

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV2016-01696

Between

Petroleum Company of Trinidad and Tobago Limited (Petrotrin)

Claimant

And

Naim Ali

Aleem Ali

Ansad Services Limited

Dolly Ali

Shafeer Ali

Defendants

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Delivered on May 22, 2019

Appearances

Mr. Roger Kawalsingh and Mr. Javed Mohammed, Attorneys at Law for the Claimant

Mr. Naim Ali, the 1st Defendant, self-represented (by decision made on the Trial date.)

Mr. Sherman McNichols Junior, Attorney at Law for the 2nd, 3rd, 4th and 5th Defendants

Reasons

A. Introduction

1. On Monday April 1, 2019 three decisions were delivered orally in relation to this matter. One of the three decisions dismissed an oral application to call a Witness for whom no Witness Statement or Summary was duly filed. That decision is the subject of an appeal. I hereby provide Reasons.

B. Background

2. The background facts of the substantive Claim are that the Claimant sought to recover possession of land trespassed upon by the Defendant. The land is located in an active oil production area at Warner Road Extension in the Adventure Estate “the Property”. The Claimant’s Title to the property, based on a 2007 Deed, was not in dispute on the pleadings of the parties. However, in their filed Defence the Defendant’s claimed that they became the owners of lands adjacent to the Claimant’s said property by Deed dated April 2, 2014.
3. The Defence of the Defendants was essentially one of adverse possession. They claimed that although the Claimant was the owner of the Property that is the subject matter of this Claim, the prior owners of the adjacent lands obtained by the Defendants in 2014 had exercised since 1987, exclusive custody, control and possession of the Property in dispute. It is on the basis of adverse possession, by the said predecessors in title that the Defendants’ pleading was that they were entitled to continue in adverse possession of the Property. In fact they claimed, without providing any particulars, to have spent over \$2,942,000.00 on the Property from 2014 to 2016.
4. The Defendants therefore filed a counter-claim seeking declarations firstly, that the Claimant’s title to the Property has been extinguished and secondly, that the Defendants are entitled to exclusive possession of the Property.

C. The Three Decisions

5. The first decision made on April 1st, 2019 was in relation to a Notice of Application ["NOA"] filed on Friday March 29, 2019 seeking to have the Trial set for the next Court day vacated on the basis that there may have been a change of ownership of lands affecting the Claimant's locus Standi. The alleged possible change was based on the recent closing down of Petrotrin's operations and vesting of its assets in various entities pursuant to the Miscellaneous Provision (Heritage Petroleum, Paria Fuel Trading and Guaracara Refining Vesting) Act No. 17 of 2018. It was contended by the Defendants that the Property in dispute may now be owned by Guaracara Refining Company Limited or Heritage Petroleum Company Ltd ["Heritage"].

6. The NOA was an "11th Hour Application" pursuant to 27.9(1) (d) of the Civil Proceedings Rules 1998, as amended ["CPR "] which only came to the attention of the Court and Claimant on the morning of the Trial. Following on the Court's consideration of Affidavits filed by both sides and hearing of comprehensive oral submissions with authorities¹ from Counsel for the Claimant this application was withdrawn by Counsel for the Defendants. The Defendants were directed to pay the costs of the Claimant of the withdrawn NOA.

7. The factors considered included that there was no explanation given for the late 11th hour application, bearing in mind that the legislation vesting Petrotrin's Assets in other entities was enacted several months before on November 28, 2018. No evidence was presented that title had been transferred. Additionally, even if Petrotrin's locus in the matter could be questioned with merit, CPR 19.3(b) provides that this could not be the basis of failure of the Claim. The conduct of the parties was also a factor referred to by the Claimant and in particular the extent to which parties were ready for trial by filing Witness Statements. Finally, Counsel for the Claimant indicated that he had with

¹ 1. Fitzroy Robinson Ltd v Mentmore Towers et al [2009] EWHC 3070 (TCC)

2. Albon v Naza Motor [2008] WLR at 2380

3. Roopchand, Crisen, J.; Gulf View Medical Centre Limited v Tesheira, Karen C.A. CIV.P.136/2014

him representatives of Heritage prepared to confirm that proceeding with the instant Claim was authorised.

