

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**SAN FERNANDO**

**Claim CV 2014-02685**

**BETWEEN**

**MARLENE WILKES**

**Claimant/Applicant**

**And**

**VERNE SYDNEY**

**Defendant**

**Before the Honourable Madam Justice E. J. Donaldson-Honeywell**

**Appearances:**

Mr. Cedric Neptune, Attorney-at-Law for the Claimant

Mr. Mustapha Mushim Khan, Attorney-at-Law for the Defendant

Delivered on March 15, 2016

**RULING:**

1. The instant claim is one for recovery of vacant possession of premises at No. 43 Bertrand Street, San Fernando in the City of San Fernando more particularly described in Deed registered as DE 2013 0240 3368 [“the property”] owned by the Claimant as well as damages for trespass. The property is the Claimant’s family

home where she and her relatives have resided at varying times over the years. She became the owner by virtue of a Deed of Gift from her father Rodney Wilkes in 2013. He died in March 2014.

2. The Defendant is the Claimant's nephew and he claims in his Defence that he lived at the premises since birth where he was cared for by his grandmother and his grandfather, Rodney Wilkes. He was only given Notice to Quit the premises on March 24, 2014 which was the day his grandfather died. The Claimant says that the Defendant's conduct in the home was disruptive and threatening to other family members.
3. The main contention in the Defence is that the Deed of Gift of the premises to the Claimant was obtained by undue influence against the Defendant's grandfather. Accordingly, there is a Counterclaim for the Deed to be set aside. Finally, the Defendant contends that the Claimant's title does not relate to the entire property where the Defendant resides.
4. The Claimant filed an application on November 3, 2015 to strike out the Defence and Counterclaim filed by the Defendant on June 11, 2015["the application"]. The application is made pursuant to Part 26.1(f) and part 26.2(1) (b) and (c) of the Civil Procedure Rules 1998 as amended ["CPR"]. The application came somewhat late at a time when the parties had commenced compliance with directions in preparation for trial. Disclosure of documentary evidence had been completed by the Defendant.
5. The grounds of the application are summarised therein and supported by information in an Affidavit sworn by Counsel for the Claimant. Essentially, there are three broad reasons for striking out as detailed in the grounds as follows:
  - a) The first reason as set out at grounds 5 and 6 of the Application as well as paragraphs 18 to 21 of the supporting Affidavit is that the Claimant has the better title. The Claimant has established at paragraph 16 to 18 of the supporting Affidavit and on the pleadings, which closed with the Amended Defence and Reply to counterclaim filed on February 5, 2015, that her father was seized of the entirety of the subject property when he conveyed it to her by Deed of Gift. As such it is argued, the

Claimant is seised and possessed as the registered title holder of the property. The Defendant has neither filed an Affidavit nor sought permission to reply to the Defence to the Counterclaim so as to contradict the title history set out in the Claimant's Affidavit and pleadings. He has not in his Defence pleaded a better title or any other basis for Defending an action in trespass. The Defendant has not provided any evidence to refute the additional information supporting the Claimant's title either as attachments to his pleadings or in his list of disclosed documents. The written submissions filed by Counsel for the Defendant do not refute the additional information provided by the Claimant to prove that she owns the entire property.

- b) The second reason is that the Defendant has no *locus standi* to maintain a Counterclaim that the Deed of Gift should be set aside due to undue influence. The Defendant in making this claim does not participate in these proceedings as a representative of the Estate of his grandfather. Accordingly, he cannot make this claim on behalf of the Estate. Furthermore, he does not on the face of his pleadings claim as a beneficiary or potential beneficiary with a better interest in the estate than the Claimant. The Claimant is not only the owner of the property by Deed of Gift but the daughter of the prior owner who died a widow. She would have been one of those first in line to inherit the property had her father not given it to her. This is a point of law and the basis for arguing it is foreshadowed in the first ground of the strike out application.
- c) Finally, the third reason for striking out is that even if the Defendant had *locus standi* to seek to have the Deed of Gift set aside; insufficient particulars have been provided in his pleadings to support a claim of undue influence. This reason is embodied in grounds 2, 3 and 4 of the Application and supported by paragraphs 9 to 14 of the supporting affidavit.

