THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017 - 00104

Between

Gloria Faustin

Claimant

And

Richard Paul

Defendant

Before Her Honour Madam Justice Eleanor Donaldson-Honeywell

Appearances:

Mr. Aaron Seaton and Ms. Daffodil Dvore Maxwell, Attorneys-at-Law for the Claimant
Mr. Rhyjell Ellis and Ms Carrie-Anne Griffith, Attorneys-at-Law for the Defendant

Delivered on June 22, 2018

JUDGEMENT

A. Introduction

1. This Case is one of three civil claims arising from a boundary dispute between the Defendant, Mr. Richard Paul and the Claimant, Ms. Gloria Faustin, concerning alleged encroachments on land owned by her family. In the instant Claim, the Claimant seeks relief for the Defendant's trespass to land, encroachment and nuisance in respect of a parcel of land in Maraval which the Claimant has owned as a tenant in common with her five siblings since February 12, 1994. The property is described as follows:-

"all and singular that certain piece of land situate at Maraval Village in the Ward of Diego Martin Trinidad comprising EIGHT HUNDRED AND FORTY-FOUR POINT FIVE SQUARE METRES (844.5m^2) being portion of the larger parcel of land described in the First Schedule of the Deed of Partition dated 12 February 1994 and registered as Deed No.14366 of 1996) and bounded on the North by the lands formerly owned by Simona de Freitas, on the South by the lands of George Aboud, on the East by the lands of Deniese Constantine and Albert Hobson and on the West by the lands of Mary Francisco and Marie Faustin, which said piece and parcel of land is owned by the Faustin Siblings referred to in the afore-stated Deed of Partition and said piece and parcel of land which is delineated and coloured pink on the survey plan dated 29 November 2016 and registered with the Lands and Surveys Division, and shown thereon as Lot No.4 (hereinafter referred to as "**the Lot 4 Property" or "Lot 4"**)."

2. The land was previously owned by the Claimant's father during which time the Defendant commenced residence in 1987 on the parcel of land that adjoins the northern boundary of Lot 4.

3. The Claimant seeks the following relief:

   a) A declaration that the Defendant has no legal or equitable right to enter upon, remain on, construct upon or in any way interfere with the Lot 4 Property;

   b) An order prohibiting the Defendant whether by himself, his servants and/or agents from entering, re-entering, remaining on, constructing upon, trespassing upon or interfering in any way with the Lot 4 Property and/or prohibiting the Defendant from interfering with the enjoyment of the Lot 4 Property by its owners, heirs, agents, licensees or the like;

   c) An order mandating that the Defendant pulls down, destroys and/or demolishes all structures including his fence, housing structure, additional construction works to his home, drainage material or the like that is presently trespassing upon the Lot 4 Property;

   d) Damages, inclusive of aggravated damages for trespass to the Lot 4 Property;

e) Damages for the erosion and disrepair of the Lot 4 Property caused by the nuisance created by the Defendant in placing his drainage system and material upon the Lot 4 property;

f) Legal Costs of pursuing this claim; and

g) Any further order which the Court finds fit and just.

4. Additionally, the Claimant originally claimed, in the alternative to the relief at c) above, that the Defendant pay to the owners such sums as they are willing to accept and agree to for the purchase of that part of Lot 4 that the Defendant had encroached upon. Parties agreed, during Case Management Conferences, to consider that alternative as a settlement option. The Claimant was directed to obtain a valuation of the alleged encroachment. Eventually, this option was not pursued as the Claimant does not have the requisite Town and Country planning approval to sustain an agreement to sell to the Defendant the land on which he has encroached.

