THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

No. CV 2019-00599

BETWEEN

CHELSEA PROPERTIES LIMITED

Claimant

AND

DAMIEN ALI

Defendant

Date of Delivery 6 March 2020

Before the Honourable Madam Justice Margaret Y Mohammed

Appearances

Ms. Crystal Dottin Attorney at law for the Claimant.

Ms. Leandra Ramcharan Attorney at law for the Defendant.

RULING ON APPLICATION FOR SUMMARY JUDGMENT AND TO STRIKE OUT DEFENCE AND COUNTERCLAIM

1. In 2003 the Claimant became the owner of 49 acres of land situated in Toco[1] ("the Parent Parcel of Land"). It issued the instant action against the Defendant in February 2018 seeking an order for vacant possession of a portion of the Parent Parcel of Land ('the disputed parcel"), damages for trespass, an injunction restraining the Defendant, his servants and or agents from remaining upon or otherwise in any way trespassing

[1] By Memorandum of Transfer No 107 dated 11 February 2003 and registered in Volume 4459 Folio 513 Clesea Properties Limited became seised of an estate in fee simple of ALL AND SINGULAR that certain piece of parcel of land situate in the Ward of Toco in the Island of Trinidad comprising Forty Nine Acres and One Perch be same more or less delineated and coloured pink in the diagram attached to and described in the Crown Grant in Volume 314 Folio 569 and also described in the Certificate of Title in Volume 1711 Folio 43 and now described in the Certificate of Title in Volume 4259 Folio 37 and bounded on the North by lands of John Guilbert on the South and East by the Sea and by lands of the Depot and on the West by the sea by lands of the Depot and by lands of John Guilbert and intersected by Toco Main Road and by another Road.

on the disputed parcel, for the Defendant to demolish and remove all and/or any structures erected on the disputed parcel, remove all and/or any chain link wire fence and/or walls erected by him which encroaches upon or barricades the disputed parcel, cost and any other relief which may be granted by the Court.

2. The Defendant filed a Defence and Counterclaim and the Claimant filed its Reply and Defence to Counterclaim and the Court gave directions in preparation for trial. After the Claimant filed the UnAgreed Bundle of documents, it filed an application ("the application") to strike out the Defendant's Defence and Counterclaim and to obtain summary judgment on its claim. I will now set the context for the application.

The Parties respective case

3. The Claimant's case is that it has been the paper title owner of the Parent Parcel of Land since 2003 and the Defendant unlawfully took and remained in possession of the disputed parcel. In October 2002, Mr Ken Holder, architect and surveyor, was commissioned by the Claimant to survey the Parent Parcel of Land. At the time the survey was completed there was no evidence of any structures and or buildings, chain link wire fences and or walls on the Parent Parcel of Land.

4. The Defendant entered into and took possession of the disputed parcel without the Claimant's consent or licence and has thereafter remained in possession of it. The Defendant has never been a tenant or sub-tenant of the disputed parcel. No part of the disputed parcel consists of residential premises. The Claimant has not to date developed the Parent Parcel of Land since its acquisition and it remains largely forested up to the current time. In July 2017, Mr Winston Doyle conducted a survey of the Parent Parcel of Land and observed that there were several structures standing thereon, one of which, after investigation was found to be occupied by the Defendant.

5. By Pre-Action Protocol letter dated 3 November 2017, the Claimant requested inter alia that the Defendant demolish all and or any structures erected on the disputed land and to vacate same. By letter dated 27 November 2017, Jerry Holder, Attorney at Law acting on behalf of the Defendant wrote to the Claimant's Attorney at law

indicating that his client has been in undisturbed possession of the disputed land for more that sixteen years.

6. On 20 July 2018, a representative of the Claimant's Attorney at Law, visited the Parent Parcel of Land for the purpose of determining whether the Defendant occupied the disputed parcel. In the course of this visit, it became apparent that the Defendant remained in unauthorised occupation of the disputed parcel and he continues to occupy it.

