REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-04011

CLAIR CARIMBOCAS

First Claimant

DELANO CARIMBOCAS

Second Claimant

LISA CARIMBOCAS-SMITH

Third Claimant

AND

CARRIE DAVIDSON

Defendant

BEFORE THE HONOURABLE MR. JUSTICE ROBIN N. MOHAMMED

Appearances:

Mr Phillip Hewlett-Lamont instructed by Mrs Lana Debbie Benoit for the Claimants

Ms Shanice Edwards instructed by Abigail Roach-Thomas for the Defendant

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DECISION ON DEFENDANT'S APPLICATION TO STRIKING OUT

Introduction

1. This matter involves a claim for damages arising out of a suit for waste and trespass in respect of a parcel of land situate at LP #168 Hill Top Drive, Saddle Road, Maraval (hereinafter "the said property").

2. On the 23rd November, 2015 the claimants filed a Claim Form and Statement of Case. The claimants claim the following relief:

a. A declaration that the defendant is committing waste to the substantial prejudice of the claimants;
b. An injunction that the defendant do forthwith cease her building works and cease committing waste upon the lands situate at **LP #168**[1] *(sic)*Hill Top Drive, Saddle Road, Maraval;
c. A declaration that any licence or permission which the defendant had to remain in the said home or on the said property has been terminated;
d. An order that the defendant do remove herself, her children and her paramour from the house and lands situate at #138 Hill Top Drive Maraval the home of the first claimant;
e. An order that the defendant whether by herself her servants or agents do cease molesting and harassing the first claimant forthwith;
f. Damages for waste;
g. Costs; and
h. Any such or further relief that the Court may deem fit.

3. On the 23rd of November 2015, the Claimants also filed an application for an injunction without notice. This application was supported by affidavit from the first claimant and subsequently on the 25th November, 2015 a supplemental affidavit was also filed by the first claimant.

4. On the December 7th, 2015 affidavits in response were filed on behalf of the defendant by Roger Salandy, Stephanie Medina, Leon Carimbocas (the third-named claimant in the claim form) and the defendant. Thereafter, on the 15th December 2015 affidavits in support of the injunction on behalf of the claimants were filed by Rhona Herbert, the second claimant and the third claimant. The claimants also amended their claim form on the 15th of December removing the then third-named defendant Leon Carimbocas.

5. On December 23rd, 2015 a Defence and Counterclaim was filed on behalf of the defendant. The defendant counter-claimed for the following relief:

[1] It is clear that the claimants intended to refer to **LP #138** Hill Top Drive, Saddle Road, Maraval instead of **LP #168**

a) a declaration that the defendant is entitled to complete the structure to the back of the said property;
b) a declaration that the defendant has an equitable interest in the said property arising out of the doctrine of proprietary estoppel;
c) an order restraining the claimants whether by themselves or by their servants and/or agents or otherwise howsoever from doing acts or any of them that prevent and/or hinder the defendant from peaceably enjoying the said property;
d) that the claimants' claim be dismissed;
e) interest;
f) cost; and
g) such and further relief as the Honourable Court may deem just and expedient.

6. On December 10th, 2015 the defendant filed and served its application to strike out the claim form and statement of case of the claimants. On the 15th December, 2015 the court ordered that the application for injunctive relief filed on 23rd November, 2015 be adjourned pending the determination of the application to strike out.

The Defendant's application to strike out the claim

7. By way of Notice of Application, filed on the 10th December, 2015 the defendant seeks an order that:
   i. The Claim Form and Statement of Case filed on 23rd November 2015 be struck out pursuant to **Rule 26.2(1)(a) of the Civil proceedings Rules 1998, (the CPR)** as the Statement of Case fails to comply with a rule;
   ii. The Statement of Case be struck out pursuant to **Rule 26.2(1)(c)** of the **CPR** as the Statement of Case or the part to be struck out discloses no grounds for bringing a claim;

iii. The Statement of Case be struck out pursuant to **Rule 26.2(1)(d)** of the **CPR** as the Statement of Case or the part to be struck out does not comply with the requirements of **Part 8** of the **CPR;**

iv. The Claimants' application for an injunction and Statement of Case be struck out as they fabricate and/or concoct evidence; and

v. The Claimants' application for an injunction be struck out on the premise that the Claimants did not come into equity with clean hands.