B. **Issues and Decision**

5. As will be more fully explained in this Judgment, the issue as to whether there was an encroachment was determined by way of an agreed survey report which fully confirmed encroachments as alleged by the Claimant. According to the Claimant, on the pleadings as filed, there were no remaining issues to be determined. There was merit to that submission; however, additional issues raised by the Defendant in submissions were considered as follows. Whether:

a) The Claimant has locus standi to bring this Claim without establishing that she had the permission of all co-owners

b) The Defendant has satisfied the requirements for pleading adverse possession

c) There is sufficient evidence before the Court to establish the pleaded defence of Adverse Possession

d) The non-objection of one of the co-owners of Lot 4 to the Defendant's encroachment renders his continued encroachment lawful

e) Even if the court finds that there was no adverse possession, it would be unconscionable to order that the Defendant's encroaching structure be demolished based on the lengthy period wherein the Claimant failed to take action to stop his encroachments

6. My determination is that in relation to issues a) to d) the Defendant has failed to make out a successful Defense to this Claim. The Defendant has failed to prove that the Claimant had no locus standi and has neither fully pleaded nor provided credible evidence of his adverse possession. The fact that a co-owner may be agreeing that the Defendant can be permitted to encroach does not provide a basis for continued encroachment in the face of the claimant's objection. Accordingly, Judgment will be awarded to the Claimant. However, in deciding on the relief to be awarded I take into consideration the issue as to unconscionability raised by the Defendant.

C. Pleaded Case

7. In her Statement of Case the claimant pleads that there were four instances of encroachments by the Defendant as follows:

   a) Sometime after her father died around 2003 the Defendant constructed an extension to the easternmost part of his property that encroached on Lot 4.

   b) Sometime thereafter he put wire fencing on the western end of his property that encroached on Lot 4.

   c) In 2016, after the Claimant's son complained about the encroaching fence, the Defendant commenced further construction extending to the front of his house.

   d) In the latter part of 2016 a drainage facility with three PVC pipes was placed on the easternmost end of the Defendant's property extending over lot 4. It transfers waste water and other fluids onto Lot 4 thereby eroding the soil.

8. According to the Claimant, the Defendant was in the habit of working on these encroachments at night or when the owners of Lot 4 were abroad or otherwise absent from the land.

9. The Claimant makes clear in her pleadings that the Defendant's encroachments did not go unnoticed and efforts were made to have him discontinue his trespass. In particular

she says that on multiple occasions from 2003 onwards he was asked to stop. The last such request, as I have gleaned from an attachment to the Claimant's pleadings, was in December 2015. It was mentioned in a letter written by Attorneys hired by the Claimant's son. That letter dated June 13, 2016, was the final demand before the first of three related litigation Claims was filed. The June 13, 2016 letter refers to a December 2015 discussion when the Defendant is said to have agreed that if shown a survey proving the encroachment he would remove the offending structures.

10. The survey was obtained but the Defendant continued to encroach. Accordingly, by the June 13, 2016 letter, the Defendant was given the option to either purchase the land encroached upon or remove the encroachment, failing which legal means to remove the building materials and fence would be initiated.

11. The Claimant duly set out in her Statement of Case, the responses given by the Defendant to the demands that he remove the encroachments. By letter dated June 22, 2016 the Defendant's then Attorney-at-Law responded to the June 13, 2016 letter. She stated that her client's fence had been in place for 13 years but that he was willing to relocate it. In the same letter she raised an unrelated issue of a right of way, seeking to have the Defendant's access recognized.

12. Despite his Attorneys indication of willingness to remove the encroachments the Defendant commenced further extension of his property onto lot 4 in 2016. At that time the existence of his PVC pipes extending onto Lot 4 was also exposed. A picture of well advanced but clearly freshly in progress construction on the Defendant's home was attached to the Claimant's pleadings. There has been no dispute to the fact that the construction was ongoing when this Claim was filed. In fact, the Court attended at the site as part of the Case Management process herein and observed the new construction. It could clearly be seen to project further onto Lot 4 as depicted in the agreed Survey.

