

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2012- 00772

BETWEEN

KELVIN FIELD 1st Claimant
DOOLARIE RAMCHARAN 2nd Claimant

AND

PROBHADAI BISSESSAR 1st Defendant
SOOKDEO RAMCHARAN 2nd Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. L. Elcock for the Claimants.

Mr. C. Blaize instructed by Ms. M. Blaize for the First Defendant.

Second Defendant appears in person.

RULING (ORAL)

1. This is application by the First Defendant to have the claim form and statement of case struck out as (i) disclosing no reasonable cause of action; (ii) being res judicata; and (iii) an abuse of the process of the court. The Civil Proceedings Rules (“CPR”) does not use the words no reasonable cause of action but rather enables a court to strike out the statement of case or part of the statement of case if it appears to the court that the statement of case or the part to be struck out discloses no grounds for bringing the claim: **Part 26.2(1)(c)**. Similarly the rule does not contain the words res judicata but rather permits the court to strike out the statement of case or

part thereof in circumstances where it is an abuse of the process of the court. It is not in dispute however that under these rules to pursue a claim in circumstances where res judicata applies can result in the claim being struck out for being an abuse of the process of the court.

2. In the circumstances I intend to treat this as an application to have the claim form and statement of case struck out as (i) disclosing no grounds for bringing the claim; and (ii) being an abuse of the process of the court. In neither case will a court employ this procedure lightly but only after being satisfied that, in the case of no grounds being shown, the case as pleaded has no chance of success and, with respect to an abuse of the process, the Claimant is guilty of using the process for a purpose or in a way significantly different from its ordinary and proper use or in circumstances where the process of the court is misused and employed not in good faith and for proper purposes but as a means of vexation or oppression or for ulterior purposes: **Halsbury's Laws of England, Fourth Edition Volume 37, page 322 paragraph 434.**

3. In this action the Claimants, Kelvin Field and Doolarie Ramcharan (hereinafter called "the First Claimant" and "the Second Claimant" respectively) are pursuing reliefs with respect to three different causes of action. While the First Defendant has filed a defence to the action the Second Defendant, the husband of the Second Claimant, is not represented by an attorney and has indicated his intention not to file a defence.

4. The statement of case reveals that the First Claimant brings the action as the landlord of the First Defendant of a parcel of land ("the first parcel of land"). The Second

Claimant brings the action as the occupier of another parcel of land which adjoins the first parcel of land (“the second parcel of land”).

5. The first cause of action concerns the tenancy held by the First Defendant in the first parcel of land. In this regard the Claimants seek two declarations (i) that the First Defendant is the tenant of the first parcel the size and the boundaries of which are temporary and cannot and will not be fixed unless determined by the First Claimant and (ii) that the parcel of land is bounded by a public road which is the only access to the said land.

6. The second cause of action concerns a consent order made between the Defendants herein in High Court action number 84 of 2001. With respect to this consent order the Claimants seek two types of relief the first is to set aside the order and the second to declare the consent order null and void and unenforceable as against them. The third cause of action is in trespass. In this regard the Claimants seek against the First Defendant damages for trespass and mesne profits.

7. For the purpose of this application an examination of the history of the consent order made between the Defendants is crucial. By High Court action number 84 of 2001 the First Defendant sought as against the Second Defendant, among other relief, declarations that she was (i) the lawful tenant of a parcel of land (ii) the owner of a two-storey dwelling house situate on the said lands and (iii) entitled to the use of a driveway 50' x 20' linking the second parcel to Upper Seventh Avenue Extension.

8. By that action the First Defendant claimed that the Second Defendant was in the occupation of a portion of land adjoining the land claimed by her on its Northern boundary. The First Defendant further claimed that the Second Defendant by, among other things, the erection of a fence wrongfully denied her the use of an access road linking her land to Upper Seventh Avenue Extension. The Second Defendant while admitting his occupation as tenant of a parcel of land denied the existence of the access road or that First Defendant or her predecessors in title were in the occupation of the parcel of land claimed by her.

9. By an order made by consent on 8th November 2002 the action was compromised. By that order:

1. the Second Defendant agreed to (i) demolish the existing fence on the Northern boundary of the First Defendant's property and to erect a chain link fence some 12 feet from the Northern side of the First Defendant's dwelling house and (ii) build his own access road to his premises; and
2. The First Defendant agreed to pay the Second Defendant the sum of \$7,500 for his 1/8 share and interest in the dwelling house on the subject property in full and final settlement of all claims against the estate of the deceased Ramcharan.

