

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV2016-00771

BETWEEN

Molly Tirbanyee

Claimant

AND

Lennox Ling

First Defendant

Joan Chadee

Second Defendant

Janet Joaquim (nee Smith)

Interested Party

Before the Honourable Madam Justice Eleanor Joye Donaldson-Honeywell

Delivered on 31 March, 2020

Appearances:

Ms Donielle Jones and Mr Kevaughn Mattis, Attorneys at Law for the Claimant

Mr Riad Ramsaran, Attorney at Law for the Defendant

Judgement

A. Introduction

1. This matter follows on a long history of dispute between neighbouring tenants of one Mervyn Smith (deceased) over access to property and perceived boundary breaches. The neighbours involved are the Claimant and the Second Defendant.
2. The Claim against the First Defendant arises from his assertion of the role as the agent for Mervyn Smith and his siblings who were all the property owners/Landlords. Eventually, the estate of the last surviving property owner/landlady, Janet Joaquim nee Smith was joined by the Defendant as an Interested Party. However, there was neither representation nor participation by any owner/landlord in the matter.
3. The history of this dispute includes prior litigation engaged in since 2006 by the same parties. The prior litigation concluded in 2012 with a Consent Order that provided that:
 - a. The Claimant and Defendants are by themselves their servants and/or agents and each and every one of them restrained from threatening, harassing, annoying and/or molesting or in any way interfering with each other or each other's occupation of the lands rented by them.
 - b. The Claimant and Defendants are hereby restrained from preventing impeding hindering or otherwise interfering with the use by each other, their servants and/or agents of any access provided by the landlady over lands in the possession of the landlady to the lands rented by them.
4. The Claimant's entitlement to use the same access to her home that was in existence and in use at the date of entering the Consent Order is once more in contention between the parties. This contention was revived when the First Defendant purported to provide an alternate access and partially fenced off the access that the Claimant had been using, claiming that this alteration restored the

original, proposed access way outlined by the landlord when the Claimant first entered the property.

5. The access that was fenced off ran through the yard space of the Second Defendant. It had always served as the Claimants access to her home where she resided prior to the Second Defendant's arrival as a neighbouring tenant. The Second Defendant is also alleged to have erected fencing and sprinkled noxious substances which completed the blocking off of/interference with the Claimant's access.
6. The Claimant seeks, by this Claim, declarations that the Defendants have breached the 2012 Consent Order and damages for flooding nuisance caused by the paving of the new access. In addition, injunctive relief is claimed to have fencing blocking her original access way removed.
7. The joint Defence of the two Defendants calls into question the Claimant's interpretation of the 2012 Consent Order. It contends that the Order did not protect the Claimant's use, without interference, of the specific access that the Claimant had used over the years. Instead, according to the Defendants, the 2012 Order referred to any access provided by the Landlord. Therefore, they argue, once a new access was provided, the Claimant could use it without interference and was not entitled to use the one she had used before.
8. Further, the First Defendant Counterclaims against the Claimant seeking damages, termination of the tenancy and re-possession of the property based on alleged non-payment of rent.
9. In response the Claimant challenges the First Defendant's authority to increase and collect rent for the property owners. He took over the role from his mother, Ms. Casilda Ling, when she was ill (now deceased) without proving to the Claimant that he was authorized by the owners to act as their agent in increasing and collecting the rent. Hence the Claimant was prepared to continue paying rent at

the rate she had agreed which was \$100. This was refused by the First Defendant and she did not pay the increased rent he claimed.

10. Finally, in defending against the Counterclaim for re-possession the Claimant contends that even if the First Defendant can prove that he is now a legitimate agent, she is entitled based on an equitable interest to remain as a tenant. As such she cannot be dispossessed. The equitable interest claim is based on the promises made to her by the First Defendant's mother who was the agent for the property owners.

B. Procedural History

11. The Re-amended Statement of Case was filed on 29 January, 2018 and the Re-amended Defence was filed on 23 February, 2018. The Witness Statements of the Defendant were filed on 5 February, 2019 and those of the Claimant filed on 12 February, 2019. The Expert Report of Preston McQuilkin was filed on 28 February, 2019 by the Claimant. This was a report furnished on the instructions of the Claimant.