13. In addition to commencing renewed construction, the Defendant's further action after receiving the legal correspondence from the Defendant's son's Attorneys was to initiate legal proceedings concerning, inter alia, his alleged right of way. CV2016-03220 was filed by Richard Paul on September 27, 2016. The instant Claim was filed thereafter on January 10, 2017 and consolidated with that matter.

14. Eventually, the Christian Persad survey report ordered by the Court did not confirm the entitlement to a right of way over Lot 4 claimed by Mr. Richard Paul in CV2016-03220. A site visit was conducted with the parties and the claim concerning the right of way was compromised by the Claimant agreeing to make a path for the Defendant, whose alternate access to his otherwise landlocked property had been blocked by other land owners.

15. The instant Claim regarding unlawful encroachment continued despite the Court's encouragement that it should be settled. After conclusion of the hearing of this matter on December 7, 2017 and the filing of the written submissions on January 19, 2018 a third related Claim was filed. In this new Claim, Gloria Faustin's brother Clyde, challenges Gloria Faustin's son's right to occupy Lot 4 and contends that he, Clyde, agreed to Richard Paul's occupation of the encroached area onto Lot 4. After the third related matter was filed delivery of Judgment herein was delayed to encourage a global settlement. However, no agreement was reached as the parties indicated that only the third matter between the two siblings could realistically be settled.

16. Accordingly, the fact of an encroachment having been established by the survey, the process towards Judgement resumed to determine the remaining aspects of the Defence. The Defendant's initial case as pleaded at paragraph 2 of the Defence was that he did not accept the survey plan relied on by the Claimant to prove his encroachment.

17. However, the parties on the Court's direction engaged the services of Registered Land Surveyor, Christian Persad. By report dated April 5, 2017 he confirmed the encroachments alleged by the Claimant. On June 21, 2017 an order was made that the evidence of Christian Persad will stand as the sole expert evidence herein. Accordingly, the Claimant's case as to encroachment was proven as is now admitted by Counsel for the Defendant.

18. In the Defence there is the further allegation, however, at paragraph 10 that the Defendant undertook his renovations in the year 2000 and not 2003 as the Claimant contends. Further he says at paragraph 12 that the fence was put in place in the 1990s and he was never asked to remove it until June 2016. He says at paragraph 17 that the PVC pipes were always in existence extending beyond Lot 4 but they were exposed more recently when damaged during construction on a neighboring property. Thus by these paragraphs a sliver of alleged fact is pleaded that can be examined to see whether it sufficiently raises a limitation defence. It is based on this that the Defendant now argues that he is entitled to remain in possession on the land on which he has encroached.

D. <u>Evidence</u>

19. The parties were both cross-examined extensively. They each relied on a different neighbour as supporting witness. In addition, the Defendant called as his witness one of the Claimant's elder brothers, Clyde Faustin. He was the co-owner of Lot 4 who later on filed a Claim against his sister in which he further sought the interests of Mr. Richard Paul.

20. The Claimant, aged 80 at the time, was a convincing witness. Her testimony reflected her pleadings and was consistent with her Witness Statement. When pressed as to details of complaints made by herself and her family about the Defendants encroachments she admitted that it was her son who on various occasions complained to the Defendant on her behalf. Then after the Defendant commenced his litigation about the right of way in September 2016 she took a more active role by filing the instant Claim.

21. Melissa Harris, the neighbor born and resident next to the Defendant since 1984, also gave a credible account that supported the Claimant's case in certain material respects.

22. Ms. Harris testified that the Defendant gradually extended his property onto Lot 4 owned by the Faustins. She identified the land in question as Faustin lands based on her understanding that there was a 6-foot right of way on their lands that she and her family used. She said that passage was eventually fully blocked by the Defendant's construction. As a result, there was strong objection expressed to the Defendant by Ms. Harris and her family. On the Site Visit attended by the Court the said obstruction was visible and correlated with the survey map of the encroachment provided by Christian Persad.