7. The Defendant filed a Defence and Counterclaim. He asserted that between 2002 and 2003 he took possession of the disputed parcel and constructed a small residential structure comprised of wood and galvanised iron sheets on it, which he occupied firstly while working as a fisherman and that he has been in undisturbed possession of it for about 17 years to the exclusion of all others including the Claimant and the Claimant's predecessors in title.

8. The Defendant also asserted that he has improved the disputed parcel which he occupies, comprising one lot of land more or less, together with his dwelling house "the house") standing thereon by partially clearing off a thick forested are over a period of time and thereafter extending and or renovating the house into a concrete structure comprising two bedrooms and kitchen with toilet and bath facilities. The house has both running water and electricity.

9. The Defendant also asserted that for the duration of his possession of the disputed parcel, from 2002 to the present time, he invested financially and physically in it by partially clearing the forested area, assisting in the building of a road for access, constructing and extending the house which he fully furnished, obtaining electricity and water connections without objection by the Claimant or its predecessors.

10. Based on those pleaded facts the Defendant is seeking the following orders: (a) a declaration that he has acquired a possessory title in the disputed parcel of land pursuant to Sections 3 and 22 of the Real Property Limitation Act ("the RPLA"); (b) in

the alternative he has acquired an equitable interest in the disputed parcel and (c) a declaration that the Claimant is estopped from denying his right to the disputed parcel.

11. The Claimant replied that the boathouse referred to by the Defendant is not part of the Parent Parcel of Land but rather belongs to the State since it was excised from the Parent Parcel of Land in 1979 and it has been in existence for over 30 years. The Claimant denied that the location of the disputed parcel would have been so obscured by reason of the tall trees which surround and shade it The Claimant averred that the Defendant did not acquire possessory title and has not shown the necessary physical effective, single and exclusive control of the disputed parcel nor the required animus possidendi. The Claimant denied that its rights to the disputed parcel has been extinguished since the Defendant has failed to show that he has asserted complete and exclusive physical control of it as from the date stated. Based on these facts the Claimant asserted that the Counterclaim discloses no reasonable cause of action against it.

The application

12. The Claimant has grounded the application in Rules 26.2 (1) (b) and (c) and 26. 1((1)(k) of the CPR and Rule 15.2 CPR. The grounds set out in the application are:

    (a) On the Defendant's List of documents filed on the 30 October 2019, the only document that pre-dates 2012, is document "No.1" being "*5 photographs of the original house"* taken in *"2002".* However, the said photographs were never forwarded to the Claimant's Attorneys as part of the process of disclosure. The 5 photographs have no bearing on the cause of action in the instant case

    (b) The Counterclaim is heavily reliant on the bare Defence, the Defendant's Counterclaim is frivolous and vexatious as the Defendant failed to set out the necessary particulars which must be pleaded to prove possessory title.

    (c) The Claimant's title to the Parent Parcel of Land is not in question.

(d) In preparation for the filing of witness statements, it has become more apparent to the Claimant's Attorney-at-law that the Defendant has failed to properly set out its case.

13. A Court should be hesitant to shut out a party before the trial. In **Belize Telemedia Limited v Magistrate Usher**[2] Abdulai Conteh CJ considered the interaction between striking out under the court's case management powers in Part 26 and the power to award summary judgment under Part 15 CPR. He stated:

> "15. An objective of litigation is the resolution of disputes by the courts through trial and admissible evidence. Rules of Court control the process. These provide for pre-trial and trial itself. The rules therefore provide that where a party advances a groundless claim or defence or no defence it would be pointless and wasteful to put the particular case through such processes, since the outcome is a foregone conclusion.
>
> 16. An appropriate response in such a case is to move to strike out the groundless claim or defence at the outset.
>
> 17. Part 26 of the powers of the Court at case management contains provisions for just such an eventuality. The case management powers conferred upon the Court are meant to ensure the orderly and proper disposal of cases. These in my view, are central to the efficient administration of civil justice in consonance with the overriding objective of the Rules to deal with cases justly as provided in Part 1.1 and Part 25 on the objective of case management."