12. The Claimant filed a claim form on 16 March, 2016, thereafter an amended claim form and statement of case on 5 September, 2016 and a reamended statement of case on 28 December, 2017. The Defendant filed a defence and counterclaim on 10 January, 2017, and an amended defence on 23 February, 2018.

13. The Claimant filed a reply to defence and defence to counterclaim on 7 March 2017 and another reply and defence to counterclaim on 9 May, 2017. There were also Further and Better Particulars filed on March 14, 2017 by the Defendant pursuant to the Court's directions to file and serve better particulars with regard to the basis for the contention that they are the authorized agent of the owners.

14. The parties were ordered to agree on an expert on 9 May, 2017. This was not done and the Claimant was granted leave to file the expert report of Mr. Preston McQuilkin. This Report, filed on 28 February, 2019, indicated that the expert was

retained as early as June 2016. A site visit was conducted by the Court on 9 January, 2018. At this site visit and throughout the early stages of these proceedings, the parties were strongly encouraged to consider settlement of this matter.

C. Issues

15. On conclusion of the Trial on 21 October, 2019 the parties were directed to file written closing submissions. After several extensions of time granted by the Court the parties failed to meet the deadlines of 3 February, 2020 for the Claimant and 2 March, 2019 for the Defendant to file submissions. The following issues identified are based on the pleadings and evidence heard without the benefit of assistance from counsel on either side.

- a. Did the Defendant's breach the 2012 consent Order by fencing off/ putting noxious substances on the access way originally provided by the landlord's agent?
- b. Is the alternate access currently used by the Claimant which was provided and/or paved by the First Defendant appropriate for use?
- c. Has the First Defendant's action in providing and/or paving an alternate access way caused a flooding nuisance to the Claimant and if so, is the Claimant entitled to compensation for repair in the amount of \$155,000.00?
- d. Has the First Defendant established that he is authorized as an agent for the property owners to collect rent, increase rent and alter the access provided for tenants?
- e. Has the Claimant breached her tenancy agreement by failing to pay rent to the First Defendant?
- f. Is the First Defendant entitled to re-possess the property tenanted by the Claimant or is the Claimant entitled in equity to an interest in the property and to remain there as a yearly tenant?

D. Relevant legal principles

Nuisance

16. The following extract from the **Clerk and Lindsell on Tort 19th Edition** paragraph 20-11 sets out what constitutes Nuisance in law:

“A nuisance to be actionable must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man an interference which alone causes harm to something of abnormal sensitivities does not of itself constitute a nuisance. In practice the general concepts of the foreseeability and reasonable user may have rendered the notion of abnormal sensitivity less significant. The discomfort must be substantial not merely with the reference to the Claimant it must be of such a degree that it would be substantial to any person occupying the Claimant’s premises irrespective of his position in life, age or state of health. It must be an inconvenience materially interfering with the ordinary comfort physically of human existence.”

17. In the text of **Charles Gale on Easements 18th ed.** the author states that:

“If an owner of land for his own convenience diverts or interferes with the course of a stream he must take care that the new course provided for is sufficient to prevent mischief from an overflow to his neighbours land and he will be liable if such an overflow takes place.”

18. These principles were applied in **Winston Adams v Steve Waldron CV2010-03625** at paras. 34-35, in a case of water runoff from a neighbouring property as follows:

“It is reasonable to expect a level of water runoff from land situate on the higher plain to that on the lower plain. However, it is quite possible for such runoff to become a nuisance, within the legal definition, if such water runoff is not monitored and/or controlled. The court finds therefore that water runoff onto a person’s property may amount to a substantial interference with that

person's use and enjoyment of land in particular circumstances, one such circumstance being where the runoff is excessive.