23. There being no current dispute as to the encroachment, what was important and compelling about Ms. Harris's testimony was that she was able to pinpoint when the encroaching structure was evident. She said that it was in 2005 when a bedroom was added on and there were many extensions thereafter. As it relates to the fence she explained that it was in 2007 that the Defendant moved his fence forward after he received a survey report. That report has since been discredited. This evidence by Ms. Harris as to the 2007 date when the fence was placed where it now stands is uncontroverted. In fact, the Defendant himself stated at paragraph 17 of his Witness Statement that it was at that time that he moved the Fence further south.

24. Seemingly inconsistently, the Defendant says elsewhere in his Witness Statement that he has occupied the encroached area by fencing since 1987 and by construction since 1999 without objection from anyone. There was also no explanation in his Witness Statement and under cross-examination as to why his Attorney wrote on his behalf in June 2016 admitting that he had only built the fence 13 years before and agreeing to relocate it.

25. In speaking about the 2007 survey the Defendant testified that it was done by one Brian Moses. He claimed that the Claimant and all neighbours were present but did not object to the survey. However, in the attached copy of that survey there is no mention of any

neighbours' presence and ownership of Lot 4 by the Claimant and her siblings is omitted.

26. At paragraph 23 of his Witness Statement the Defendant says that he was never approached by the Claimant about the encroachment until after he filed his Claim about the right of way and obtained an injunction against her in September 2016. This belies the fact that the Defendant in fact received the Claimant's son's Attorney's letter demanding removal of the structures five months before that in June 2016.

27. Clyde Faustin, the Claimant's brother was the Defendant's witness. He testified that he has lived mainly abroad for over 30 years but visits Trinidad and Tobago. It was clear from his witness statement that he took umbrage with the fact that the Claimant commenced this Claim without consulting him as a co-owner of Lot 4.

28. He attempted to support the Defendant by testifying that the Defendant made his building extensions in the year 2000 and had his property fenced since 1987. However, Mr. Faustin gave no evidence as to the position of the fence in 1987 and how far out the construction extended in 2000. His testimony was limited to expressing the view that the Defendant has always occupied "the same yard space" with no objection raised by himself or his siblings. Under cross-examination he acknowledged that the encroachment to the extent that it now stands was not always there.

29. Mr. Faustin appeared to acknowledge that there has been some encroachment onto Lot 4 by the Defendant but said that he has no problem with it. Accordingly, he never objected to the encroachment.

30. The Defendant's final witness was Greta Holder, a neighbour who had resided in the vicinity for 50 years. She also said that the Defendant always occupied the same yard space. She did not specify the dimensions of that occupation. However, under cross-examination she admitted she had seen the survey that shows his encroachment and also reveals that she herself has encroached beyond her boundaries.

31. As it relates to the Nuisance Claim there was neither a specific pleading as to loss sustained nor any evidence led. Likewise, there were no particulars of loss suffered as a result of the Defendant's encroachment.

E. Analysis of Evidence and Legal Submissions

Locus Standi

32. Although much was made of this issue by Mr. Clyde Faustin and Counsel for the Defendant during the Trial, there was no written submission by the Defendant on the point. In any event it is clear, as fully explained by Counsel for the Claimant in his written submissions, that the Claimant was entitled as a tenant-in-common to bring this Claim without joining the other tenants-in-common. This position is well stated by Will J in **Roberts v Holland [1893]1 QB 665** at page 667. Accordingly, this issue is determined in favour of the Claimant.

Adverse Possession pleadings

33. The Defendant's written closing submission focusses mainly on the question whether, pursuant to **Section 3 of the Real Property Limitation Act, Chap. 56:03** the Claimant is statute barred in bringing this Claim. The section provides:

"No person shall make an entry or distress, or bring an action to recover any land or rent, but within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within sixteen years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

34. Counsel for the Claimant points out however, that the issue was not sufficiently pleaded in the Defence. In fact, initially the position of the Defendant was that he had placed the fence and extended his construction within his own boundary. Hence, his Defence as pleaded did not underscore the issue of adverse possession.