14. In **The University of Trinidad and Tobago v Professor Kenneth Julien & Ors**,[3] Kokaram J (as he then was) examined the different tests for summary judgment and striking out a Defence. He stated:

> "**The rolled up Striking out and Summary Judgment applications**

[2] (2008) 75 WIR 138

[3] Claim No. CV2013-00212

24. In my view I agree with the observations made in **Swain v Hillman** [2001] 1 All ER 91 that there is an obvious relationship between CPR rule 26.2 (c) and rule 15. They are both summary proceedings that seek to bring a premature end to proceedings without the opportunity being given for the parties or the Court to fully investigate the facts and the law at a trial. The premise of both applications is that it would be a waste of the parties' and Court's resources to do otherwise and that further management to trial is an uneconomical, un-proportionate response to the nature of the case presented by the litigant. The approach maintains the equality of arms between a litigant spared the further expense of a hopeless or weak case and a Defendant's right not to be harassed by such cases. The assessment in both cases is an exercise of the Court's case management powers to give effect to the overriding objective. See CPR rules 1.2, 25.1 (a) (b) and (h). See also the judgment of Jamadar JA in **Real Time Systems Ltd v Renraw Investments Ltd** CA Civ. 238 of 2011. The Court makes a broad judgment after considering the available possibilities and concentrates on the intrinsic justice of a particular case in the light of the overriding objective. See **Walsh v Misseldine** [2001] CPLR 201. In examining the tests in a rolled up application one may look at the individual trees but then must step back to "look at the forest" in making an overall assessment of the case.

15. At paragraphs 28 to 33 Kokaram J (as he then was) continued:

28. I consider the approach in "dismissing" a claim under a rolled up application of striking out and summary judgment such as this one as adopting at the same time a "soft" and "hard" or more robust approach in the assessment of a Claimant's case. The governing caveat of course is that a Court must not, regardless of the nature of its assessment, embark upon a mini trial requiring the resolution of the minutiae of detail in evidence or the applicable law to disputed facts only available at a full blown trial. If there is a legally determinable claim based upon

the Claimant's facts, then the Court must consider the available evidence in assessing the prospect of success. See *Caribbean Civil Court Practice Note 23.23* and **Chief Constable of Kent v Rixon** [2000] AER 476.

29. The enquiry under CPR rule 26.2 (1) (c) is in my view the soft approach where the language of rule 26.2(1) (c) is so generous that so long as the statement of case discloses a ground for bringing the claim it cannot be struck out. The Court of Appeal and Privy Council in **Real Time** CA Civ. 238 0f 2011 and [2014] UKPC 6 respectively added a new dimension to the curative powers available in lieu of the draconian measure….

33. It is indeed worthy of note of this soft approach, especially in the context of this case that a case will not be struck out in an area of developing jurisprudence and where the facts need to be investigated before conclusions can be drawn about the law. **Farah v British Airways plc and the Home Office** (2000) Times 26 January. In **Partco Group Ltd v Wragg** [2002] EWCA Civ. 594. This "soft approach" is further explained in Zuckerman:

> "A strike out decision may also be criticized on an entirely different ground: that the court was in error in deciding that the issues did not require investigation by the normal procedural process. In certain circumstances it would be appropriate to allow an issue to be aired at the trial even if the court believes that the claim or defence is groundless. For instance, even though the court considers an allegation of sexual abuse farfetched, it may be desirable to allow the allegation to be tested at the trial. See S v Gloucestershire County Council. Similarly the court may allow proceedings to go forward in order to enable the court to clarify an uncertain point of law."

16. The test in Rule 26. 2 (1) (c) is the "soft approach" and not the high threshold of Rule 15. 2(a) of no realistic prospect of success.

Reasonable grounds for defending the Claim

17. Rule 26.2(1) (b) CPR empowers the Court to strike out a statement of case or a part on the basis of abuse of process. Rule 26.2 (1) (c) CPR empowers the Court to strike out a pleading or any part thereof where it discloses no ground for bringing or defending the claim.

18. Rule 2.3 of the CPR defines a "Statement of Case" to include a Counterclaim. Rule 8.6 of the CPR sets out the information which must be set out in a Statement of Case. It provides:

    (1) the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. (2) The claim form or the statement of case must identify or annex a copy of any document which the claimant considers necessary to his case.