Although the natural gradient of the land in this case allows for the flow of water in the direction of the Defendant's property, it is reasonable to conclude that the additional use to which the Claimant has put his land (by way of the addition of the shed on that part of his land where the downward slope towards the Defendant's land begins) would have made this natural flow more intense. This, it appears from the evidence, was done without the addition of a drainage system to facilitate such increase in flow resulting ultimately in the interference with the use by the Defendant of his land."

Agency

19. The **Halsbury's Laws of England on Agency** (Vol. 1 (2017)) at paras. 1 & 30 sets out principles of Agency as follows:

"1. The relation of agency typically arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf, and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relation of agency will not have arisen.

...

30. As between the agent and his principal, an agent's authority may be limited by agreement or special instructions, but, as regards third persons, the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties"

Equitable Interest

20. The **Halsbury's Laws of England on Estoppel** (Vol. 47 (2014)) at paras. 309 & 392 examines the modern principles of proprietary estoppel, which may establish an equitable interest in land:

"309. The owner of land, A, in some way leads or allows the claimant, B, to believe that he has or can expect some kind of right or interest over A's land (or, more generally, his property). To A's knowledge, B acts to his detriment in that belief. A then refuses B the anticipated right or interest in circumstances that make that refusal unconscionable. In those circumstances, an equity arises in B's favour which gives B the right to go to court and seek relief. The court has a very wide discretion as to how it will give effect to this equity.

...

392. The court will inquire:

- a) whether an equity in favour of B arises out of the conduct and relationship of the parties;*
- b) what is the extent of the equity, if one is established; and*
- c) what is the relief appropriate to satisfy the equity.*

The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of proprietary estoppel; in the end the court must look at the matter in the round. Modern analysis distinguishes three 'strands' on which the estoppel can be based: acquiescence, representation, and promise."

E. Analysis of Evidence

Breach of the Consent Order

21. The Claimant in her Witness Statement avers that the original access way to her property shown to her by Ms. Ling was a footpath but that there was an acknowledgment given that this access was insufficient and an indication that an enhanced access way was to be provided. The Claimant states that in 2004 she got

the permission of Ms. Ling, although permission had already been given since 1993 to widen the footpath to a 10 foot-wide access.

22. It was at this time that the Second Defendant allegedly began to make use of the access way, blocking it from the Claimant and proceedings were brought in the High Court to resolve this dispute. This led to an appeal and finally a resolution by way of a consent order.
23. After these proceedings concluded in 2012, an alternate access way was made by the Defendants and outlined for use by the Claimant. A fence was erected by the Defendants blocking the Claimant from the original access way. However, the Claimant now complains that this alternate way is more inconvenient to her than the original and claims it is in breach of the consent order.
24. The Claimant outlines that the alternate access traverses sloping land on a gradient higher than the land on which her home stands. There is also a gully or ditch which separates the access from the entrance to her home and no connector was built from her property to the path, she claims. She states that it is difficult for her to manoeuvre from her home across this ditch to and from the path in her old age. She also claims she has slipped and fallen many times when accessing this pathway.
25. The First Defendant, in his Witness Statement, denies that his mother gave permission for the Claimant to expand the original footpath and states instead that there was a proposed new access route first shown to the Claimant by himself and his mother in 2005. The First Defendant claims, therefore, that the injunctive relief granted by the High court in the previous matter and subsequent consent order in the same terms concerned the proposed new access and not the existing access.
26. The First Defendant states that the Claimant was the one who dug the deep trench between her lot and the new access way. The Claimant denies this. The Witness Statement of the Expert, Mr. McQuilkin, states that the new access way is just over

two feet higher than the land on which the Claimant's house is situated and that the Claimant and users of the access must climb or leap onto it. He states that this is a dangerous activity that is contrary to official safety guidelines.

27. Regarding the 2012 Consent Order, it was clear from the cross-examination of the Defendants that the only access that could have been in contemplation when they all agreed not to interfere was the original one passing through the Second Defendant's yard.

28. Further, the expert observed and it was observed by the Court at the site visit that the getting into the Claimant's home from the new access involves dangerous climbing and uneven terrain. This cannot be considered adequate as an alternate access for the Claimant. It is also not appropriate as, inter alia, it does not lead to the Claimant's natural front of her home. A declaration that the defendants are in breach of the 2012 Consent order will be granted and an order will be made that the fencing installed be removed.