35. The dicta of Lord Griffiths in **Ketterman and Ors v Hansel Properties and Ors [1987]AC 189** is cited by the Claimant where is said at page 219 that:

"*A defence of limitation permits a defendant to raise the procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid him meeting a stale claim.* ***The choice lies with the defendant and if he wishes to avail of***

the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar *but prefers the court to adjudicate on the issues raised in the dispute between the parties.*" [Emphasis Added]

36. Guidance on the issue was also cited from the Judgement of Mendonca JA in **First Citizens Bank Ltd v Shepboys and anor. Civ App No. P231 of 2011**. He explained at paragraphs 26 and 28 that:

"*If the limitation issue is not raised by the defendant, it is not appropriate for the Court to determine whether the action is time barred……..the clear inference is that if the statute of limitations is not pleaded by the defendant in his defence it is not an issue in the case"*

37. On a review of the Defence there is merit to the Claimant's submission that there is no express pleading of adverse possession. In particular the Defence makes no reference to the particular statute of limitation relied on for adverse possession or the fact that the Defendant relies on that Statute as a defence.

38. Counsel for the Claimant goes further by saying that the Defendant pleaded no facts to show that the Statute applies. This is not so as the Defence outlines the basic alleged fact that the Defendant had fenced his property in the late 1990s as stated at paragraph 12 of the Defence. As it relates to the home renovations, he does not concede in his Defence that the construction was around 2003. Instead at paragraph 10 he says he undertook renovations in the year 2000.

39. In light of the foregoing, while accepting as argued by the Claimant that a limitation Defence was not expressly pleaded but was an afterthought, I will give the Defendant's adverse possession claim consideration based on the alleged timeline pleaded in the Defence. This does not prejudice the Claimant's case or allow for trial by ambush as suggested by Counsel for the Claimant because the Claimant had the opportunity to address these pleadings in evidence of her version of the timeline, which she did.

<u>Adverse Possession Evidence</u>

40. In closing submissions Counsel for the Defendant advocated his client's position as having had his property fenced since 1987 and all extensions built within the confines of the pre-existing fence. While the existence of a fence since 1987 was the evidence

presented by the Defendant and his witnesses it was clearly inconsistent with his pleading as to constructing the fence in the 1990s.

41. Furthermore, the submission by Counsel for the Defendant that the fence always remained in the same position is not borne out by either the Defendant's own evidence or the letter sent by his Attorney to the Claimant's son in 2016. The Defendant's evidence at paragraphs 14 to 17 of his witness statement is that in June 2007 after receiving a survey from a Mr. Moses he moved his fence further south to meet what he then believed was his boundary. The letter from his Attorney pinpointed the existence of the fence to having been in place for 13 years prior to 2016. Thus her position was that it was constructed around 2003, which accords with the Claimant's case.

42. What is more important is that even if a fence was there since 1987 as the Defendant's witnesses belatedly state, the Defendant has himself confirmed that it was not always at the position where it is now. It was moved to that position in 2007. This evidence from the Defendant which is fatal to his own version of the timeline is corroborated by the Claimant's witness Ms. Harris.

43. In all the circumstances the Defendant's evidence as to the timeline of his alleged adverse possession of the part of Lot 4 where his fence now stands and his construction is ongoing, is not credible. Accordingly, I find in favour of the Claimant that the Defendant's encroachment, by way of the fence and extensions to his home, had not been in existence on Lot 4 for 16 years at the time of filing of this Claim. His partially pleaded limitation defence fails. The Claim that the Defendant has by these encroachments trespassed on the Claimant's land remains unanswered by the attempt to prove adverse possession.