19. It was clearly established in **McPhilemy v Times Newspapers**[4] that the purpose of pleadings was to set out the parameters of the Claimant's case, to set out the general nature of the Claimant's case to the Defendant, to identify the issues and the extent of the dispute between the parties. This position was adopted by Kokaram J in the High Court in this jurisdiction in **Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and Ors**[5].

20. In **Bernard v Seebalack**[6] the Privy Council reiterated the importance of a proper pleading as: "Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader...'

21. Rule 10. 5 CPR sets out the matters which a Defendant must set out in a defence. It provides:

[4] [1999] 3 All ER 775 at page 792 J
[5] CV 2007-00387
[6] 77 WIR 455

10.5 (1) The general rule is that the period for filing a defence is the period of 28 days after the date of service of the claim form and statement of case.

(2) However where permission has been given under rule 8.2 for a claim form to be served without a statement of case, the period for filing a defence is the period of 28 days after the service of the statement of case.

(3) In proceedings against the State the period for filing a defence is the period of 42 days after the date of service of the claim form and statement of case.

(4) Where the defendant within the period set out in paragraph (1) (2) or (3) makes an application under section 7 of the Arbitration Act (Chap. 5:01) to stay the claim, the period for filing a defence is extended to 14 days after the determination of that application.

(5) A defendant may apply for an order extending the time for filing a defence.

(6) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3) up to a maximum of three months after the date of service of the claim form (or statement of case if served after the claim form).

(7) Only one agreement to extend the time for filing a defence may be made.

(8) The defendant must file details of such an agreement.

(9) Any further extensions may only be made by court order.

(10) The general rule is subject to rule 9.7".

22. In the leading case by the Court of Appeal in this jurisdiction which sets out the Defendant's duty to plead in the Defence, **M.I 5 Investigation v Centurion Protection Agency Limited**[7] Mendonca JA stated at paragraph 7:

> "In respect of each allegation in a claim form or statement of case therefore there must be an admission or a denial or a request for a claimant to prove the allegation. Where there is a denial it cannot be bare denial but it must be accompanied by the defendant's reasons for the denial. If the defendant wishes to prove a different version of events from that given by the claimant he must state his own version. I would think that where the defendant sets out a different version of events from that set out by the claimant that can be a sufficient denial for the purposes of 10.5(4)(a) without a specific statement of the reasons for denying the allegation. Where the defendant does not admit or deny an allegation or put forward a different version of events he must state his reasons for resisting the allegation (see 10.5(5)). The reasons must be sufficiently cogent to justify the incurring of costs and the expenditure of the Court's resources in having the allegation proved."

23. The Defendant's Defence and Counterclaim is grounded on the doctrine of adverse possession. Sections 3 and 22 of the Real Property Limitation Act[8] ("the RPLA") creates a right of possession in favour of an adverse possessor who has been in continuous undisturbed possession of property for 16 years and prevents his ouster from the land by the paper title owner.

24. Section 3 of the RPLA provides that "No person shall make an entry of distress, or bring an action to recover any lands or rent, but within 16 years after the time at which the right to make such entry or distress, or to bring such an action, shall have first accrued to some person ...".

[7] Civ App No 244 of 2008
[8] Chapter 56:03

25. Accordingly, any action for recovery of any land that may have accrued by an entry on land by an unauthorized third party after 16 years of interrupted possession is barred by section 3 of the RPLA.

26. Section 22 of the RPLA provides for the extinguishment of the title of the owner of the land where 16 years have lapsed from the date of the accrual of the right to bring an action if no action for recovery was brought. It provides that:

> "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any action or suit, the right and title of such person to the land or rent for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period shall be extinguished".

27. In the instant case the Parent Parcel of Land falls under the Real Property Act[9] ("the RPA") . Section 37 and 45 of the RPA sets out the conclusiveness of the register in the system of registration under the RPA. Section 37 provides:

> **"**37. Every certificate of title duly authenticated under the hand and seal of the Registrar General shall be received, both at law and in equity, as evidence of the particulars therein set forth, and of their being entered in the Register Book, and shall, except as hereinafter excepted, be conclusive evidence that the person named in such certificate of title, or in any entry thereon, is seized of or possessed of or entitled to such land for the estate or interest therein specified, and that the property comprised in such certificate of title has been duly brought under the provisions of this Act; and no certificate of title shall be impeached or defeasible on the ground of want of notice or of insufficient notice of the application to bring the land therein described under the provisions of this Act, or on account of any error, omission, or informality in such application or in the proceedings pursuant thereto by the Judge or by the Registrar General."