8. The grounds for the application are as follows:

I. The Statement of Case struck out pursuant to **CPR Part 26.2(1)(c)** on the ground that it discloses no grounds for bringing the action;

II. The Statement of Case be struck out pursuant to **CPR Part 26.2 (1)(d)** on the ground that there is no certificate of truth as provided by **CPR Part 8.8 (3)(a)** and **(b)**,

III. The Statement of Case be struck out pursuant to **CPR 26.2(1)(a)** on the ground that there is no certificate of value as required by **CPR Part 8.7**

IV. The Claimants were dishonest by alleging that they had permission of the Former Third Claimant (hereinafter called Leon Carimbocas) to issue proceedings on his behalf and did not come before the court with clean hands, and

V. The claim is frivolous, vexatious and malicious.

Nature of the Claim

(a) The claimants' case

9. The first claimant is the wife of Gibbs Carimbocas (hereinafter "the deceased"). The second claimant and the defendant are their children while the third claimant and Leon Carimbocas are the children of the deceased only.

10. According to the claimants, the first claimant and the deceased first began living together as man and wife in or about 1971. Before 1980, the deceased bought rights to the said

property and began to build a house thereon. The first claimant maintains that she assisted the deceased by doing manual labour on the said house and the couple built the house themselves. The deceased was a mason by trade and a fisherman. By virtue of deed **DE200500107489** made between Denise Irma Bain and the deceased dated the 17th August 2004, the deceased acquired the fee simple in the said property. In or around 1980-1981, the deceased, the first claimant, the third claimant and the defendant moved into the house built on the land and first claimant maintains that she has lived there ever since.

11. Under and by virtue of deed **DE201500814455** dated 27th March 2015, the first claimant became the life interest owner in the said property remainder to the four children of the deceased in equal shares.

12. The claimants allege that in 2000, the defendant got married and moved out of the said property but when the marriage broke down she moved back into the home. Allegedly, the defendant lives in the house rent free and caused her present companion, Roger Salandy to move in also. The house is a two-bedroom home occupied by the first claimant, the second claimant and his two children, the defendant and her two children along with her paramour, Roger Salandy.

13. The claimants claim that the defendant began to build a foundation left by the deceased to the back of the house. The deceased had built the foundation some 20 years ago but never completed the building. The defendant extended the foundation and is in the process of erecting a separate building thereon. It is on this basis that the claimant claims that the defendant has committed waste on the said property since she has done these acts without the consent of and in opposition to the claimants. The first claimant has called upon the defendant to move herself, her paramour and her children from the property but the defendant has refused to do this and according to the claimants has torn up a letter sent to her by the first claimant on 7th April 2015 and thus is trespassing on the home of the first claimant.

14. The first claimant has called on the defendant to stop committing waste on the said property but the defendant is causing the building works to advance with increased speed and is thereby damaging the interest of the remaindermen.

(b) <u>The defendant's case</u>

15. It is the defendant's case that around 1999 she began a foundation to the back of the home and took a loan from Cannings Credit Union to assist the deceased in financing the project. She says that the foundation is not 20 years old but 16 years old. She avers that after she got married, she began renting in Diego Martin for approximately 2 months. She claims that she was called by the deceased and he encouraged her to move back home to finish the foundation that they had started. She says that after her marriage broke down and she returned home, she paid bills and even some medical expenses of the deceased. She says that due to her bills, she was unable to start building right away. She claims that she and the deceased were very close.

16. The defendant contends that she has always contributed to household expenses and the upkeep of the said property since she started working. Roger Salandy moved in with the consent of the first claimant in 2010. The defendant says that she purchased building materials in 2005, began work in 2006 and purchased additional materials in 2013. The materials were stored on the said property with no objections from the claimants. She also says that she was never called upon by the first claimant to remove herself, her children or her paramour, Roger Salandy, from the home until an application for a Protection and Exclusion Order was made by her at the Port of Spain Magistrates' Court in January 2015. The defendant states that she received no eviction letter from the first claimant and she is not trespassing on the property. She also says that she has an equitable interest in the said property.

17. The defendant contends that she began work on the said property in the lifetime of the deceased and without objections from any of the claimants. Also, she has expended money towards the erection of the foundation and has continued to expend money since then in 2005, 2006, 2013 and 2015.