Non-objection of co-owners to the adverse possession

44. The fact that the Claimant's brother gave evidence that he had no problem with the encroachment does not protect the Defendant by allowing for him to continue his trespass. This is so as a matter of procedure because it was not a pleaded point in the Defence. In accordance with **Part 10.5(1) and 6(1) of the Civil Proceedings Rules, 1998** the Defendant ought to have included this point in his Defence. Having failed to do so he is not entitled to rely on it. It ought not to be considered as the Claimant had no opportunity to file a Reply pleading to this new issue.

45. In any event, there is no merit substantively to this point as a Defence. Counsel for the Claimant cites **Dingwall and Ors v Curtis Wilson CV2012-03945** where Boodoosingh J refers to the St. Lucian Court of Appeal case **Ulysses v. Estephane,**

Magisterial Civil Appeal No. 4/1975, at page 2. In that case Justice of Appeal St. Bernard stated as follows:

"*Tenants in common have unity of possession and each tenant is as much entitled to possession of any part of the land as the others. Their occupation is undivided and neither party can point to any particular part of the land as his own to the exclusion of the others. It seems to follow therefore that one co-owner cannot rent a particular part of the land to the exclusion of the others without their consent, but, he may, in my view, transfer his rights in the common property to another and the transferee stands in his shoes and may do all such things on the land as the co-owner is able to do*."

46. It is clear from the foregoing that as a tenant in common Mr. Clyde Faustin would have no legal right to take possession of any part of Lot 4 to the exclusion of the Claimant or the other tenants-in-common. Accordingly, he does not have the right to give exclusive possession of the encroached area to the Defendant.

47. In conclusion, neither this point nor any of the other issues raised by the Defendant in written submissions provides an answer to the Claimant's Claim. Judgement will therefore be awarded granting the injunctive relief prohibiting the Defendant's continued trespass on Lot 4.

Unconscionability

48. As aforementioned I will consider the final point made by the Defendant as to unconscionability as it can be seen as relevant to deciding on the details of relief to be granted.

49. Counsel for the Defendant highlights in his submission that "*under cross examination, the Claimant admitted that upon seeing the extensions being conducted by the Defendant, she took no action against him and that prior to bringing these proceedings that it was only her son that spoke to the Defendant about the extensions and any possible encroachment. The Claimant further stated that it was only until she had a survey done in 2016 that she confronted the Defendant regarding the encroachment*."

50. There was in fact an apparent lackadaisical approach by the Claimant to the Defendant's encroachments. It is also clear that until 2016 the Defendant thought that he was building within his own boundaries. It is unfortunate that, due to lack of planning permission and the fact that the structure blocks a right of way used by other

neighbours, an order cannot be made allowing the Defendant to purchase the land encroached upon. That would have been the fairest outcome. However, as that is not possible I will make provision for a lengthy period within which the removal of the structures must be accomplished.

There were no submissions regarding either the nuisance claim or the alleged damages sustained due to the trespass. In these circumstances and taking into account the Claimant's laches in addressing the encroachment over the years, I will make no award of damages to be paid by the Defendant to the Claimant.

F. Order

51. It is hereby ordered as follows:

a) It is declared that the Defendant has no legal or equitable right to enter upon, remain on, construct upon or in any way interfere with the Lot 4 Property;

b) The Defendant is ordered to pull down, destroy and/or demolish all structures including his fence, housing structure extension, additional construction works to his home, drainage material or the like that is presently trespassing upon the Lot 4 Property and this order must be complied with by March 22nd 2019 ["the Compliance date"].

c) The Defendant is prohibited forthwith from otherwise interfering with the enjoyment of the Lot 4 Property by its owners, heirs, agents, licensees or the like;

d) After the compliance date, the Defendant is prohibited whether by himself, his servants and/or agents from entering, re-entering, remaining on, constructing upon, trespassing upon or interfering in any way with the Lot 4 Property.

e) The Defendant is to pay forthwith the Claimant's prescribed costs in the amount of $14,000.

f) Liberty to apply.

Delivered on June 22, 2018

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Eleanor Joye Donaldson-Honeywell

Judge.

Assisted by Christie Borely JRC I