## Submissions:

6. In accordance with the Court's directions written submissions for and against the application to strike out the Defence were filed and served by exchange on February 5, 2016. The Claimant's submissions provided cogent arguments in relation to all the reasons set out above. The submissions on behalf of the Defendant focussed solely on the strongest point for the Defence namely, whether sufficient particulars of undue influence were pleaded in the Defence and Counterclaim. In so doing Counsel for the Defence correctly underscored that if lack of particulars is of concern the first recourse is not necessarily to strike out the pleadings. Instead the Court in exercise of Case Management powers can direct that further and better particulars be filed by the Defendant.
7. The submission of Counsel for the Defendant on this point was set out as follows:
  10. *"In this regard the Defendant submits that the CPR and the authors of same have provided that in cases where the Claimant and or Defendant requires further and or better particulars in respect of matters which are pleaded an order should be sought pursuant to Part 35 of the Civil Proceedings Rules 1998 seeking further and better particulars.*
  11. *It is to be noted that from the date of the filing and serving of the Defence and the filing of the said application no request for further and better particulars has been made by the Claimant.*
  12. *The Defendant relies on the case of **Civil Appeal No, 238 of 2011 Real Time Systems Limited v. Renraw Investments Limited and Others**<sup>1</sup>and the reasoning of the Honourable Justice of Appeal Jamadar at paragraphs 22 to 25 of the said judgment.  
  
*" 22. I have quoted Chief Justice Sharma at length, because his introduction to the CPR, 1998 is a secondary interpretative source which assists in ascertaining both the intention and meaning of the Rules themselves. Clearly judicial officers now have the responsibility not just for managing the pace of litigation but also the shape of litigation. Hence the 'intense focus ... on the pre-trial**

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<sup>1</sup> This COA decision was upheld by the Privy Council ([2014] UKPC 6).

*stages.’ What then are the ‘noble objectives embodied in Part 25’? Simply put, the core objective is to ‘further the overriding objective by actively managing cases,’<sup>18</sup> which includes achieving, inter alia, the thirteen objectives listed in Rule 25.1, CPR, 1998. I have already identified that these include, the early identification of the issues and the sorting out of which issues need a full investigation and which ones can be dealt with summarily,<sup>19</sup> and ensuring that no party gain any unfair advantage by reason of a lack of full disclosure of all relevant facts.*

*23. In order to achieve the above, case management, which necessarily includes issue management, is central to achieving the Overriding Objective of the CPR, 1998, which is to deal with cases justly.<sup>21</sup> And, to achieve success in this task the court is given certain general wide ranging powers of management. These are listed at Rule 26.1, CPR, 1998. Among these powers are several which are directly related to identifying issues and determining whether they should be heard and if so when and how. And critical to these powers of management is the specific power to: “take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.”*

*24. This specific power includes the power to order the delivery of ‘further and better particulars’ on either a statement of case or a defence. And, in exercising this power the court can act on its own initiative, pursuant to its duty and power to actively manage cases.<sup>23</sup> Clearly this is a necessary power, because there will always be matters in which a ‘pleading’, whether a statement of case or a defence, is defective by reason of the inadequacy of facts disclosed, but not to the extent to make it an abuse of process or to constitute such a non-compliance with Parts 8 or 10 to reasonably or proportionally justify striking it out pursuant to Part 26.2. In such cases a court ought to be able to manage the matter so as to properly identify the issues to be responded to, in say a defence, by making an appropriate order for the supplying and serving of*

*'further and better particulars' as directed. In my opinion, a purposive reading and interpretation of the CPR, 1998 reveals this intention.*

*25. In this case it has been argued that by reason of Rule 35, any order compelling a request for information can only be made after the time for serving a witness statement,<sup>24</sup> and therefore could not be made and enforced before a defence has been filed (an argument which the trial judge upheld and which influenced his decision in this case). As already indicated, I disagree with this position."*

*13. The Claimant's grounds for seeking the said Defence and Counterclaim to be struck out are the failure to give particulars and evidence. In light of the reasoning of the said Justice of Appeal the Defendant submits that the appropriate Order to be made is for further and better particulars to be provided by the Defendant to the Claimant in respect of certain facts the Claimant wishes the Defendant to address. An Order such as this would provide for the Overriding Objective of the CPR to be achieved and for the triable issues to be narrowed.*

8. If the Claimant's contention that the Defence herein should be struck out had rested solely on the alleged insufficiency of particulars provided by the Defendant in the pleadings I would have ruled against striking out and given directions for further and better particulars. On all other aspects of the Claimant's application however, the submissions filed were sound. There was merit in the contention that the Defence and Counterclaim must be struck out for the first two reasons outlined above.