LAW AND ANALYSIS

18. The Defendant seeks to have the claimants' claim struck out based on various grounds which I shall address in turn.

Ground I: That the Statement of case be struck out pursuant to CPR Part 26.2(1) (c) on the ground that it discloses no grounds for bringing the action.

19. **Part 26.2(1)(c) of the CPR** provides the following:

> ***"(1) The court may strike out a statement of case or part of a statement of case if it appears to the court—***
>
> ***(a) ……..***
>
> ***(b) ……..***
>
> ***(c) that the statement of case or the part to be struck out discloses no grounds for bringing or defending a claim"***

20. According to **Zuckerman on Civil Procedure Principles of Practice Third Ed at page 373, para 9.36:**

> ***"The full pre-trial and trial process is appropriate and useful for resolving serious or difficult controversies, but not where a party advances a groundless claim or defence or abuses the court process. There is no justification for investing court and litigant resources in following the pre-trial and trial process where the outcome is a foregone conclusion...In such cases the court has therefore the power to strike out the offending claim or defence and thereby avoid unnecessary expense and delay ."***

21. The defendant submits definitions of trespass to land and waste. They submit that **trespass to land** is described in **Mozley and Whiteley's Law Dictionary, 12th Ed** as:

> ***"The tort of entering the land of another unlawfully, i.e. without permission of the owner, or remaining on land entered upon with the***

permission of the owner but following the withdrawal of that permission and a reasonable time/opportunity to leave."

Further the defendant submits that **waste** is described in **Black's Law Dictionary 5th Edition** as:

"An abuse or destructive use of property by one in rightful possession."

22. The defence submits that the causes of action of **waste and trespass contradict each other**. The defence further claims that in order for waste to be committed the person doing such must be a tenant in rightful possession of the property. The defendant asserts that having **"no authority"** and being in **"rightful authority"** cannot occur simultaneously. The defendant puts forth the authority of **Bullen and Leake and Jacob's, Precedents of Pleadings, 12th Ed**, wherein the case of **Phillips v Phillips (1878) 4 Q.B.D 127 at 139** was cited and in which Cotton L.J said -

"….that the pleadings should state those facts which put the defendants on their guard and tell them what they will have to assert when the case comes on for trial."

They submit that all matters must be stated concisely and yet with sufficient detail to enable the defendant to know precisely what case he has to meet. They assert that the pleadings drafted do not indicate to the defendant what case she has to meet and she cannot ascertain the grounds on which the cause of action in waste and/or trespass lie.

23. On the other hand, the claimants contend that the defendant's submission has no merit since the definitions in support are flawed because they come from an unrecognised authority. They submit that the **Black's Law Dictionary 5th Edition** is an American dictionary and illustrates American principles. Further, they submit that the defendant is erroneously under the impression that the two causes of action occurred simultaneously. They state that it is evident on the face of the pleadings that the two causes of action occurred subsequent to each other. The claimants cite the definition of waste in **Megarry and Wade: The Law of Real Property, 7th Edition pg 78**, as -

"*a limited owner despoiling the land to the prejudice of those in reversion or remainder".*

24. Counsel for the claimants submits that paragraph 11 of the statement of case infers that after moving back to the disputed property and prior to 2015, the defendant began committing waste by doing work on the land. At that point she would have been a licensee i.e. a limited owner. At paragraph 13 of the statement of case, it is pleaded that the defendant was asked to leave on 7th April 2015 and refused thus committing trespass from the date of refusal to vacate the property.

25. **Halsbury's Laws of England 5th ed. 2013 Reissue. Vol. 62** describes waste ***at para. 577*** as -

"any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land. The obligation not to commit waste is an obligation in tort, and is independent of contract or implied covenant."

Further at para 578:

"Although changing the nature of the demised premises is technically waste, this is not so if the change has been expressly sanctioned by the landlord. It seems that an act does not constitute waste unless it is in fact injurious to the reversion either by diminishing the value of the estate, or by increasing the burden upon it, or by impairing the evidence of title. At any rate, in the case of acts which may be technically waste but in fact improve the inheritance ('meliorating waste'), the court will not interfere to restrain them by injunction, nor will they be a ground of forfeiture under a proviso for re-entry on commission of waste. Apart however from acts done to the exercise of the statutory authority, a substantial alteration in the character of the demised premises will be treated as waste and restrained by injunction, notwithstanding that the value may be thereby increased."

