IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV 2011-02402**

BETWEEN

GEORGE OJAR
NARENDRA OJAR

Claimants

AND

LILOUTIE DEOSARAN also called SHIRLEY BADAL
DEOSARAN also called SHIRLEY LILIOUTIE DEOSARAN-BADAL
INDROUTIE DEOSARAN
KALOUTIE DEOSARAN
HEERAWATIE OJAR also called
HEERAWATIE DEOSARAN
CHIEREDAN BADAL

Defendants

Before The Honourable Madame Justice Margaret Y Mohammed

Appearances:

Mr. Seenath Jairam SC leading Ms. Alisa Khan and instructed by Ms. A Cheeseman for the Claimants
Mrs. Lynette Maharaj SC leading Ms. Keisha Khan instructed by Mrs. Dawn Gillian Seecharan for the Defendants

RULING

1. The reliefs sought in the Claimants application filed on the 3rd July 2015 ("the application") are for the trial dates in the instant action ("the first action") fixed for the 9th, 13th 14th and 15th July 2015 to be stayed and that they be vacated. The grounds of the

application are: that there was a Consent Order entered on the 13th January 2015 ("the Consent Order") between Caren Ojar Atwaroo ("Caren") and the Defendants in an Ancillary Claim whereby the 1990 deed of gift ("the 1990 deed") from Bassoo Kanhai deceased to the Second Claimant and Caren was set aside as far as it related to the conveyance of an interest to Caren ; on the 3rd July 2015 the First Claimant instituted an action CV 2015-002266 ("the second action") against Caren and the Defendants seeking to set aside the Consent Order and any Compromise Agreement entered pursuant to the Consent Order, on the basis that it affected the interest of the First Claimant and they colluded and conspired against the First Claimant by entering into such an agreement; the second action must be determined before the first action can proceed since there is a live issue of whether or not the First Claimant has land to partition which will be determined in the second action and that it is in the interest of justice to grant the orders sought.

2. It was not in dispute that the Claimants instituted the first matter for partition of a 3 acre parcel of land situate in St Ann's ("the land"). The First Claimant became an owner of his 1/6 share in the land by virtue of a 2004 deed ("the 2004 deed") when he purchased Caren's interest. The Second Claimant became the owner of his interest by virtue of the 1990 deed. The Defendants collectively own the other 2/3 interest in the land. In the Defence and Counterclaim the Defendants challenged the validity of the 1990 deed whereby Bassoo Kanhai , deceased conveyed her 1/3 interest in the land to the Second Claimant and Caren reserving a life interest for herself. They also challenged the validity of the 2004 deed.

3. The Defendants also instituted ancillary proceedings against Caren ("the ancillary claim") challenging the validity of the 1990 deed. At a Pre Trial Review ("PTR") on the 13th January 2015 the Court permitted the Defendants and Caren to enter the Consent Order whereby Caren's interest in the 1990 deed was set aside. The Consent Order was appealed to the Court of Appeal and subsequently withdrawn effectively leaving the terms of the Consent Order in full force and in effect. At the hearing of the application there was no dispute that the Court has the power to grant a stay in these proceedings.

4. In support of the application Senior Counsel for the Claimants submitted in his written submissions that:

    - The Consent Order entered in the first action affected the rights of the First Claimant. It amounted to a conspiracy against him and he has instituted the second action to deal with the said conspiracy.
    - There are common issues of fact and law arising in the first action and the second action and that they should be consolidated, tried together or immediately one after the other. As such it is convenient, practical and just to grant the stay.
    - It is just, reasonable and proportionate to stay the first action to preserve the First Claimant's access to justice in seeking the relief in the second action;
    - It would save time, expense and the courts resources since 4 days have already been side aside for the trial of the first action and several days would have to be set aside for the trial of the second action where there are similar issues.
    - There will be no prejudice to the Defendants since there is no pressing urgency to proceed with the first action. The witness statements have already been filed in the first action. Even if witnesses pass on their evidence is before the Court. The Defendants cannot claim prejudice since everyone is prejudiced and it is for the Court to determine who has the greater prejudice;
    - The delay in instituting the second action was justifiable since the circumstances giving rise to it only arose on the 4th May 2015 after the hearing before the Court of Appeal.