[9] Chapter 56:02

28. Section 45 provides:

> **"**Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this Act, and any rights subsisting under <u>any adverse possession of such land</u>; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value." (Emphasis added).

29. One of the exceptions whereby the indefeasibility of the title can be challenged is by adverse possession.

30. Slade J**.** in **Powell v. McFarlane**[10] is instructive in providing guidance on what constitutes "possession". The Court stated that:

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance,

[10] [1977] 38 P & CR 452

ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("animus possidendi")". (Emphasis added).

31. "Factual possession" was described by Slade J. in **Powell v. McFarlane** as:

"Factual possession signifies an appropriate degree of physical control. It must be single and conclusive possession, though there can be a single possession exercised by or on behalf of persons jointly. Thus, an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which the land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. "What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants": **West Bank Estates Ltd. v. Arthur [1967] AC 665, 678, 679; [1966] 3 WLR 750, per Lord Wilberforce.** It is clearly settled that acts of possession done on parts of land to which a possessory title is sought may be evidence of possession of the whole. Whether or not acts of possession done on parts of an area establish title to the whole area must however, be a matter of degree. It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

32. The "intention to possess" was described by Slade J as:

> "The animus possidendi, which is also necessary to constitute possession, was defined by Lindley MR in Littledale v Liverpool College [1900] 1 Ch. 19**,** as "the intention of excluding the owner as well as other people." This concept is to some extent an artificial one because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. <u>What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow." (Emphasis added)</u>

33. If a party intends to assert a claim based on adverse possession the onus is on that party to satisfy the Court that he is not only had factual possession of the disputed property for more than 16 years but that he also had the requisite intention to possess same to the exclusion of others.

34. There has been no shortage of case law emanating from this jurisdiction on the extent and clarity which is required in pleading a claim for adverse possession. In **Nelson v DeFreitas**[11] Pemberton J (as she then was) opined that the facts relied upon to establish '*adverse possession*' must be cogent and clearly stated in the defence. In **Lystra Beroog & Anor. v Franklin Beroog**[12] Kokaram J (as he then was) observed that a claim for adverse possession *"pits the rights of persons in occupation against the title owners of the property. It is a short hand expression for the type of possession which can, with the passage of years, mature into a valid right. It is therefore a very serious and significant claim where that type of occupation will trump a legal right. The claim must therefore be carefully scrutinized to determine the character of the land, the nature of the acts done upon it and the intention of the occupier. The onus of*

[11] CV 2007-0042
[12] CV 2008-04699

establishing the defence of adverse possession is on the Defendant who put it forward".

35. Therefore the pleading must establish that the entry on the land was unlawful; that the possession was for a period of at least 16 years; and the intention to dispossess. Anything short of establishing this will not suffice[13].

36. In my opinion, the Defendant has met the required low threshold of establishing that he has a reasonable cause of action. In the Defence and Counterclaim, the Defendant set out the year 2002, he came unto the disputed parcel; the size of the dispute parcel; his acts of possession since he has been in occupation of the disputed parcel and that nobody has told him to leave the disputed parcel since his possession.