8. The second decision was on an Application that was mainly made orally on the Trial date but for which the relevant Rule was referred to in the March 29, 2019 NOA. It was an Application for an extension of time to file a Witness Summary for the 1st Defendant and for permission for him to be called as a Witness despite not having filed. This would have been the sole item of “evidence” before the Court as it relates to the five Defendants’ case. A grant of permission to rely on the Witness Summary would have allowed for the 1st Defendant to be sworn in as a Witness, give oral evidence –in chief based on the Summary and then be cross-examined.
9. CPR 29.13 (1) was cited by Counsel for the Defendants in the said NOA. However, in addition to there being no application in writing for the extension of time there was no written application for relief from sanctions as required by CPR29.13 (2).
10. The oral application was denied, with the consequence that the Defendants presented no evidence and their Counterclaim was dismissed. This decision on the oral application, which effectively left the Defendants without a witness to be called in Defence of the Claim as well, is the decision appealed by the Defendants.
11. The third decision delivered orally on April 1, 2019 was Judgement for the Claimant against the Defendants. This decision was made based on the Pleadings, Witness Statements and oral testimony of the Claimant’s Witnesses. The sole Defendant actually present at the Trial was the 1st Defendant. The Witnesses were cross-examined by the First Defendant in person and by Counsel for the 2nd to 5th Defendants. Thereafter, oral submissions were heard and taken into account before Judgement was delivered. Judgment was in favour of the Claimant in circumstances

where its evidence of Title was unchallenged in the pleadings and there was no evidence of adverse possession by the Defendants.

D. Issue Determined

12. On the decision appealed, the issue to be determined was whether based on the oral application made on the Trial Date relief from sanctions, an extension of time to file a Witness Summary of the 1st Defendant and permission for him to be called as a Witness should be granted.

E. Procedural History

13. Directions for Witness Statements were first given to the parties on March 6, 2018. The date for filing and exchange was set as July 27, 2018. The parties applied, by consent, for extensions of time which were granted to 27th September, then 29th October, 2018 and then 31st January 2019. Only the Claimant complied with the direction to file Witness Statements. On the deadline date Counsel for the Defendants applied for permission to file a Witness Summary of the 1st Defendant.

14. There was neither an application for an extension of time nor for relief from sanctions for breach of the deadline for filing of Witness Statements. The January 31, 2019 NOA was supported by an Affidavit of Counsel then on record for all the Defendants. He explained that the reason for seeking to file a Witness Summary was that he had difficulty contacting the 1st Defendant. The NOA indicated at paragraph (5) of the grounds that “a copy of the Witness Summary is filed alongside this Application.” However, no such copy was attached to the NOA received on the Court file.

15. Due to an administrative oversight, the January 31, 2019 NOA was not brought to my attention until March 26, 2019. As this was effectively four days before the Trial, leaving minimal time to set a hearing of the Application, I granted permission in Chambers. In so doing account was taken of the fact that the Claimant seemed not to have been taken by surprise. I formed this impression since although there was none

on the Court File, the Trial Bundles filed by the Claimant included a Witness Summary of the 1st Defendant.

16. I was of the view that the Defendants served a courtesy copy of the Draft Witness Summary on the Claimant and it had been included in the Trial Bundle based on agreement between the parties. The order of permission to file a Witness Summary was granted on March 26th 2019 and the Defendants were required to file the 1st Defendant's Witness Summary by the next day, March 27th, 2019.
17. The Defendants failed to comply with the March 26th order requiring that the Witness Summary be filed by the next day. All the Defendants save for the 1st Defendant failed to attend on the Trial Date.
18. The first matter addressed on the Trial date was the Defendants' application to adjourn the hearing, which as aforementioned, was dismissed. At that time the 1st Defendant sought permission to represent himself and the absent 2nd to 5th Defendants continued to be represented by Counsel.
19. When the matter of the failure to file the Witness Summary was raised by the Court, Counsel for the Claimant indicated that this was viewed as an element of conduct on the part of the Defendants that should be taken into account in dismissing the 11th hour application to adjourn the Trial date. Counsel noted that the Court had granted the Defendants' January 31, 2019 NOA seeking permission to file the Witness Summary despite the fact that there had been no application for relief from sanctions. It was not an NOA that the Claimant consented to. However, of more concern to the Claimant was the fact that even that order was not complied with.