10. By consent on the 20th day of July 2004 the consent order was varied to provide for (i) a survey of the parcel of land and (ii) the First Defendant's driveway on the Northern entrance to measure 12 1/2 feet and from the Western boundary of Young's land 15 feet in a north-south direction and from the First Defendant's house post in an east to west direction a distance of 12 feet and (iii) the Second Defendant to construct a fence along those boundaries.

The orders of the 8th November 2002 and the 20th July 2004 are hereinafter together referred to as “the consent order”. By an order made on the 4th November 2011, upon an application by the First Defendant to commit the Second Defendant for his contempt in failing to comply with the terms of the consent order, Justice Harris committed the Second Defendant to fourteen (14) days imprisonment suspended for two (2) months pending his compliance with the consent order.

11. By HCA No 1754 of 2004 the Second Defendant and the Second Claimant herein commenced an action against the First Defendant seeking (i) an order that the consent order be declared null and void and of no effect against the Second Claimant and consequently not enforceable against the Second Defendant; (ii) that the consent order be set aside as having been procured by the undue influence over the Second Claimant of his attorney at law (iii) further or in the alternative on the ground that the Second Defendant initialled a draft consent order in reliance upon the false representations made to him by said attorney at law that it was a document that would enable him to fully defeat the claim of the First Defendant in the said High Court action and as a consequence the Second Defendant did not initial the said draft consent order and never intended to do so; (iv) a declaration that the Second Defendant and Second Claimant are jointly the lawful tenants of a parcel of land specifically described in the pleading and the owners of a dwelling house on the said parcel of land and (v) a stay of execution of the consent order.

12. On 20th June 2004 by way of a summons the Second Claimant and Second Defendant sought to stay the execution of the consent order. This summons was struck out on

28th September 2004. No further steps have been taken in this action. This action therefore stands dismissed.

13. By High Court action number 2755 of 2004 the Second Claimant and Second Defendant commenced another action this time against the First Defendant and Atiba Bostic seeking the same relief as in High Court action number 1754 of 2004. This action was discontinued by a notice of discontinuance filed on 19th January 2005.

14. In this regard therefore it is clear that by these latter two actions the Second Claimant and the Second Defendant were seeking to set aside the consent order and raise at least one of the claims that was compromised in the first action.

Does the statement of case disclose any grounds for bringing these claims?

15. The justification for dismissal under this rule rests on the idea that no further investigation into the facts as pleaded could provide any appreciable assistance to the task of arriving at a correct outcome: **Zuckerman on Civil Procedure page 248 paragraph 8.35.**

The consent order

16. By this action the Claimants seek to set aside the consent order on the ground that it was obtained by fraud and/or illegality and/or misrepresentation on the part of the First Defendant. In my opinion the Claimants are not entitled to do so. In the first place neither Claimant was a party to the order. Secondly, and in any event no particulars of fraud or any

allegations of illegality on the part of the First Defendant with respect to the obtaining of the consent order have been alleged in the statement of case.

17. While paragraphs 20 to 23 of the statement of case raise allegations of misrepresentation by the First Defendant the allegations are in respect to representations made to the Second Defendant. To found a case in misrepresentation, fraudulent or otherwise, a Claimant must establish that the representation was made to the Claimant with the intent to induce the Claimant to act on it and in fact the Claimant has acted on it to his /or her detriment: **Halsbury's Laws of England, Fourth Edition Reissue Volume 31, page 492 paragraph 778**. There is no allegation in the statement of case of any representation made by the First Defendant to either of the Claimants. It follows that there is also no plea with respect these Claimants acting to their detriment as a result of any representation. The essential elements of this cause of action have therefore not been pleaded.

18. In these circumstances insofar as the case before me seeks to set aside the consent order on the ground of fraud, illegality and misrepresentation it is clear that this claim has no chance of success. In the circumstances this claim must fail as disclosing no grounds for seeking this relief. In my opinion therefore, insofar as this action seeks to set aside the consent order those parts of the statement of case must be struck out.