5. In his oral submissions, Senior Counsel also added that the Defendants did not impugn the 2004 deed in their pleading. He stated that even if the First Claimant did not use the words *"bona fide purchaser for value without notice"* in his pleading the First Claimant's witness statement has placed facts before the Court which demonstrated that he was a bona fide purchaser for value without notice and the Court is entitled to examine the witness statement. He further submitted that if the Defendants intended to impugn the 2004 deed in their pleading they ought to have applied to join the First Claimant as an Ancillary Defendant in the first action.

6. In response Senior Counsel for the Defendants submitted that:

- The Defendants made it clear in their Defence and Counterclaim that they were challenging the validity of the 1990 deed and the 2004 deed.
- The First Claimant failed to plead in the Defence to Counterclaim that he was a bona fide purchaser for value without notice;
- The First Defendant had ample opportunity to raise the issue that he was a bona fide purchaser for value without notice in his pleading and he cannot rely on his witness statement to do so.
- There was no duty on the Defendants to join the First Claimant as a party to the ancillary claim. The onus was on the First Claimant to do so but he failed to although he had ample opportunity and he only sought permission in the Court of Appeal proceedings to be joined as an Ancillary Claimant.
- The Defendants and Caren were entitled to enter into negotiations to enter the Consent Order. The onus will be on the First Claimant to prove in the second matter that they colluded or conspired against him.
- In the second action, the First Claimant is attempting to re-litigate an issue namely whether he is a bona fide purchaser for value without notice of Caren's interest which he had ample opportunity to place before the Court in the first action.
- The Defendants will be prejudiced if a stay of the first action is granted since it would give the First Claimant the opportunity to rehabilitate witness statements and fix his case in the second action concerning issues which he should have raised in the first action. They are now faced with paying two sets of legal fees for issues which the First Claimant could have raised in the first action. The second action is oppressive since it seeks to litigate issues which could have been raised by the First Claimant in the first action.
- In considering delay, the delay is not the institution of the second action on the 3rd July 2015 some two months after the hearing in the Court of Appeal in May 2015, but the delay in raising the issue of bona fide purchaser for value by the First Claimant against Caren which could have been done since 2012.

7. The onus is on the Claimants who are the applicants to demonstrate by cogent evidence that there are sound reasons for the Court granting the stay. In the instant case the Claimants are seeking to stay their own claim, the first action which they instituted some 4 years ago over a new claim, the second action which they have instituted less than 1 week before the dates fixed for the trial.

8. The test in law is whether in the circumstance of this particular case it is reasonable that a stay should be granted so that justice shall be done between the parties. (**Edmeades v Thames Board Mills Ltd)**[1]**.**

9. In **Slough Estates Ltd v Slough Borough Council**[2] the Court summed up the factors which the applicant (in **Slough**, the defendants) must prove in order to obtain a stay of the proceedings where another action has been filed as:

> "It is common ground that to obtain relief the defendants must establish, (1) duplication between two sets of proceedings; (2) oppression, vexation or abuse of process of the court resulting from the continuation of the proceedings sought to be stayed; and (3) the absence of any other consideration against the relief sought such as- what was suggested in this case- unreasonable delay, or acquiescence on the defendants."[3]

10. There was no objection by parties for the Court to examine the documents filed in the second action in determining the application. As I stated in my Reasons dated 29th January 2015 the issues arising from the pleadings between the Claimants and the Defendants in the first action are: (a) whether the 1990 deed was procured by undue influence on Basso Kanhai; (b) if so, whether it and the 2004 deed should be set aside; (c) if not, should the Court order the said lands to be partitioned; or (d) should the Court order the said lands to be sold. Neither party made any submissions indicating that there are any additional issues for determination.

[1] [1969[2 All ER 127
[2] [1967] 1 Ch 299 a
[3] Supra at page 312.

11. In the second action, the First Claimant is seeking several orders and declarations. The main reliefs he is seeking are a declaration that the Consent Order and/or Compromise Agreement entered into between the Defendants and Caren were obtain by fraud and/or conspiracy to defraud / injure by unlawful means the First Claimant and that the Court set aside, expunged, nullify and/or cancel the said documents; an order compelling the Defendants to produce the original and all copies of the Compromise Agreement for its cancellation and/or destruction and a declaration that the First Claimant is a bona fide purchaser for value without notice of a 1/6 undivided share in the land which he is entitled to under the 2004 deed.

12. Having examined all the circumstances in the first action and the documents filed in the second action, I have decided to refuse the application for the following reasons.

