

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2008-00924

BETWEEN

IDORINE GEORGE

Claimant

AND

CYNTHIA TAYLOR

Defendant

Before: Master Margaret Y Mohammed

Appearances:

Ms Chrislyn Moore instructed by Ms J Furlonge for the Claimant

Dr C Seepersad for the Defendant

DECISION

FACTUAL BACKGROUND

1. On July 8, 2011 I dismissed an application by Cynthia Taylor (“the defendant”) to join an ancillary defendant pursuant to Part 18.4 Civil Proceedings Rules (“the CPR”) and ordered the defendant to pay Idorine George (“the claimant”) the costs of the

application which I assessed in the sum of \$5,500. In order to appreciate my reasons for this decision it is necessary that I set out the factual background of the application.

2. On December 5, 2003 the claimant filed an action under the Rules of the Supreme Court 1975 ("the RSC") against the defendant claiming a declaration that the claimant is the statutory tenant of a parcel of land ("the said land") situate at Lucas Estate, Marie Road, Lady Young Road, Morvant and the owner of a 3 bedroom dwelling house situated thereon. The claimant also claimed damages for trespass, for conversion and/or detinue and costs. The claimant filed her statement of claim on March 24, 2004.
3. The defendant filed her defence and counterclaim on December 8, 2005 where she denied the claimant's claims and instead counterclaimed that she was one of the owners of the said land which was conveyed by Berthel Lydersey Lucas ("Berthel") and Erica Lucas ("Erica") to the defendant, Charmaine Taylor and Abigail Taylor by deed dated January 24, 2001 and registered as DE 200100239633D001.
4. In response, the claimant filed her reply and defence to counterclaim on February 9, 2006 where she claimed in the alternative that even if indeed the said land was sold to the defendant it was subject to the existence of the statutory tenancy of the claimant.
5. The matter was set down for trial on March 16, 2007 and it was transferred to the CPR pursuant to Part 80.3(1)(a). A notice was issued on March 18, 2008 by the court office setting out the CPR case number, the Master who was assigned to conduct the case management conference ("the CMC") and scheduled the first hearing of the CMC on April 15, 2008.
6. According to the court's records, on April 15, 2008, at the first hearing of the CMC, only the attorney for the claimant appeared. He indicated to the court that his client was bedridden and that she was willing to settle this matter.

7. At the second hearing of the CMC, on June 17, 2008 both parties were represented and the attorney for the claimant indicated to the Master that he was not in receipt of any response to his settlement proposal to the defendant.
8. The CMC was next heard on November 10, 2008 where both parties were represented and the Master gave directions for the parties to file and serve their respective list of documents, bundles of documents and witness statements on or before February 16, 2009.
9. At the hearing of the CMC on March 9, 2009 the attorney for the claimant informed the court that no settlement had been reached and that the attorney for the defendant was not in court due to illness.
10. On April 28, 2009, both parties were represented before Master Paray- Durity where she granted the defendant relief from sanctions and extended the time for the filing of the witness statements of Cynthia Taylor and Carlton Taylor, list of documents to March 6, 2009 and to file her bundle of documents on or before May 13, 2009. Time was also extended for the claimant to file her bundle of documents and witness statements to June 8, 2009. The defendant had also filed an application on March 6, 2009 ("the March 2009 application") to join Erica as a third party. In support was an affidavit of Dr Charles Seepersad, attorney for the defendant. The Master did not deal with this application.
11. Between the period June 15, 2009 to April 18, 2011 further CMCs were held namely on June 15, 2009, November 23, 2009, November 30, 2009, March 23, 2010, June 14, 2010, November 18, 2010, March 3, 2011, March 24, 2011 and April 18, 2011. During this period, Mr Keith Scott, a surveyor was appointed by the court pursuant to Part 33 CPR to conduct a survey of the subject lands. Mr Scott's report was submitted on October 25, 2010. The Master also extended time for the parties to comply with her initial directions.