26. Trespass to land is the unwarranted intrusion upon land and interference with certain interests in land in the possession of, or belonging to, another. In order to succeed in its claim the claimant must satisfy the court on a balance of probabilities that - (i) at the time of the alleged trespass the claimant was in lawful possession of the land that is the subject matter of the complaint; and (ii) the Defendant wrongfully entered the said land: **National Spiritual Assembly of the Baha'is of Trinidad and Tobago v Winston Chen H.C.1833/2004**

27. In the instant matter, irrespective of the definition of waste applied, it is clear that the defendant being a licensee is a person in rightful possession/limited owner since at the time there was permission granted by the first claimant. The contention arises not with the definition of waste but the consideration of whether the claimants could rightfully bring a claim in both waste and trespass. I am of the view that the Claimants did plead a case for **both** **trespass** and **waste** against the defendant in the statement of case. I do agree with the claimants' contention that the acts to warrant waste and trespass did not occur simultaneously but subsequent to each other.

28. I shall examine the pleadings of the claimants' statement of case below. At paragraph 11 of the statement of case of the claimants it was averred that -

> ***"The defendant has extended the said foundation, and is in the process of erecting a separate building thereon. In addition, the defendant has established that she intends to open a driveway over another part of the said property.***

Further, at paragraphs 12 and 13 of the statement of case the claimants pleaded -

> ***"The defendant is thereby committing waste upon the said property, without the consent of and in opposition to the wishes of the claimants.***
>
> ***"The first claimant has called upon the defendant to remove herself, her children and her paramour from the house and the said premises, but the***

defendant refuses to do this, and has torn up a letter sent to her by the first claimant on the 7th April 2015 and thus is trespassing in the home of the first claimant.

29. I am of the view that the claimants quite sufficiently pleaded the causes of action of both waste and trespass. First, the statement of case outlined that the defendant who was in rightful possession was also doing acts on the property without the permission of the first claimant or the remaindermen. At this point, the claimants submit that the defendant who was still a licensee committed waste on the said property. The claimants undoubtedly outlined that thereafter, the defendant was asked to leave. At this point, the submission is that the defendant was no longer a licensee or someone in rightful possession or a limited owner. After notice of eviction was given, the claimants submit that defendant would thereafter be a trespasser on the said property. I do accept that the claimants have outlined their case for the causes of action of waste and trespass distinguishing by sequence in time when each cause accrued. It is my finding, therefore, that the defendant's application to strike out on this ground is without merit and is accordingly refused. It must be stressed, however, that the injunction sought at paragraph (b) of the relief stated in the claim form and statement of case that the defendant cease committing waste, cannot be pursued as this would be contrary to the finding of the court as to when waste can be committed.

<u>Ground II & IV</u>: The Statement of Case be struck out pursuant to CPR Part 26.2 (1) (d) on the ground that: (1) there is no certificate of truth as provided by CPR Part 8.8 (3) (a), (b); and (2) the Claimants were dishonest by alleging that they had authorisation of the former third-named Claimant (hereinafter called "Leon Carimbocas") to issue proceedings on his behalf and therefore did not come before the court with clean hands.

30. **<u>Part 8.8 of the CPR</u>** provides for the following:

(1) The claimant must certify on the claim form or his statement of case that he believes that the contents are true and that he is entitled to the remedy claimed.

(2) If it is impractical for the claimant to give the certificate required by paragraph

(1) it may be given by his attorney at-law.

(3) If the certificate is given by the attorney-at-law he must also certify—

(a) the reasons why it is impractical for the claimant to give the certificate; and

(b) that the certificate is given on the claimant's instructions.

31. The defendant submits that no issue is taken with the presence of the necessary certificate of truth but rather, the defence takes issue with the substance of it. The defendant contends that the attorney-at-law for the claimants inserted and signed a certificate of truth in the statement of case and claim form on behalf of **all** the claimants indicating that the claimants were unavailable to sign at the relevant time. It was particularly indicated that authorisation of **all** the claimants were given for the attorney-at-law to sign on their behalf.