It is an abuse of process to stay the first matter due to the filing of the second matter.

13. In **Johnson v Gore Wood & Co**[4] Lord Bingham expressed the following view on estoppel and abuse of process.

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings or if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards ad unjust harassment of a party. It is however wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt a too dogmatic approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raise before. As one cannot comprehensively list

[4] (2002) 2 AC 1

all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is found"

14. At page 31 he went on to state the question the Court must ask itself is:

> "… While the result may often be the same, it is in my view preferable to ask whether in all circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of justice."

15. Lord Millette when on further to express the view that:

> " While the doctrine of *res judicata* in all its branches may properly be regarded as a rule of substantive law, applicable in all save and exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression"[5].

16. One of the issues raised in the first action is whether the 2004 deed should be set aside. In my view the First Claimant had ample opportunity to plead his claim as a bona fide purchaser for value without notice of Caren's interest in the first action which is one of the issues raised in the second action but he failed to do so. The Claimants filed the first action against the Defendants for partition in June 2011. The Defendants filed a Defence and Counterclaim against the Second Defendant. In the Counterclaim the relief being sought by the Defendants is for both the 1990 deed and the 2004 deed to be set aside. They also asked for the Court to order that they are jointly legally entitled to the said lands; to refuse the Claimants request to partition the said lands on the basis that the Defendants collectively own two thirds of the said lands and to refuse the request to sell the said lands on the grounds of hardship since they have lived there all their lives. In the Reply and Defence to Counterclaim the Claimants denied the assertion that the 1990 deed was procured by any undue influence over Basso Kanhai, deceased. Their only pleading on the validity of the 1990 deed is at paragraph 4 of the Defence to Counterclaim which stated:

[5] Supra at page 47

> " Further the deceased had conveyed her undivided one third share to the second Claimant and Caren which Caren at all material times acknowledged to be a lawful valid gift to her but subsequently sold same to the First Claimant under and by virtue of deed of conveyance registered as No. 200403485511 dated 11 December 2004".

17. In my view, upon service of the Defence and Counterclaim, the First Defendant was put on notice that the Defendants were in substance challenging the 2004 deed which was his deed but he chose not to respond to the claim for the relief to set aside the 2004 deed.

18. The Defendants then issued an ancillary claim in accordance with Part 18.4(1) CPR against Caren as the Ancillary Defendant. Case management of the first action took place before Rahim J from 24th January 2012 to 17th July 2012 when he gave further case management directions and scheduled the PTR for the 18th June 2013. There were several adjournments of the PTR and the Consent Order was entered on the 13th January 2015. Based on the history of the first matter it appeared to me that the First Claimant had notice of the ancillary claim, the reliefs being sought therein and he ought to have known that his interest in the 2004 deed was going to be affected in the ancillary claim. However despite the several opportunities from the filing of the Defence and Counterclaim and the ancillary claim the First Claimant failed to apply to be joined as a party to the ancillary proceedings or even to plead in the Reply and Defence to Counterclaim that he was a bona fide purchaser for value without notice and that the 2004 deed ought not to be set aside.

19. Further, Part 18.3 of the CPR permitted the First Claimant to serve a Defendant's notice on Caren who was the Ancillary Defendant claiming from her an indemnity in respect of the purchase price if the 1990 deed and the 2004 deed were set aside or alternatively that the 2004 deed ought not to be set aside on the basis that the First Claimant was a bona fide purchaser for value without notice but he failed to avail himself of the opportunity to do so. He only applied to join as a party to the ancillary claim when he filed the procedural appeal of the Consent Order.

20. In these circumstances, I do not agree with Senior Counsel's submissions that it was for the Defendants to join the First Claimant as an Ancillary Defendant in the ancillary

claim. In my view, if the First Claimant knew of the relief sought in the Defence and Counterclaim and he was aware of the relief sought in the ancillary claim and it was his position that he was bona fide purchaser for value without notice, then it was in his interest to ensure that he was a party in the ancillary claim since it had consequences for the 2004 deed. In the absence of the First Claimant being a party to the ancillary proceedings between the Defendants and Caren there was no impediment stopping them from entering into the Consent Order without including him.

21. Further although the Claim, counterclaim and ancillary claim were case managed together this did not prevent the parties to enter into negotiations to settle any one of them or for the Court to order the priority which each one would be dealt with.