9. As aforementioned the first of those two reasons was the relative strength of the Claimant's title as against neither title nor equitable interest pleaded by the Defendant. As it relates to this first reason for striking out the Claimant argued at paragraphs 24 to 33 as follows:

*24. "In our view, from the date the said Deed was executed i.e. on the 09<sup>th</sup> September, 2013 the Defendant was occupying the subject premises without the Applicant/Claimant's consent and/or permission. Any license*

*the Defendant enjoyed from the Applicant/Claimant's predecessor in title was revoked/extinguished the day the subject premises was conveyed to the Applicant/Claimant.*

25. *Further, in the instant case the Defendant is not a tenant of the Applicant/Claimant at the subject premises and possesses no title and/or interest in the subject premises. The Defendant is thus in illegal occupation of the subject premises.*

26. *The Defendant in his defence and Counterclaim has questioned the Claimant/Applicant's title to the subject premises. In the Privy Council decision of **Ocean Estates Limited v Pinder (1969) UKPC 3** Lord Diplock opined as follows:-*

*"It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."*

27. *Lord Diplock further opined at page (3) of **Ocean Estates** (supra) that "where questions of title to land arise in litigation the court is concerned only with the relative strengths of the title proved by the rival claimants." In the instant case the Defendant has not provided any 'alternative title' to the subject premises nor has he pleaded any other legal claim to the subject premises.*

28. *In **Civil Appeal 243 of 2011 Xavier Goodridge v Baby Nagassar Mendonca** JA applied **Ocean Estates** (supra) and stated at paragraph (26) as follows:*

*" A Claimant, who relies on his documentary title to obtain possession of land against a trespasser who does not seek to prove any documentary title in himself, although he has to adduce some evidence of ownership of the lands, need not adduce evidence of title to the lands for the same period as may be required of a vendor by a purchaser under a contract of sale of lands under section 5 of the CALPA... As the Claimant may succeed even though he may not strictly prove his title for the same period as*

*may be demanded by a purchaser of lands, it follows that he may not set out such a title in his pleading.”*

29. *Des Vignes J in CV 2012-2163 Mark Hughes (as the Legal Personal Representative of Francis Mathew Frontin) and Anor. –v- Anthony Francis and Anor. opined at paragraph (8) that “Having regard to the fact that this is a claim by the Claimants against the Defendants for possession of the lands occupied by the Defendants and based on the authorities cited above, the Defendants were not entitled to challenge the title of the Claimants and to call upon them to deduce title in order to succeed in their claim for possession”.*
30. *Based on the foregoing, it is submitted that the Claimant can proceed with her claim for possession of the said premises and the Defendant cannot challenge the title of the Applicant/Claimant herein.*
31. *The Defendant, notably and quite correctly, have not pleaded any right, whether legal or equitable, to remain in possession/occupation of the subject premises after the termination of the license granted by the Applicant/Claimant’s predecessor in title.*

**A. DEFENCES TO A CLAIM FOR TRESPASS TO PROPERTY:**

32. *According to Halsbury’s Laws of England the defences to a claim of trespass to property are:-*
  - a. *“Claim of right- A Defendant may plead and prove that he had a right to the possession of the land at the time of the alleged trespass, or that he acted under the authority of some person having such right...*
  - b. *Leave and licence- It is a good defence to a claim of trespass to land for the defendant to plead and prove that he entered on the land by the leave and licence of the claimant.*
  - c. *Exercise of legal right- It is a good defence to a claim of trespass for the Defendant to plead and prove that he entered on land in the exercise of a legal right, whether statutory or otherwise.*
  - d. *Acquiescence- It must be shown that the Defendant had been misled to his detriment so that it would be unconscionable for the Plaintiff to assert his right.*



- e. *Entry to retake or remove goods- If a person unlawfully takes the goods of another and puts them on his own land, the owner of the goods is entitled to enter immediately on the land for the purpose of retaking his own goods.*
- f. *Necessity.*
- g. *Claim statute-barred.*