32. The defence maintains that the court has a duty to further the overriding objective and parties are also required to assist the court in doing so: **(Part 1.3 CPR)**. It was discovered that there was no authorization or instruction given by the then third-named claimant (Leon Carimbocas) to sign on his behalf, the said Leon Carimbocas having filed an affidavit in support of the defendant on the 7th December, 2015. That affidavit, which was filed in relation to the claimants' application for injunctive relief, clearly deposed that Leon Carimbocas never gave any permission to the first claimant or any of the claimants or their attorneys-at-law to file any claim on his behalf. The statement of case was later amended removing the above-mentioned Leon Carimbocas as a defendant. The defendant, however, contends that the error was not procedural but one of dishonesty which cannot be cured by an amendment.

33. The claimants on the other hand, submit that this ground is unmeritorious. They cite Part **20.1(1) of the CPR** which states that a statement of case may be changed at any time before the Case Management Conference (CMC) without the permission of the court. They maintain that an application was made to remove the wrongfully added party which was granted and they rely on **Part 19.3 (a) CPR** which states that a claim shall not fail

because a person was added as a party to the proceedings who should not have been added.

34. **Part 20.1(1) of the CPR** of the statement of case provides:

> ***(1) A statement of case may be changed at any time prior to a case management conference without the court's permission.***

35. I note that in the case before me the Claim Form and Statement of Case filed on 23rd November, 2015 both contain a Certificate of Truth signed by the attorney-at-law for the claimants on behalf of them all. It was stated that due to the urgency of the matter, the claimants were not available in time for filing. I also note that on December 15th 2015, the claim form was amended to remove the then third claimant Leon Carimbocas who according to his affidavit did not give permission to be part of proceedings. The amended claim form also included a certificate of truth signed by all three claimants.

36. While I do acknowledge that the initial statement of truth contained a false statement by the attorney-at-law, I cannot determine whether it was dishonest. It appears that the attorney would have taken instructions from the first-named claimant who has a life interest in the property in contention, the other claimants having a future interest in the remainder. The question whether the first-named claimant was dishonest or made an honest mistake as to whether she had the permission of Leon Carimbocas, he also being a person having a future interest in the remainder of the said property, to file a claim on his behalf, has not been tested by cross-examination.

37. I also bear in mind that the attorney-at-law for the claimants was seeking an ***ex parte*** injunction which requires the attorney to establish the element of urgency and which in itself requires the attorney to approach the court at the earliest possible opportunity after the cause has arisen. This may very well account for the attorney not having the requisite time to consult with each individual claimant before filing, as stated on the certificate of truth. I am also mindful that there was an attempt to cure same as soon as the attorney

was apprised of the lack of authorisation on the part of Leon Carimbocas, by filing an amended claim and statement of case which included a certificate of truth now signed by all individual claimants. It is instructive to note that in the **Civil Procedure, Volume 1, The White Book Service 2009 at 22.3.2** under the rubric **"Failure to verify a statement of case"**, it is reported that ***"It is perhaps unlikely that a court would strike out a claim form or statement of case for failure to comply with r.22.2(2)[2] if the document was verified but not properly verified; see, e.g. Protea Leasing Ltd v Royal Air Cambodge Ltd, March 7, 2000, unrep. (Timothy Walker J.)."*** [Emphasis added]

38. Further, it is reported in the said **White Book** under the rubric **"False statements"** at **22.1.18**: ***"In certain circumstances, a false statement made in a document verified by statement of truth may lead to a liability for contempt of court……Proceedings for contempt of court may be brought against a party if he makes, or causes to be made, a false statement in a document verified by a statement of truth."***. I note that the false statement in the certificate of truth may be subject to liability for contempt of court but no such proceedings have been brought before this court.

39. Bearing all of the above in mind and applying **Part 19.3(a) of the CPR** which provides that **"*a claim shall not fail because a person was added as a party to the proceedings who should not have been added"*** I do not find the defect in the certificate of truth to be one which could not be rectified by **Part 20.1 of the CPR**, especially where the first CMC had not yet occurred and that the claimants acted as soon as practicable when it was clear that Leon Carimbocas had not given his permission to bring a claim on his behalf. In these premises I find that the claim and statement of case ought not to be struck out as a result of the procedural shortcoming in that regard. I do find, however, that the defendant was justified in attempting to have the claim and statement of case struck out on these grounds and therefore I will give consideration to this aspect of the application when considering the question of the entitlement to costs.

[2] Rule 22.2(2) of the UK CPR provides "The court may strike out a statement of case which is not verified by a statement of truth."