29. It must be observed here that if neighbourly discussions had taken place before any of these measures by the Defendants were put in place, a satisfactory and mature compromise between the parties could have been struck, avoiding significant costs and time spent in this matter. It does not take much reasoning to come to the conclusion that this new access way, although it avoids passing through the Second Defendant's property, would be ill-suited for the Claimant's use.

Nuisance

30. The Claimant claims that, due to the failure of the First Defendant to build an embankment for the drain once the alternate access way was created, there now exists the problem of water channelling into her property. At paras. 7 and 17, the First Defendant admits to preparing this accessway with gravel since 2005.

31. The paving of the access, she alleges, has caused heavy flow of rainfall into her yard which did not occur before and has created foundational cracks on her property. However, she cites at para. 59 of her Witness Statement the gradient of the access, the paving of it with pitch and the failure to build proper drainage as the cause of the water flow onto her land.
32. The Claimant relies on the expert report of Mr. Preston McQuilkin of M&S Engineering Services Limited dated 4 July, 2016. This report outlined the costs of construction to solve the water flow problem. Works were estimated at \$155,000 for construction of a box drain, a drain crossing and steps, a retaining wall and repairs to cracks in the masonry.
33. The flow of water, she claims, makes her use of the access way even more unsafe. She also avers that it is a source of embarrassment for her whenever she has guests invited to her home and they have to cross the ditch.
34. The Second Defendant claims in her Witness Statement that the Claimant's land was always lower than hers and that rainwater would run from higher lands into her lot. She claims that it is due to the failure of the Claimant to build a drain to collect and direct the rainfall that the water comes onto her lands. She does not directly deny paving the new access after the consent order was entered. She states at para. 7 of her Witness Statement that it "was sometime thereafter paved with oil and sand." The First Defendant at para. 17 of his Witness Statement denied having any knowledge of or participation in the paving of the access. However, judicial notice is taken that the access was paved as it was observed at the site visit.
35. The conclusion stated by the Expert Engineer was as follows:
- "The root cause of the problems encountered on this property is the unregulated development and associated land use of the general neighbourhoods. Little or no consideration has been given to the basic requirement of vehicle and pedestrian access, drainage, electrical supply,*

water supply and waste disposal. It is the responsibility of the land owner to adhere to the regulatory requirements concerning land developments.”

36. Under cross-examination of the Expert and the Claimant, the Defendants were successful in shedding doubt on whether only the paving of the road caused the flooding of the Claimant’s premises. It was admitted that the Claimant had complained of flooding prior to the paving of the access and had even written a letter published in the Newsday about it.
37. The Expert supported that some flooding came from the newly paved access but did not rule out other sources of flooding e.g. from the Second Defendant’s land based on the natural incline down to the Claimant’s property. This and the conclusions stated in the report show that the general unregulated development and land use of the area have contributed to the poor drainage that the Claimant experiences.
38. Hence, it is not possible to determine that the road paving caused the damage that would justify \$155,000 in repairs and only a nominal sum will be awarded. Due to the fact that the Claimant would have experienced extra discomfort due to the acts of the Second Defendant, a nominal sum of \$12,000 in line with the awards given in **Rasheed Ali v Super Industrial Services Ltd & AG CV2006-02256** and **Ganesh Madho v Chanderdaye Ramdhanie & Rajindra Ramdhanie CV2012-03876** will be awarded.
39. The Claimant further avers in her Witness Statement that the Second Defendant placed noxious substances on the gate causing her hand to burn when she touched it. The Second Defendant denies doing so in her Witness Statement. This aspect of the case was not cross-examined on by either party, however, so the truth cannot be determined. There is no finding of further nuisance to the Claimant in this regard but an injunction preventing harassment by either party will be included in the court’s order to prevent acts such as these from occurring.