33. *It must be noted that neither of these defences were pleaded by the Defendant in his defence to the Claimant's claim herein. The Defendant has failed to establish any grounds for defending the Claimant's claim for possession of the subject premises."*

10. The Claimant's second reason for striking out the Defence is the defendant's absence of locus standi to bring a counterclaim based on undue influence in relation to the estate of the Claimant's father. The Claimant's arguments on this point were set out at paragraphs 37 to 40 of the submissions. Counsel opined:

37. *"It is our respectful view that to commence an action to set aside the said Deed where the Donor/Vendor/Assignor in respect of the subject Deed is deceased, the Defendant/Ancillary Claimant ought to have some interest in the estate of the deceased whether as the Executor or the Administrator of the Deceased's estate. Further, in the instant Counterclaim the Defendant has not pleaded the existence of and/or any beneficial interest under a Will nor is he a person entitled to benefit from the Deceased's estate in the instant fact scenario under the laws of Intestacy.*

38. *The Defendant or proposed Ancillary Claimant in the instant case has neither a Grant of Probate nor Letters of Administration in respect of the estate of the deceased. As such it is submitted that the Defendant/Ancillary Claimant, having brought the instant Counterclaim against the Claimant/Ancillary Defendant in his personal capacity, lacks the proper locus standi to institute any action in relation to any purported interest of the deceased in the subject premises. On this issue as well the Defendant's Defence and Counterclaim should fail.*

39. *Notwithstanding the obvious and fatal defects noted above, it is also submitted the Defendant/Ancillary Claimant has the burden of proving on a balance of probabilities the existence of undue influence by the*

*Claimant/Ancillary Defendant over the Deceased in the procurement of the said Deed as asserted by him.*

40. *To succeed in a Claim of undue influence the Defendant/Ancillary Claimant must show that there existed between the Deceased and the Claimant/Ancillary Defendant such a relationship from which it can be said/presumed that the Claimant/Ancillary Defendant had influence over the Deceased. Alternatively, the Defendant/Ancillary Claimant must show that the Claimant exerted acts of pressure and/or coercion over the Deceased.*”

**Analysis and Decision:**

11. This second reason as argued by the Defendant is further borne out in settled authorities. The finding of Des Vignes J, in *CV2008-00926 Kenneth Lashley v Patricia Marchong et al* is applicable to the circumstances of the Defendant herein. Kenneth, the Claimant, in that case, was seeking to establish that as against the Defendants he was entitled to possession of the disputed property by virtue of his being the lawful heir of one Cleveland Lashley. Des Vignes J held,

*“Since Kenneth has not been appointed the Legal Personal Representative of Cleveland’s or Carmen’s estate and has not brought this action in a representative capacity, I agree with the submission made by Counsel for the Third Defendant that he lacks locus standi to maintain this claim based on his status as Cleveland’s heir.”*

Similarly in the instant case the Defendant seeks to challenge the Claimant’s right to possession and counterclaims for her title to be set aside based on his allegation that she caused her father by undue influence to give her the property by Deed of Gift.

12. The Defendant has no locus standi however to make this claim as he is neither the Personal Representative for the Estate nor has he pleaded that he is an heir of the deceased. The Defendant has not pleaded that he had a right to an inheritance from the deceased such that this could be a basis for any prospective action on his part to have the estate administered and thereby claim entitlement to remain in possession of the

property. In any event unlike the position for a spouse<sup>2</sup> or minor children there is no basis for such a claim on his part.

13. There is precedent for a ruling that a Defence should be struck out in the circumstances where the basis for defending a Claim or making a Counterclaim arises from the ownership of an un-administered estate and the Defendant has no locus standi since he is not the Personal Representative.

14. In **Lall v Lall - [1965] 3 All ER 330**, the Plaintiff was the registered proprietor of a house which was occupied by the Defendant, his mother. He started an action to obtain possession of it. Her defence was that the Plaintiff was a trustee of the house for her husband who had died intestate. She claimed to be entitled as against the Plaintiff to occupy the house on the ground that it formed an asset of her husband's estate in which she had an interest under s 5a of the Intestates' Estates Act, 1952, and Sch 2, para 1, as the surviving spouse thereby entitled to have the matrimonial home appropriated to her interest. No grant of administration had been obtained and she was unable to obtain one herself. As no one else was interested proceedings had been launched to obtain a grant to the Official Solicitor.