Ground III: The Statement of Case be struck out pursuant to CPR 26.2(1) (a) on the ground that there is no certificate of value as required by CPR Part 8.7

40. **Part 8.7 of the CPR** requires the following:

> ***"If the amount of any damages claimed is not specified the claim must include a certificate by the claimant or his attorney-at-law that the damages claimed exceed or are likely to exceed $15,000 or the basis on which it is said that the High Court has jurisdiction."***

41. The defendant submits that pursuant to **Part 8.7 of the CPR**, the claimants have failed to include a certificate of value. The claimants contend that this defect is not fatal and the court may apply **Part 26.8(1) of the CPR** to cure this defect. Counsel for the claimants cited **African Option and David Walcott v Bank of Baroda (Trinidad and Tobago) Limited CV2013-05221** where this court adjudicated on the issue of procedural defects in the statement of case in relation to both the certificate of truth and certificate of value. They submit that the Honourable Judge stated **"*Nonetheless, I do not find any defect in that regard to be of the kind that cannot be rectified by Part 26.8 of the CPR"***

42. Part **26.8 (1) of the CPR** provides:

> ***(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.***
> ***(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.***
> ***(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.***
> ***(4) The court may make such an order on or without an application by a party.***

43. It must first be acknowledged that this is a claim in which damages are claimed but the amount of such damages has not been specified. Accordingly, pursuant to **Part 8.7 CPR** the claimants or their attorney-at-law ought to have included a certificate of value stating that the **damages claimed are likely to exceed $15,000.00** or the basis on which it is said that the High Court has jurisdiction to deal with this claim. This certificate is also required to deal with the provisions of **sections 8 and 25A of the Petty Civil Courts Act Chap. 4:21** wherein the jurisdiction of the Magistrates' Court extends to all matters the values of which do not exceed **$15,000.00** but excepting those matters the values of which may be under $15,000.00 but for which the Registrar certifies that there is a point of law to be decided by the High Court. It must be noted that **Part 8.7 CPR** is now out of sync with the current state of the law since the **Petty Civil Courts Act** has been **amended** by **section 4 of the Finance Act, 2015 (Act No. 2 of 2015)** whereby the limit of the **jurisdiction of the Magistrates' Court has been increased to $50,000.00** with effect from the **27th January, 2015**. Consequently, **Part 8.7 CPR should also be amended to read $50,000.00 instead of $15,000.00. It is hoped that the Rules Committee will take cognisance of this anomaly and rectify Part 8.7 CPR accordingly.**

44. Taking all of the above analyses into account, I find that at this early stage of the proceedings, the statement of case ought not to be struck out for the claimants' failure to include a certificate of value. While I do acknowledge that the procedural directions incorporated in the CPR are present to ensure that civil proceedings are conducted more efficiently, I am of the view that it will be unconscionable to strike out the statement of case on this ground only. I find that the defect is one that can be rectified by the application of the provisions of **Part 26.8 (1)–(4) of the CPR** and considering the overriding objective of the CPR which requires the court to deal with all cases justly, I shall order that the statement of case be amended to include a certificate of value. Again, I am of the opinion that the defendant was justified in raising this defect as an issue since it may appear grossly irresponsible on the defendant's attorney's part if this defect were to be overlooked or simply ignored. Such a course will undoubtedly lead to a cancerous

laissez-faire attitude in litigation which the CPR are designed to eradicate. Accordingly, on the question of the entitlement of costs I shall take this into account.

Ground V: The claim is frivolous, vexatious and malicious.

45. The defendant submits that the claim is frivolous because it does not put forward any grounds or sufficiently pleaded facts to support the cause of action. It is vexatious because the causes of action cannot co-exist and therefore they will only make the whole claim hopeless. Further, they state that if the claimants pursue only one cause of action, they will fail to satisfy the elements of the torts of both trespass and waste according to the claimants' pleading.