Non-payment of Rent

40. The Claimant avers in her Witness Statement that she paid rent to the First Defendant's mother at the agreed rate of \$100 per year from the beginning of her tenancy in 1993. She claims further that Ms. Ling promised that the annual rent would remain the same for as long as she lived there. Thereafter, in about 2008 after the passing of his mother, the First Defendant began to collect rents from the Claimant and purported to increase the rent to \$300 per annum.
41. The Claimant disputes the authority of the First Defendant to introduce such an increase and refused to pay the increased rent. She continued payment at the initial rate and attaches proof through receipts to her Witness Statement. In 2010, she sought Legal Aid to challenge the First Defendant's authority to increase rent but no response was received. In that same year she claims that the First Defendant stopped accepting rents from her and she was forced to make payment to his bank account.
42. In February 2018, the Claimant received an eviction notice purporting to be on the instructions of the owner of the lands. The First Defendant now claims the sum of \$2,700 in rental dues for the Premises and that the Claimant must vacate the premises on expiry of the notice to quit in July 2019.
43. The First Defendant avers in his Witness Statement that the Claimant has recognised his mother and then him as the duly authorised agents of the land owners through payment of rental sums to him without dispute. In the Further and Better Particulars filed, he makes mention of a letter of authorisation from Janet Joaquim dated 20 November 2015 but fails to produce same. In his Witness Statement he also states he has copies of a letter from one Roderick Smith dated 28 September, 2010 but it was not attached.
44. The First Defendant attaches only an authorisation from his mother to him to collect rents from the tenants and to give notices to delinquent tenants. This

authorisation is not direct from the landowners, does not mention authority to increase rent or alter access ways and is dated 2006.

45. The First Defendant also attaches to his Witness Statement a Deed of Gift dated 19 December, 2017 from Janet Joaquim to himself conveying one undivided third share in the property. It is notable however, that in the Defendants' amended defence there is no pleading that he was acting in his own right as owner. At paras. 12 & 19, he avers that he acted as the duly authorised agent of the landowners. In the absence of a pleading, this could not have been responded to by the Claimant. Therefore, this belated Claim by the First defendant to be not just an agent but a part landowner is not a live issue to be determined and only the First Defendant's authority as agent for the owners will be examined.
46. Despite the Claimant's dispute as to the First Defendant's authority from the owners of the property to increase rent, he has not furnished the Court with any documentary proof or other proof of this authority/agency. He also adamantly avers in his Witness Statement at para. 21 that neither he nor his mother were authorised to sell or promise sale of the property to the Claimant. This indicates some limits to his agency.
47. Given the absence of any evidence from the Interested Party to this matter or even a hearsay notice covering evidence of the First Defendant to prove his agency was authorized by the property owners, it cannot be held on a balance of probabilities that he was duly authorised to increase the Claimant's rent. Under cross-examination, the First Defendant admitted the letter from his mother does not authorize interference with access ways or increases in rent.
48. The First Defendant also admitted under cross-examination that it was he who stopped collecting rent from the Claimant and refused to cash rent cheques she gave him. Thus, non-payment of rent by the Claimant has not been proven and the Defendant's counterclaim must fail in this regard.

Equitable Interest

49. The Claimant in her re-amended statement of case has claimed an equitable interest in the property based on her detrimental reliance on the promises of Ms. Ling in respect of the lands. This promise, the Claimant claims, was that although Ms. Ling was not authorised to sell the lands, she would allow the Claimant to build a house on the property that she could live in as long as she paid the rents of \$100 per year.
50. This, the Claimant states in her Witness Statement, caused her to expend monies in the sum of approximately \$200,000 in erecting a concrete, permanent structure on the lands. A portion of this money was obtained through loans and donations from personal friends. She claims that it took tremendous hard work and sacrifice to accumulate enough to complete her home and that her life saving went into it. She claims that all this was done in reliance on the promise made by Ms. Ling on behalf of the Landlord. Furthermore, Ms. Ling and the First Defendant were fully aware of the Claimant's construction of the concrete house.
51. Accordingly, the Claimant claims an equitable interest in the property such that she should not be evicted once she continues to pay rent in the sum of \$100 annually. She further claims that if she were to be evicted, the First Defendant, if as he now says he is a landowner, would be unjustly enriched as there now stands a fully constructed dwelling house on the property.
52. The First Defendant in his Re-amended Defence denies that the promise was made by his mother and states that she could not have made such an agreement by virtue of their contracts with the owners of the said Lands. However, the First Defendant fails to attach proof of any such contract. He puts the Claimant to strict proof of the promise but for his own part relies on no specific evidence that the promise was not made.
53. The Claimant is in a difficult position due to the passing of Ms. Ling and her inability to give testimony on the matter. However, it is not in dispute that the Claimant

