment was actually allowed, I urged the attorneys to speak on the issue of the further information that was requested and to include such information to which the claimant was entitled in the proposed draft so as to avoid the expenditure of costs and further time on that matter in the future. Indeed when it is closely examined, the amendments to the defence which were eventually allowed essentially answered the request for further information. On April 29<sup>th</sup> 2009, when I made the order under appeal, it was done after a painstaking exercise to determine what were the objections which

still remained, and I found them to be without merit. The claimant seemed to be insisting on a full witness statement as opposed to a short statement of the relevant facts as required by the rules. The amendment to the counterclaim which was actually allowed at the end, in fact had the effect of striking out the defendant's claim as filed originally to the declaration that he was a land tenant of the lands he occupied. I was of the view that such a declaration could not be granted in these proceedings and I believe that the claimant agreed and indeed took an objection to it. The court's jurisdiction to do this of its own motion in any case cannot be disputed.

10. The opportunities which were granted to the defendant were given with a view to narrowing the factual contentions on the remaining issue and especially to meet the claimant's objections that the statement of facts lacked sufficient particularity. The defendant's attorney eventually managed to get the amendment right, to the satisfaction of the court. The court must be concerned about the justice of the case where there appeared to be a genuine defence and counterclaim and in this case these were apparent since the defence and counterclaim were first filed in January 2008. There was therefore never any question of striking out on the grounds identified by the claimant even on the pleadings as originally filed.

11. The court could have ordered the filing of further information by the defendant. It was convenient to ask the defendant to include it in the proposed

amendments. At all times I thought that Counsel for the claimant understood that this was one of the objectives of considering the amendment. Indeed the co-operation of the parties was sought to achieve this end. Had I refused the amendment I would have had at some stage to deal with an application for further information. This option would still be open to the court if this appeal is upheld. Applying the overriding objectives and with a view to properly managing this case, the amendment was allowed. The formal refusal of the striking out application was recorded then, but it had been made abundantly clear before April 29<sup>th</sup> 2009 that there was no merit in the application.

**Dated this 13th day of May 2009**

**CAROL GOBIN**

**JUDGE**