46. They also argue that the claimants are trying to re-litigate on the issue raised in para 17 of the statement of case where it is pleaded that the first claimant was subjected to threats to her life and physical assault by the defendant and her paramour, Roger Salandy which they say was already adjudicated upon by a court of competent jurisdiction. Counsel for the defendant cited the authority of **Narash Ramlogan v Ramesh Persad Maharaj and Ors No. CV2011-04594** at para 53 where mention was made of the landmark decision of **Henderson v Henderson [1893] 3 Hare 100** wherein the following principle was laid down:

> **"*Where a matter was the subject of adjudication by a court of competent jurisdiction, the parties to that litigation would not be permitted to open the same litigation in respect of matters which were or ought to have been brought forward*".**

47. On the issue as to whether the claim is frivolous, vexatious and malicious, counsel for the claimants contends that the power to strike out is one that is to be used sparingly and is not to be used to dispense with a trial where live issues are to be tried: **Beverley Ann Metivier v The Attorney General of Trinidad and Tobago and ors, No. CV2007-00387 per Kokaram J**. Counsel submits that there is a serious issue to be tried, since the defendant's action on the interest of the remainder men is now being threatened.

48. Counsel also submitted that even if the court were to find that there is an abuse of process, the court's power to strike out a claim or statement of case is discretionary and one which should only be exercised as a last resort. Counsel cited as authority for this statement the case of **Danny Balkissoon v Roopnarine Persad and JSP Holding Limited No. CV2006-00639** in which Jamadar J (as he then was) opined:

> ***"That a court when considering an application to strike out proceedings under CPR 26.2(1) (b) as an abuse of process of the court must do so in light of the overriding objective and the function of the court to deal with cases firstly……even where there may be an abuse of process that does not mean that the only correct response is to strike out a claim or statement of case…….Third, the jurisdiction or power of the court to strike out proceedings as an abuse of the process of the court is discretionary, given the status of the constitutional rights of access to the court it would appear that striking out a claim should be the last option…."***

49. I am in agreement with the above two authorities cited, namely, **Metivier v The AG** and **Balkissoon v Persad**. On basis of my findings under **Ground I** above, I hold that the defendant's argument that the claim is frivolous and vexatious has failed since the claimants have sufficiently pleaded their case and it is not without substance nor groundless.

50. In **Narash Ramlogan v Ramesh Persad Maharaj and Ors,** at paragraph 55, Justice Rampersad referred to the case of **Patrick v Beverly Gardens Development Co [1979] A.C 547** where it was stated:

> ***"To form a basis for estoppel per rem judicatem there has to be a final determination of the issue by a court of competent jurisdiction. A judgment on an interlocutory aspect is not sufficient and it is open to a plaintiff to bring further proceedings on the same factual basis……"*** [Emphasis added]

51. Counsel for the defendant is seeking to equate the proceedings for a Protection Order and Exclusion Order dealt with at the Magistrates' Court with these proceedings in which

declaratory relief as well as injunctive relief are sought. In this regard, it appears that counsel for the defendant is submitting that since the Magistrate had made a final Protection Order in favour of the defendant and refused to make an Exclusion Order again in favour of the defendant that this creates an issue estoppel against the first-named claimant in relation to advancing the issue of threats and violence and on the issue of seeking to exclude the defendant from the property in contention. Counsel advances the argument, it appears, that by the first-named claimant raising these issues in these proceedings the claimants are seeking to re-litigate issues that have been adjudicated upon by the Magistrates' Court.

52. I am of the view that this submission by counsel for the defendant is indeed misconceived and seeks to conflate the jurisdictions of the Magistrates' Court and the High Court. It is clear that the Magistrate would have exercised jurisdiction under the **Domestic Violence Act Chap. 45:56 (Act 27 of 1999 as amended by Act 8 of 2006)** (hereinafter referred to as **"the DV Act"**) in particular **section 6(1)(a)(i)-(vii)** thereof for the making of the Protection Order. It is also clear that the Magistrate would have had jurisdiction to consider making an Exclusion Order against any of the parties in relation to the property in contention under **section 6(1)(c)(iv) of the said DV Act** although no such order was made as the evidence suggests. The jurisdiction exercised by the Magistrate under the DV Act is to provide immediate injunctive relief to victims of domestic violence and to ensure a prompt and just legal remedy for victims of domestic violence as prescribed by section 2 of the DV Act. The jurisdiction does not extend to determining substantive legal rights and declaratory proprietary interest in property but based more so on the preservation of the safety of the victim until substantive rights can be established. Accordingly, the making of a Protection Order which is only granted for a particular period does not preclude a claimant from seeking injunctive relief from the High Court on similar facts. Of course the High Court must take into account that a Protection Order was made when dealing with any such application. Similarly, the refusal or the granting of an Exclusion Order by a Magistrate does not prevent a claimant from seeking from the High Court a declaration as to proprietary interest in the said property or residence as the

Magistrate's Court Exclusion Order can only be made for a specified period and does not and cannot declare substantive rights to the said property.