12. At the 14th hearing of the CMC, on May 5, 2011 the parties informed me that this matter could not be settled. The claimant with the consent of the defendant was granted relief from sanctions for her witness statements filed on July 30, 2010 and permission to serve them on or before May 9, 2011. Attorney for the defendant also informed the court that the March 2009 application to join Erica as a third party was still outstanding. The CMC was then adjourned to June 9, 2011 to deal with the March 2009 application.
13. In the intervening period, on June 3, 2011 (“the June 3, 2011 application”), the defendant filed another application for permission of the court to join Erica this time as an ancillary defendant. In support of this application was an affidavit of the defendant, Cynthia Taylor (“the Cynthia Taylor affidavit”). At the next hearing of the CMC on June 9, 2011 the claimant sought and was granted permission to file and serve an affidavit in reply on or before June 16, 2011 which she complied with.
14. On July 1, 2011 the defendant withdrew the March 2009 application and instead proceeded with the June 3, 2011 application.

ISSUE

15. The broad issue which arose for me to determine was whether I should permit the defendant to join Erica as an ancillary defendant at this stage of the proceedings. The 2 questions which emerged as a result of this broad issue were : what was the significant change in circumstances that the defendant relied on to make it necessary to permit the change and even if the defendant succeeded on the first limb, did this come about after the first CMC.

THE CYNTHIA TAYLOR AFFIDAVIT

16. In her affidavit for permission to join Erica as an ancillary defendant, the defendant stated that one of the owners of the said land Berthel passed away some years ago and she had been informed that Berthel's sister, Erica had also died. She also stated that she had purchased the said land from the Lucas family and that she was aware that Berthel and Erica owned the subject lands. Her attorney made attempts to trace Erica through Messrs Gopeesingh, Martineau, Edwards and Company, attorneys at law who prepared the deed of conveyance from the Lucas family to her and was informed that the firm was no longer acting on behalf of the Lucas family. All efforts to trace Erica failed and she believed that Erica had died. Recently she got information that Erica was alive and living in St James. Erica is advanced in age but is in good health. She was aware of the sale of the said land by the Lucas family to the defendant and he has a good working knowledge of the developments in this case.

17. According to the defendant, Erica also offered to assist her by agreeing to be joined as a party to this action so that Erica can give details of the tenancy which existed in relation to the said land and to clarify the Lucas's family position in this matter. Erica also informed the defendant that the tenancy of the claimant was abandoned by Julian George sometime after 1989. Julian George died in 1990-1991. The defendant believed that without Erica's evidence the court would be deprived of critical evidence without which justice cannot be done to the parties in this matter.

THE AFFIDAVIT IN RESPONSE

18. The claimant's affidavit in opposition stated primarily that the June 3, 2009 application was made some 3 years and 2 months after the first CMC, the defendant had been a party to these proceedings since inception and that the defendant had not filed an

application pursuant to Part 26.7 to be granted relief from the implied sanction attached to his application.

THE CPR

19. Part 18.4 sets out the procedure for making an ancillary claim other than a counterclaim. The relevant parts read:

- (1) A defendant may make an ancillary claim without the court's permission, if the ancillary claim is issued before the date of the first case management conference.
- (2) Where paragraph (1) does not apply an ancillary claim may be made only if the court gives permission.
- (3) An application for permission to make an ancillary claim may be made without notice unless the court directs otherwise.
- (4) The court may give permission at a case management conference.
- (5) The court must not give permission after the first case management conference to any person who was a party at the time of the case management conference unless satisfied that there has been a significant change in circumstances which became known after the case management conference.

20. In the instant case, the following appeared not to be in dispute namely: (a) the reference to "CMC" in sub rule (5) was interpreted as the first CMC; (b) the first CMC was on April 15, 2008; and (c) the defendant was a party at the time of the first CMC.

21. Having examined Part 18.4 I was of the view that this is a self-contained rule and as a consequence I did not agree with attorney for the claimant that the provisions of Part 26.7 commonly referred to "the relief from sanctions provision" applied. To me Part 18.4 allows a defendant to make an ancillary claim anytime before the first CMC but if he wishes to do so after the first CMC there is no implied sanction, but rather he must overcome the 2 hurdles set out in sub-rule (5). The 2 hurdles are to convince the court

there has been a significant change in circumstances and secondly that the change became known after the first CMC. I will now deal with the 2 limbs which the defendant must overcome under Part 18.4 (5).