20. Counsel for the Defendants then made submissions in support of an oral application for relief from sanctions and permission to call the 1st Defendant as a Witness. He explained that he had filed the Witness Summary on the same day that he applied for permission i.e. January 31, 2019. It appears from his submissions that this was based on an expectation that permission would be granted. In attempting to explain why the Court's order that the Witness Summary be filed was not complied with Counsel explained that he thought it was sufficient to have filed it before seeking permission.

21. In response Counsel for the Claimant pointed out that the reference in the Defendants' NOA to CPR 29:13 made clear that the Defendants were aware they had not complied with directions for the filing of Witness Statements. Accordingly, relief from sanctions was required. Counsel for the Claimant urged that the provisions of CPR 29.13 should be applied so that no Witness could be called for the Defendants.

F. Reasons for Decision

22. In all the circumstances it was my view that there was merit in the submissions of Counsel for the Claimant that the oral application made on the Trial date should not be granted. The Defendants were not granted relief from sanctions for failure to file Witness Statements or the Witness Summary and the 1st Defendant was not permitted to be sworn in as a witness.

23. Consequentially, there being no other witnesses for the Defence the Counterclaim was dismissed with costs to be paid by the Defendants to the Claimant. The Trial proceeded and on completion Judgement was awarded to the Claimant.

G. Order

IT WAS ORDERED that:

1. The Defendants' Application dated and filed 29th March 2019 is withdrawn with costs to be paid by the Defendant to the Claimant.
2. Oral application made by the Defendants is dismissed with no order as to costs.
3. The Defendants' Defence and Counterclaim filed on 14th June 2016 is dismissed with costs to be paid by the Defendants to the Claimant in the sum of Fourteen Thousand dollars (\$14,000.00) plus vat.
4. Judgment is awarded to the Claimant on the Claim with prescribed costs on the claim to be paid by the Defendants in the sum of Fourteen Thousand dollars (\$14,000.00) plus vat.

IT WAS FURTHER ORDERED ON THE CLAIM as follows:

- i. A declaration that the Claimant is owner of **ALL AND SINGULAR** that certain piece or parcels of land comprising approximately 0.9099.hs situated at the extension of Warner Road Point Fortin being a portion of larger parcel of land known as the Adventure Estate and situated comprising 272A OR and 08 P and more particularly shown area 1 A, 1 B, 2, 3 and 4 and colored green, red and yellow on the survey plan hereto annexed and marked as "A" (the lands).
- ii. An order that the Defendants their servants and or agents do deliver up to the Claimant vacant possession of the lands and an Order compelling the Defendants their servants and or agents to remove whatever structure, equipment and material that they have on the lands on or before 1st July 2019.
- iii. A declaration that the Defendants or either of them and/or their servants and/or agents are not entitled to enter upon and/ or to remain upon the lands except for carrying out the order made in sub-paragraph (ii).

iv. An injunction restraining the Defendants, their servants and or agents from entering upon and or remaining on the lands.

v. Nominal Damages for trespass in the sum of Twenty Thousand dollars (\$20,000.00) plus vat is to be paid by the Defendants to the Claimant.

IT WAS FURTHER ORDERED that the Defendants are to pay the Claimant's costs of application dated 19th May 2016 in the sum of Fifty-One Thousand dollars (\$51,000.00).

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Eleanor Joye Donaldson-Honeywell

Judge