Realistic prospect of success in the Defence

37. Rule 15.2(a) CPR, empowers the Court to give summary judgment on the whole or part of the claim if the Defendant has no realistic prospect of success on his Defence or part thereof. In **Western Union Credit Union Co-operative Society Limited v Corrine Amman[14]** Kangaloo JA was dealing with an application for summary judgment by the Claimant. The learned Judge applied the English approach on applications for summary judgment and gave the following guidance:

> "The court must consider whether the Defendant has a realistic as opposed to fanciful prospect of success: **Swain v Hillman** [2001] 2 AER 91
>
> A realistic defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: **ED &F Man Liquid Products and Patel** [2003] EWCA Civ 472 at 8.
>
> In reaching its conclusion the Court must not conduct a mini trial **Swain v Hillman** [2001] 2 AER 91:

[13] See Atkins Court Forms Volume 25(1).
[14] CA 103/2006 Kangaloo JA

This does not mean that the court must take at face value and without analysis everything the Defendant says in his statements before the court. In some cases it may be clear there is no real substance in the factual assertion made, particularly if contradicted by contemporaneous documents: **ED & F Man Liquid Products v Patel** EWHC 122

However in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence which can reasonably be expected to be available at trial **Royal Brompton NHS Trust v Hammond** (No 5) [2001] EWCA Cave 550

Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd** [2007] FSR 63."

38. At this stage of the action, I have not been persuaded that the Defendant's Defence has no realistic prospect of success for the following reasons.

39. First, the Defendant is still entitled at the trial to rely on the 5 photographs which he has disclosed but fail to produce. Rule 28.11 set out the procedure for inspection. It states:

> **28.11** (1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except-
>
> (a) documents which are no longer in the physical possession of the party who served the list; or

(b) documents for which the party claims a right to withhold from disclosure.

(2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.

(3) The party who is to give inspection must permit inspection not more than 7 days after the date on which the request is received.

(4) If the party giving notice undertakes to pay the reasonable cost of copying, the party who served the list must supply the other with a copy of each document requested.

(5) The party who served the list must supply the copy not more than 7 days after the date on which the request was received.

40. The consequence of failure to disclose documents under an order for disclosure is set out at Rule 28.13 CPR as:

28.13 (1) A party who fails to give disclosure by the date specified in the order may not rely on or produce any document not so disclosed at the trial.

(2) A party seeking to enforce an order for specific disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out.

(3) An application under this rule may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.

(4) On such an application the court may order that unless the party in default complies with the order for specific disclosure by a specific date that the party's statement of case or some part of it be struck out.

(Rule 26.7 deals with applications for relief; Rule 11.15 deals with applications to set aside order made on application without notice; Rules 26.4 and 26.5 deal with judgment after striking out).

41. At this stage of the proceedings it was not in dispute that the Defendant has disclosed that he has 5 photographs from 2002 which he has not produced to the Claimant for inspection. In my opinion, the expressed sanction in Rule 28.13 CPR is for failing to disclose the document but there is no expressed sanction for not permitting inspection. Therefore, the Defendant can still produce the said photographs for inspection at any time before the trial. The position would be different if there is an order from the Court setting a time frame for the inspection of the photographs and the Defendant fails to comply with the said order. In those circumstances, the Defendant would not be able to rely on the photographs.

42. Second, the issues in a claim on adverse possession are factual based. In order to prove his case on a balance of probabilities the Defendant is entitled to call witnesses to give oral evidence on the date of entry, nature, extent and duration of the Defendant's possession of the disputed parcel. The contemporaneous documents in the action are only one type of evidence which the Defendant is entitled to rely on and at the trial, once they are admissible, it is for the Court to determine the weight to be attached if any given the totality of the credible evidence.

43. Third, the main aerial photographs which the Claimant relies on to prove that the Defendant was not in possession of the disputed parcel in 2002 have been contested by the Defendant. The Defendant's pleaded position on the aerial photographs is that he neither admits nor denies that an aerial survey was conducted in October of 2002 as he does not know if the same is true or false. He asserted that the aerial photographs reveal the new and/or renovated boathouse on the Parent Parcel of Land which was constructed in 2014 to 2015. The Defendant also averred that due to the location of the disputed parcel, it would be obscured in aerial photography by the tall trees which surround and shade the same. In my opinion in the absence of evidence from the expert witness who took the aerial photographs, the Court at this stage of

the proceedings cannot accept them at face value since their reliability is an issue to be determined by the Court at the trial.

ORDER

44. The Claimant's Notice of Application filed the 12 December 2019 is dismissed.

45. The Claimant to pay the Defendant's costs of the said application.

46. I will hear the parties on quantum.

Margaret Y Mohammed

Judge