22. If I accept Senior Counsel for the First Claimant's oral submission that in the first action the First Claimant has alluded to the fact that he was a bona fide purchaser for value without notice without using those exact words in his Reply and Defence to Counterclaim and that his witness statement sets out that he was a bona fide purchaser for value, this submission appears to defeat one of his grounds for the stay since this is one of the issues to be determined in the second action before the first action is heard. In any event having examined the Reply and Defence to Counterclaim I did not find any material facts which point to the First Claimant's assertion that he was a bona fide purchaser for value without notice to comply with Part 10.5 (1) CPR which states :

> "Defendant must include in his defence a statement of all facts on which he relies to dispute the claim against him."

23. Part 10.6(1) CPR sets out the consequences of not setting out matters in the Defence as :

> " (1) The defendant may not rely on any allegation which he did not mention in his defence, but which he should have mentioned there, unless the court gives him permission to do so."

24. It therefore appears that the First Claimant cannot rely on his reference to being a bona fide purchaser for value without notice in his witness statement in the first action if he did not plead such material facts.

25. Secondly, the First Claimant had in his possession information and documents which he failed to disclose before the entry of the Consent Order in the first action which he is now seeking to rely on to demonstrate collusion between the Defendants and Caren in the second action. The First Claimant pleaded at paragraph 30 in the second action that:

> "(3) On the 19th September 2011 a series of emails were exchanged between the 1st Defendant (Caren) and the Co-Defendant (Narendra). In one such email the 1st Defendant asserted that Basso's thumbprint on the said Deed of Gift was in fact valid. Trues copies of the said emails are hereto annexed in a bundle marked "G.O 22". The Claimant will rely on the said emails for their full terms, true meaning and effect.
> (4) On the 4th December 2014 there was further correspondence via email between the Co-Defendant and the 1st Defendant. An emails sent by the 1st Defendant to the Co-Defendant contained an unsigned copy of the Compromise Agreement (which was forwarded from one Mr. Ronald Dowlath, attorney at law for the 1st Defendant) (hereinafter referred to as **"the said Compromise Agreement**") purportedly entered into between the 1st Defendant and the 2nd to 6th Defendants, providing for the said Deed of Gift to be set aside. In these emails the 1st Defendant admits and confirms that the said Deed of Gift was valid."

26. The documents which the First Claimant relies on are emails between the Second Claimant and Caren commencing 2011 and an unsigned proposed Compromise Agreement between the Defendants and Caren dated December 2014 which were not disclosed during the course of the first matter. In my view, these documents indicate that the First Claimant was aware that settlement negotiations were taking place between the Defendant and Caren and he chose not to disclose the documents in the first matter. It is therefore an abuse of process to stay the first matter at the behest of the First Claimant on the basis of documents he did not disclose to facilitate him relying on the same documents to pursue the second matter which he instituted about one week ago on July 3, 2015.

There has been inordinate delay by the First Claimant in seeking to raise the issue of whether he is a bona fide purchaser for value without notice.

27. One of the main issues which the First Claimant is seeking to raise in the second matter against Caren is whether he is a bona fide purchaser for value without notice. In my view the delay in the First Claimant now seeking to do so cannot be calculated in terms of the time between the withdrawal of the appeal in May 2015 and the institution of the second action on 3rd July 2015. From a perusal of the Statement of Case filed in the second action the information upon which the First Claimant is seeking to ground his claim against Caren was available to him during the entire duration of the first action and there is no new information which came to his knowledge recently for the Court to make an exception to find that there is good ground for granting a stay of the first action.

The prejudice suffered by the Defendants if the stay is granted will be greater than the prejudice suffered by the First Claimant if it is not granted.

28. I agree with Senior Counsel for the First Claimant that there is prejudice on both sides and it is for the Court to weigh all the factors and determine who will suffer the greater prejudice if the stay is /is not granted. It is not in dispute that both the Claimants and Defendants have incurred considerable costs in legal fees in pursuing the first matter which is literally on the threshold of the trial since the application was filed some 6 days before the first scheduled date of trial, 9th July 2015. I have determined that the Defendants would suffer the greater prejudice if the stay is granted for following reasons.

29. Firstly, the information which the First Claimant is relying on to ground his claim in the second action was available to him during the duration of the first action. It is the First Claimant who did not use the opportunities available to him under the CPR in the first action to pursue the main relief which he is now seeking in the second action. It is the First Claimant who brought the Defendants to court when he instituted the first action. All the Defendants in the second action were parties in the first action. Caren was an Ancillary Defendant. The subject matter in the first action and the second action still concerns a share in the lands.