53. On the authority of **Narash Ramlogan** and **Patrick v Beverly Gardens Development Co**, quoted in paragraph (50) above, I disagree with the submissions by counsel for the defendant that the claimants have tried to re-litigate on issues which have been dealt with by the Magistrates' Court under the **DV Act**. The Protection Order which was granted in favour of the defendant on the 25th day of September, 2015 was only effective until 24th March, 2016. It was thus temporary in nature and has already surpassed its expiry date. I find that there has been no final determination of the issues and that the claimants are not barred from raising the same facts in their pleadings. Accordingly, the claim including the amended claim and statement of case shall not be struck out on this ground.

54. From the above analyses and findings in relation to all of the grounds raised for striking out the claim and statement of case it is clear that the application to strike out filed on the 10th December, 2015 will be dismissed. The question of the entitlement to costs now arises for consideration.

ENTITLEMENT TO COSTS:

55. The general rule is that the court must order the unsuccessful party to pay the costs of the successful party: **CPR Part 66.6(1)**. However, under the CPR, this general rule that costs follow the event is just a starting point since CPR Part 66.6(2) gives the court the discretion to order the successful party to pay all or part of the costs of the unsuccessful party: [see **A.E.I. Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 W.L.R. 1507**, CA, per Lord Woolf and **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TCC)** per Jackson J.]

56. This new approach, which is the issue-based approach, requires the court to consider issue by issue to ascertain where costs should fall, particularly in cases which are not "money claims" which more accurately reflect the level of success achieved: [see the cases of: (1) **Summit Property Ltd v Pitmans [2001] EWCA Civ. 2020**; (2) **Secretary**

of State v Frontline [2004] EWHC 1563; (3) **Fulham Leisure Holdings v Nicholson Graham [2006] EWHC 2428, Ch, per Mann J**.; and **A.E.I. Rediffusion** (supra).

57. In exercising its discretion as to who should pay costs the court is mandated to consider all the circumstances of the case including, but not limited to: (a) the conduct of the parties (both before and during proceedings); (b) whether the party has succeeded on particular issues even if not wholly successful; (c) the manner and reasonableness in which a party pursued the proceedings, a particular allegation or issue; and all other factors provided for in **CPR Part 66.6 (5) and (6)**: [see **Firle v Data Point International Ltd [2001] EWCA Civ. 1106, CA**, and **Islam v Ali [2003] EWCA Civ. 612**].

58. The question as to who is the successful party was considered in the case of **BCCI v Ali (No. 4), The Times March 2, 2000** which was approved in **Day v Day [2006] EWCA Civ. 415** in which it was stated that the court must treat ***"success"*** not as a technical term but ***"a result in real life"*** to be determined with the ***"exercise of commonsense"***. In CPR Part 66.6(3) the court is given the power in particular to order a person to pay-

> ***(a) only a specified proportion of another person's costs;***
> ***(b) costs from or up to a certain date only; or***
> ***(c) costs relating only to a certain distinct part of the proceedings.***

59. In light of the new approach to the entitlement of costs under the CPR, it appears to me that both parties have won and lost on particular issues but on the application of the issue-based approach and considering success with the exercise of commonsense, and having regard to what I have already indicated during my analysis of the different issues raised, it appears to me that the claimants are the overall successful party, marginally. In this regard I hold that the defendant shall pay to the claimants **60%** of their costs of the application to strike out to be assessed in accordance with **CPR Part 67.11**.

DISPOSITION:

In light of all of the foregoing this Court orders as follows:

ORDER:

(1) The defendant's Notice of Application filed on 10th December, 2015 to strike out the claimants' statement of case be and is hereby dismissed.

(2) The claimants shall amend their statement of case to include a certificate of value in compliance with CPR Part 8.7 on or before the 29th April, 2016.

(3) The Defendant to pay to the Claimants 60% of their costs of this application to be assessed in accordance with CPR Part 67.11, in default of agreement.

(4) In the event that there is no agreement of the quantum of costs, the claimants shall file and serve a Statement of Costs for assessment on or before 31st May, 2016.

(5) The defendant shall file and serve Objections to the said Statement of Costs on or before the 24th June, 2016.

Dated this 18th day of April, 2016

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Robin N Mohammed
Judge