Trespass

19. The basis of the case presented by the statement of case is that the trespass occurred with respect to the parcel of land rented to the Second Claimant and Second Defendant.

The law with respect to trespass is clear it is an injury to a possessory right. In the circumstances the proper Claimant is the person who was or is deemed to have been in possession at the time of the trespass. An owner of land subject to a tenancy therefore cannot maintain an action in trespass since “a mere right of property without possession is not sufficient to support an action in trespass: **Halsbury’s Laws of England, Fourth Edition Volume 45, page 637 paragraph 1396**. In the circumstances it is clear that the First Claimant cannot pursue this cause of action.

20. In so far as the statement of case is concerned the allegations with respect to trespass are solely against the First Defendant. The Claimants plead that the trespass commenced in January 2012, when the First Defendant wrongfully took possession of what is described as “the newly identified lot”. From the statement of case it is clear that the establishment of what the Claimants described as this newly identified lot was as a result of the consent order.

21. Further the First Defendant's occupation or possession of the newly identified lot was pursuant to and in accordance with the consent order and commenced when the Second Defendant was compelled by virtue of the order of Mr. Justice Harris to comply with the order. This is clear from the relevant pleas in the statement of case. The consent order remains until set aside a valid and enforceable order of the court. In circumstances the First Defendant cannot be said to be in the wrongful possession or occupation of the land. In these circumstances it would seem to me that insofar as the Claimants seek orders based on trespass there are no grounds for bringing such a claim.

Abuse of the process of the court

22. The First Defendant submits that it will be an abuse of the process of the court to allow the Claimants to pursue these claims. The question of the abuse of process of the court is much wider than *res judicata simpliciter*. In this regard the court has a wide discretionary power under the rules and in its inherent jurisdiction to protect its processes from being “undermined by disruptive oppressive, or otherwise inappropriate use of court procedures”. Zuckerman in his book on Civil Procedure and Practice describes this jurisdiction as open ended and capable of being invoked in any situation: **Zuckerman page 413 paragraphs 10.171 and 10.172.**

23. It is clear that one of the main purposes of this action, if not the main purpose, is to set aside the consent order obtained in proceedings in which neither Claimant was a party. This is despite the fact that according to the statement of case both Claimants were aware of the action; were both present in the courtroom at the time of the entry of the consent order and in fact the First Claimant admits participating in the process to the extent of filing an affidavit.

24. The question here is what is the effect of these facts. Some assistance in this regard can be obtained from the statements of Lord Denning in the Privy Council decision in **Nana Ofori Atta II Omanhene of Akyem Abuakwa and Another v Nana Abu Bonsra II as Adansehene and as representing the Stool of Adanse and Another [1957] 3 All ER 559**. In that case the appellant was estopped from raising the question of his title to the lands as a result of his taking no part in previous proceedings where the matter to be determined was the same.

25. In arriving at their decision, the Court applied what it considered to be an exception to a general rule of law:

“The general rule of law, undoubtedly, is that no person is to be adversely affected by a judgement in an action to which he was not a party because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a “privity” as he is called, is bound equally with the parties, in which case he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgement, in which case he is estopped by his conduct.”: **per Lord Denning at page 561 paragraphs C and D.**

26. Their Lordships recognised three types of conduct which would result in a party being estopped from litigating that the issue all over again: (i) active participation in the proceedings; and in this regard Lord Denning gives the example of a tenant sued for trespass on his neighbour’s land and who defends the suit on the strength of his landlord’s title and by the direction and authority of the landlord. According to Lord Denning, if the tenant loses the action the landlord would not be allowed to re-litigate the title all over again by bringing an action in his own name; (ii) taking an actual benefit from the judgement in the previous proceedings and (iii), as was the case before them, of standing by and watching the proceedings fought out or at most giving evidence in support of one side or the other.

27. The conclusion of the court was that in all three situations a party would be estopped by reason of that conduct from relitigating the issues. Insofar as the Privy Council's decision in that particular case was based on a practice in the West African courts by which any person having an interest may make himself a party to this suit by intervening I refer to **Order 15 of the Orders and Rules of the Supreme Court of Judicature 1975**, which allows a person with an interest in a dispute to apply and be joined as a party.