did construct the permanent structure with the knowledge of Ms. Ling and the First Defendant. That provides some evidence that there may have been a promise relied on as if not Ms. Ling or the First Defendant would have stopped the Claimant from acting to her detriment. Instead they stood by and acquiesced. On a balance of probabilities the Claimant, having been put to strict proof, has given sufficient evidence of her equitable interest in the property.

54. It is determined that there does exist an equity in favour of the Claimant due to the Claimant's forthrightness under cross-examination about the promise made to her and the strong inference that the Claimant would not have expended such large sums, her life savings, on a property that she did not think she would be able to reside upon for her lifetime. This is buttressed by the First Defendant and his mother's acquiescence in allowing the Claimant to erect such a structure without expression of complaint.

55. It is unjust of the First Defendant to demand the eviction of the Claimant in circumstances where she is willing to pay the sum agreed at the beginning of her tenancy (\$100 per annum). The Defendant's counterclaims that the Claimant's tenancy be determined and for possession of the property therefore fail. The Claimant's claim to an equitable interest succeeds. This interest is simply the entitlement to reside in the property as long as she pays the \$100 per annum, which the Defendant is not entitled to reject.

F. Conclusion

56. On analysis of the written and oral evidence, all the issues identified above are determined in the claimant's favour save for the claim for compensation for nuisance.

57. The vitriol between the parties has certainly impeded their ability to interact reasonably with each other and has prevented them from empathising with the other's interests and concerns. Such a non-constructive frame of mind ought to be reflected upon carefully by the parties. It should be altered as the parties are

neighbours, who will have to reside in close proximity for a considerable period of time.

58. It is, therefore, hereby ordered as follows:

- a. Judgement for the Claimant on her claims as follows:
 - i. A declaration that the Defendants are in breach of the Consent Order/Consent Agreement dated March 16, 2012 before the Honourable Justices of Appeal Mendonça, Jamadar and Bereaux by placing impeding barriers/fencing along the access way that was in place at the date of the Order that runs through the yard space the Second Defendant occupies as a tenant.
 - ii. An order that the Defendants are to remove the fencing/impediments which block the Claimant's former access within forty-two (42) days from the date upon which this order is granted.
 - iii. Alternatively, the Second Defendant is to deliver to the Claimant all keys for the gate and access through the gateway within forty-two (42) days from the date upon which this order is granted.
 - iv. An order for nominal damages in the sum of \$12,000 against the First Defendant for the damage caused by the excessive flow of water into the Claimant's property from his provision and preparation of the new access way.
 - v. A declaration that the Claimant is entitled due to her equity in the property to a yearly tenancy for the duration of her life at the rental rate of \$100 per annum.
- b. An Injunction restraining all parties whether by themselves, their servants and/or agents from harassing and/or molesting each other and/or affecting the other's peaceful and quiet enjoyment of their rented properties.
- c. The Counterclaim is dismissed.
- d. The Defendants shall pay to the Claimant's costs of the Claim on the prescribed basis discounted to \$6,000.00 to reflect that the Claimant

succeeded in the claims for injunctive relief but failed to prove other than nominal damages for nuisance and that no closing submissions were filed.

- e. The Defendants are to pay the Claimant's costs of the Counterclaim on the prescribed basis discounted to \$10,000.00 to reflect that neither party filed written closing submissions.
- f. Liberty to Apply.

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Eleanor Joye Donaldson-Honeywell
Judge

Assisted by: Christie Borely JRC1