30. Secondly, it is unfair to the Defendants who have expended legal fees in defending the first action for 4 years, both the High Court and Court of Appeal, to be now faced with a stay of it when it is on the threshold of the trial.

31. Thirdly, the 2004 deed is still on the face of it a good deed until it is set aside. The First Claimant's prejudice is his root of title namely, the 1990 deed with respect to Caren's interest which has been side aside. However, the First Claimant's predicament appears to have been self-inflicted since he did not take the appropriate steps in the first matter to plead that he was a bona fide purchaser for value without notice. The failure by the Court to grant the stay in the first action does not prevent the First Claimant from vigorously pursuing the relief he seeks in the second action. He still has recourse in damages, which he has claimed in the second action, if successful since it is a 1/6 share of the land he contends he owns under the 2004 deed.

It is not furthering the overriding objective to stay the first action

32. Both parties referred to the overriding objective in support of their position. Part 1.1 CPR sets out the overriding objective as:

> "1.1 (1) The overriding objective of these Rules is to enable the court to deal with cases justly.
> (2) Dealing justly with the case includes-
> (a) ensuring, so far as is practicable , that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with cases in ways are proportionate to-
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously ; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

33. **Zuckerman on Civil Procedure**[6] is of the view that *"the use of a stay as a management tool will be guided by the overriding objective."* In my view to grant the stay in the first

[6] 3rd ed (2013) at page 715

action in order to facilitate the issues to be resolved in the second action before the trial in the first action would not further the overriding objectives of the CPR for the following reasons.

34. I accept that the First Claimant is not an equal footing with the other parties since the 1990 deed which affects his interest in the 2004 has been set aside by the Consent Order and he has no pleading against Caren concerning his claim that he was a bona fide purchaser for value without notice. However, in my view it is the First Claimant who has caused this predicament. The first action is now 4 years old and it is well advanced to trial. Pleadings have long closed, it has gone through rigorous case management, witness statements have been filed, evidential objections have been dealt with and the only outstanding aspect of the matter is the trial to facilitate cross-examination of the witnesses.

35. The issues which the First Claimant is attempting to raise in the second matter are not based on new information which was not available to the First Claimant during the first action. It therefore cannot be a saving of expense to stay the first action where considerable legal costs have already been expended and which is on the threshold of the trial to now allow the second action to proceed.

36. Based on the valuations filed in the first action the 1/6 interest value of the land is approximately $3.8 million. As in all land disputes involving family members both actions are important to them. However, the Defendants in the first action live on the land so I ascribe a greater importance of the first action to them as opposed to the First Claimant who has never taken possession since his 2004 deed and the Second Claimant who lives abroad and who has also not taken possession since 1999 when the deceased passed on.

37. The issues in the first action and second action which I have set out earlier are not complex.

38. The First Claimant is an Attorney at law and according to the Second Claimant's witness statement he is a software engineer who lives abroad. The majority of the Defendants are pensioners. Based on this information the Claimants appear to be in a financially better position than the Defendants.

39. To stay the first action which was instituted on 29th June 2011 and is scheduled for trial on 9th July, 2015, 13th July, 2015, 14th July 2015 and 15th July 2015 until the determination of the second action which was only instituted on the 3rd July 2015 will not be permitting an expeditious resolution of the first action which has taken 4 years to be ready for trial.

40. The court has already allocated its resources for 4 years in the case management of the first action. The trial dates in July 2015 were fixed since 24th February 2015. This was after trial dates in March 2015 were vacated due to a pending appeal. The hearing of the last PTR before the application for the stay was filed was on the 24th June 2015. To vacate the trial dates in the first action at this late stage of the proceedings for the resolution of the second matter would mean the Court would have to allot additional time for the trial. The Counterclaim in the first action is against the Second Claimant and the issues raised in the second action are between the First Claimant, Caren and the Defendants in the first action. There is no valid reason at this stage to stay the Counterclaim in the first proceedings since the First Claimant's evidence is not with respect to the Counterclaim.

Order

41. The application is dismissed. The trial in the first action will commence on Monday 13th July, 2015 at 9:30 am. The Claimants to pay the Defendants costs of the application. I will hear the parties on quantum.

10th July 2015

Margaret Y. Mohammed
High Court Judge