15. The Plaintiff applied by summons to have the defence struck out on the ground that it disclosed no reasonable cause of defence and would tend to delay the fair trial of the action. On the question whether the Defendant had a sufficient locus standi to defend the action, the Court held in a decision delivered by Buckley J, that:

*“(i) Just as a residuary legatee who had an interest in the totality of assets in an estate had not an equitable interest in a particular asset, so a surviving spouse, who had in some sense a particular interest in the matrimonial home under the Act of 1952, had no equitable interest in it that was recognisable by law; and, as the defendant could not have a locus standi unless it was based on an interest recognised by the law in property, she had no locus standi to defend the action (see p 333, letters a to d, post).”*

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<sup>2</sup> Tolley's Administration of Estates/Part H: Contentious Probate/H2: Preliminary Issues/Locus standi to bring probate actions and accrual of cause of action

16. The CPR provides at Part 26.2 (1) that “*the Court may strike out a statement of case or part of a statement of case if it appears to the court—*

*(c) That the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim;”*

17. The meaning of “statement of Case” as defined at CPR Part 2.3 includes both a Defence and a Counterclaim. Kokaram J in **CV2013-00212 UTT –v- Ken Julien and others** set out the considerations that guide the Court’s decision making on CPR 26.2(1) applications. He said “*A striking out application is a draconian remedy only to be employed in clear and obvious cases where it is possible to demonstrate at an early stage before further management of the claim for trial that the allegations are incapable of being proved or the Claimant is advancing a hopeless case, either accepting the facts as pleaded as proven or as a matter of law. See Caribbean Court Civil Practice 2011, Mc Donald Corporation v Steel [1995] 3 AER 615. Zuckerman on Civil Procedure, A. Zuckerman p 279.*”

18. Further guidance was provided in **CV2013-04647 Kadir Mohammed –v- The AG** where at paragraph 16 Kokaram J adopted the following principle from **Belize Telemedia v Magistrate 75 WIR 143** :

*“It is important to bear in mind always in considering and exercising the power to strike out, the court should have regard to the overriding objective of the rules and its power of case management. It is therefore necessary to focus on the intrinsic justice of the case from both sides: why put the defendant through the travail of full blown trial when at the end, because of some inherent defect in the Claim, it is bound to fail, or why should a Claimant be cut short without the benefit of trial if he has a viable case?”*

19. Accordingly, a practical guideline as to whether any pleading should be struck out is to assess whether it is bound to fail. In all the circumstances of this case and on the pleadings and evidence before the Court the Defence herein and the Counterclaim are doomed to fail. This is so because the Defence does not plead any sound basis to challenge the Claimant’s claim to possession. The matters pleaded including, the un-particularised undue influence are not such that a successful defence is possible in this matter.

20. This is so particularly in light of the fact that the Defendants pleadings do not support that he has any *locus standi* to bring the claim whether as a title holder to the property, or as a prospective heir to his grandfather's estate, or as his personal representative, or based on any claim to beneficial interest, or by adverse possession, or by paid tenancy. On the pleadings the Defendant was simply allowed by his Grandfather to continue to reside at the premises. The Claimant allowed him to continue residing there after she became the owner in 2013 until March 24 2014 when she served him with a Notice to Quit. Having refused to vacate the premises the Defendant remained resident as a trespasser. The Claimant now seeks recovery of the property from the Defendant and as the owner she is entitled to vacant possession.

21. **Order:**

Having considered the submissions in support of the application, the affidavits and pleadings herein I hereby order that:

- i) The Defence and Counterclaim herein are struck out and the Counterclaim is dismissed;
- ii) There be Judgment for the Claimant against the Defendant for possession of the property;
- iii) The Defendant do deliver up vacant possession of the property on or before May 31, 2016;
- iv) The Defendant do pay to the Claimant nominal damages for trespass to the property in the sum of Ten Thousand Dollars (\$10,000.00) together with interest at the rate of 6% per anum from the date of expiration of the Notice to Quit delivered to him on March 24, 2014 to the date of Judgment;
- v) The Defendant is to pay the Costs of the Claimant on the Claim and the Counterclaim to be assessed by a Master if not agreed.

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Eleanor J. Donaldson Honeywell  
Judge