22. Part 18.4 (5) refers to “significant change in circumstances” and not merely as a “change in circumstances” as in Part 20.1(3)¹. In **Rajesh Chitta v Point Lisas Industrial Port Development Corporation Ltd**² Pemberton J in examining Part 10.6 which deals with permission to amend a defence and where the test is also a “significant change in circumstances” was of the view that the defendant has a higher threshold, than that under Part 20.1 to meet in order to be granted permission by the court. I agree with this interpretation and it is therefore not unreasonable for me to assume that the threshold under Part 18.4 (5) is higher than that under 20.1 (3) and similar to that under Part 10.3.

23. The significant change in circumstances on which the defendant had relied to be permitted to make the ancillary claim was the “recent” discovery of Erica who has knowledge of the transaction on the Lucas property and who is willing to be joined as a party to this matter to give evidence in order to clarify the Lucas family’s position. I did not accept this as satisfying the requirements of “a significant change in circumstances which became known after the CMC” for the following reasons:

(a) The Cynthia Taylor affidavit was lacking in particulars. To me an affidavit which was filed in support of an application to join a party as an ancillary defendant some 3 years and 2 months after the first CMC ought to have adequate particulars to support its position. The defendant said that the discovery of Erica was “recent”. In my mind “recent” connotes within the last month. However there was no evidence in the Cynthia Taylor affidavit of when the defendant discovered Erica was alive and when she spoke to Erica in the context of the June 3, 2011 application and the first

¹ In *Charmaine Bernard v Ramesh Seebalack* (2010 UKPC 15) the Privy Council defined the interpretation of “change in circumstances” under Part 20.(3)

² CV 2008-03628

CMC which was on April 15, 2008. Further, the evidence in support of the March 6, 2009 application revealed that the defendant was aware of Erica's existence and whereabouts since 2009.

- (b) There was no evidence from Erica indicating her "willingness to join as a party" and that she understood the effect of being joined as an ancillary defendant. There was no evidence that Erica understood that in being joined as an ancillary defendant, the party whom she is seemingly seeking to assist would in effect be seeking to attach some degree of liability on Erica.
- (c) The defendant did not set out her proposed ancillary claim against Erica neither was there a proposed draft of the claim. To casually indicate that the purpose of joining Erica as a party to these proceedings was because she is willing to assist the defendant and to give evidence to clarify the Lucas' family position, to me, did not satisfy the test of a "significant change in circumstances".
- (d) Indeed based on the Cynthia Taylor affidavit it appeared to me that the application to join Erica as an ancillary defendant may have been misconceived and a more appropriate application would have been to seek permission to have a witness statement of Erica filed on behalf of the defendant. I was of the view that the defendant's attempt to join Erica as an ancillary defendant was an effort on her part to circumvent the Part 26.7 provisions with respect to being allowed to call Erica as one of her witnesses.
- (e) The information set out in paragraph 7 of the Cynthia Taylor affidavit was not new. The defendant was aware in December 8, 2005 of the conveyance of the said land to the defendant, Abigail Taylor and Charmaine Taylor since she referred to Deed registered as No DE 200100239633 in paragraph 4 of her defence and counterclaim.

(f) This defendant has been a party to the proceedings since inception. Based on her defence and counterclaim, the defendant has denied that the claimant has lived on the said land since 1979. The defendant was also always aware of the importance of her purchase of the said land from Bertel and Erica. However, in the witness statements filed on behalf of the defendant namely that of the defendant and Carlton Taylor, reference was made to Bertel visiting the said land and collecting rent. There was no mention of Erica. I therefore could not see the relevance of joining Erica as an ancillary defendant.

Dated this 14th day of July, 2011.

Margaret Y Mohammed
Master (Ag.)