28. In my view it is clear that in the instant case both Claimants are guilty of conduct which falls into one or the other category referred to in the West African case. With respect to the Second Claimant it cannot be disputed that she is a privy of the Second Defendant, as joint tenants their interests are the same. And while it may be debatable whether she received a benefit from the consent order the statement of case confirms that she stood by and watched the proceedings being fought out between the First and Second Defendants. In the case of the First Claimant he admits his participation in the action. In the statement of case he states that in that action he expressly denied and rejected the claims of the First Defendant to the alleged right-of-way and expressly upheld the right of the Second Defendant to occupy and build his new house on the property exactly as and where it was being built.

29. The fact that the action was compromised by way of a consent order is in my opinion irrelevant. See **Zuckerman page 815 paragraph 24.69**. Both Claimants had the opportunity to seek to be joined in the action and participate in its conclusion.

30. From the history of the proceedings it is painfully clear that this is not the first attempt by the Second Claimant or indeed the Second Defendant to set aside this order. This brings me to the participation of the Second Defendant in this matter. There are no allegations or case made out against the Second Defendant. Interestingly, according to the claim form and statement of case, neither do the Claimants seek costs against the Second Defendant. From his limited participation in these proceedings and his active participation in the earlier proceedings it is clear that this Defendant is a Defendant only in name and in fact his position is the same as that of the Second Claimant.

31. The statement of case does not suggest any reason for making the Second Defendant a defendant in these proceedings. If it were that the Claimants are relying on Part 19.4 of the CPR in this regard the statement of case ought to say so. In the absence of such a plea and given the position taken by the Second Defendant in the earlier proceedings and before me I can only conclude that to pursue a case against the Second Defendant in these circumstances is an example of an inappropriate use of the court's process and solely for the purpose of attacking the consent order.

32. Further paragraph 10 of the statement of case contains allegations of undue influence over the Second Defendant on the part of the attorney who acted for him in the first action. This attorney is not a Defendant in this action. In my opinion these allegations are scandalous and in the context of this case irrelevant. The allegations have no connection to any relief sought; they are serious allegations made against a person is not a party to the action; they are allegations made by persons who were not parties to the action and made in proceedings

brought against the very person whom they allege was unduly influenced. Further these allegations were also made in proceedings which for some reason were not pursued. In my opinion the process of the court ought not to be used in such a manner.

33. The joinder of the Second Defendant apart, it is clear from an examination of causes of action and the reliefs sought that there is no unity of interest between the Claimants nor, save perhaps in so far as it deals with the consent order, are the causes of action related to the same set of facts. The Second Claimant has no interest in law in the declarations with respect to the tenancy sought by the First Claimant nor the First Defendant in the claim in trespass. Insofar as it may be suggested that both Claimants are in fact equally interested in the consent order it can just as easily be said that, in any event, they are both equally estopped from disputing and denying it. The effect of this estoppel is that not only are the Claimants unable to set aside the order, but they will not be able to allege that, insofar as they are concerned, it is null and void and of no effect.

34. While I accept that when the dust clears it may very well be that the First Claimant may have a valid cause of action against the First Defendant with respect to the declarations sought as to the boundaries of the tenancy and whereas I have the discretion to order a person to cease to be a party and, pursuant to Part 26, strike out parts of the statement of case the issues and the parties as pleaded by the statement of case are so intertwined and the pleading so verbose that in my view, it borders on the prolix.

35. In the circumstances I am of the opinion that no useful purpose would be served in engaging in an exercise geared towards saving these proceedings to preserve the declaratory relief sought with respect to that single cause of action which may itself be affected by the estoppels arising from the consent order. In any event a declaration remains a discretionary remedy and will not generally be used to determine academic or hypothetical questions: **Halsbury's Laws of England, Fourth Edition Volume 37, page 192 paragraph 253.**

36. For these reasons I am satisfied that to allow the Claimants to pursue this action would be an abuse of the process of the court. To pursue this action will allow the Claimants to use the process for a purpose or in a way significantly different from its ordinary and proper use. I am of the opinion that in the instant case the process of the court has been misused and employed not in good faith and for proper purposes but as a means of vexation or oppression or for ulterior purposes.

37. In all the circumstances of the case therefore this action is struck out as being an abuse of the process of the court.

Dated this 28th day of September, 2012.

Judith Jones
Judge