

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV 2016-01199**

**BETWEEN**

**ANNETTE FRANCOIS JENNINGS**

**Claimant**

**AND**

**LIONEL LEWIS JR.**

**Defendant**

**Before the Honourable Mr. Justice Robin N. Mohammed**

**Appearances:**

Mrs. Leandra D. A. Ramcharan for the Claimant

Mr. Brent K. Ali for the Defendant

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**DECISION ON POINT *IN LIMINE* RAISED BY DEFENDANT**

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**I. Background**

1. The Claimant and Defendant are owners of separate but adjoining pieces of land. The Claimant's land is referred to as the "**Jennings Land**" and abuts the Defendant's land, known as the "**Lewis Land**", on its eastern boundary. The Defendant's land is part of a larger parcel of land that was initially owned by his father. The remainder of that larger

parcel was conveyed and subdivided between the father's wife and three children who are known as the beneficiaries. Within these three parcels of land there exists a **Right of Way** that is central to the dispute between the parties in these proceedings. However, the date, location and circumstances under which this Right of Way came into being remain disputed and in any event, are matters to be determined at trial. What is undisputed is the fact that, in the father's conveyance of the Lewis Land to the Defendant, no Right of Way was included.

2. Sometime between 2009- 2011, the Defendant began construction of a building scheme on the Lewis land, which is the genesis of the claim and the declaratory reliefs sought against him. As part of this development, the Defendant began construction of a concrete wall along the southern boundary of the Claimant's land. The Claimant protests that the wall obstructs her and her tenant's use of the Right of Way and has also caused damage to her property. The Defendant, however, maintains that he is entitled to build this wall as it is necessary for his building scheme and in any event, the wall does not affect the Claimant's access to any Right of Way.
3. The parties were not able to resolve this issue amicably and accordingly, on the 15<sup>th</sup> April, 2016, the Claimant instituted proceedings against the Defendant seeking several declaratory reliefs, one of which is the subject of this decision:

*“...that the Claimant, her servants and/or agents, tenants, visitors and licencees<sup>1</sup>[sic] for all purposes connected with the use and enjoyment of the Jennings Land are entitled to the use of the Right of Way and that the benefit of same is appurtenant to the said Jennings Land.”* (“the Subject Declaratory Relief”)

4. By Notice of Application filed on the 1<sup>st</sup> June, 2016, the Claimant sought injunctive relief against the Defendant to prevent him from, inter alia, obstructing her use of the right of way. The Application was set to be heard on the 28<sup>th</sup> July, 2016 but on said date, the parties instead consented to preserve the status quo until the hearing and determination of the trial, which was set to commence on the 6<sup>th</sup> December, 2016. On the date fixed for the trial, the Defendant's attorney-at-law, for the first time, raised a point *in limine* before the start of the

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<sup>1</sup> Correct spelling being “Licensees”

trial and opted to make oral submissions on such preliminary point. He submitted that the Claimant could not be granted the Subject Declaratory Relief because the parcel of land over which the Right of Way exists is not owned by the Defendant but rather, the beneficiaries. In light of this submission, and on the basis that counsel for the Claimant was not prepared to address this preliminary point which was made without notice, this Court vacated the trial and ordered the parties to engage in discussions to find a common way forward failing which, written submissions on the point *in limine* were to be filed and exchanged before the 20<sup>th</sup> January, 2017.

5. On the 20<sup>th</sup> January, 2017 written submissions on the point *in limine* were filed on behalf of the Defendant and on the 8<sup>th</sup> February, 2017 response submissions were filed on behalf of the Claimant. The Court must now decide on the point *in limine* raised by the Defendant.

## **II. Issue:**

6. Whether the Claimant can be entitled to the Subject Declaratory Relief?

## **III. Submissions:**

7. The Defendant made two essential submissions to argue that the Subject Declaratory Relief sought by the Claimant should not be granted:
  - (i) That the Claimant's case is that the Right of Way sits on the beneficiaries' land, who are not parties to these proceedings and, as noted in **Savitre Lochan v Keith Farfan**<sup>2</sup>, the Court should not grant Orders which affect third parties' interests *in absentia*;
  - (ii) That pursuant to **Part 19.2 of the CPR**, the failure to add the beneficiaries cannot be rectified at this stage. The result being that any part of the Claimant's claim that relates to its entitlement to use of the Right of Way should be struck out.
8. The Claimant opposed the Defendant's submissions on several fronts:
  - (i) That the case of **Savitre Lochan** is distinguishable from the instant matter;

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<sup>2</sup> CV 2008-02015

- (ii) That the Defendant has denied the existence of any Right of Way in its Defence and therefore, cannot now contradict himself by submitting that the Right of Way exists on land owned by parties who are not present to these proceedings.
- (iii) That the Court can still restrain the Defendant from blocking the Claimant's use of the Right of Way for three reasons: First, there existed an agreement between the father and the Claimant for use of the Right of way; secondly, the Defendant is not the owner of the land on which the Right of Way sits and therefore, is not entitled to prevent the Claimant's access to same; and thirdly, the Claimant's use of the Right of Way does not affect the interests of the beneficiaries on whose land the Right of Way sits.
- (iv) That in the interests of justice and fairness, the Court should exercise its jurisdiction under **Part 19.2(3) CPR** to add the beneficiaries to the proceedings. In this light, counsel submitted that the Court of Appeal in **Savitre Lochan** agreed that the lower court should have considered whether to add the missing party to the proceedings<sup>3</sup>;
- (v) That the Court should weigh the likely minimal increase in costs occasioned by adding the beneficiaries to the claim with **Part 19.3(b) CPR**, which states that a claim should not fail merely because of a failure to add a relevant party.
- (vi) That the Defendant, by not raising this point *in limine* in its statement of issues and choosing instead to introduce it at the first day of trial, is effectively ambushing the Claimant and not abiding by the philosophy of the CPR, which promotes full and frank disclosure.

#### **IV. Law & Analysis:**

9. At the outset, this Court notes that by its decision to vacate the trial and allow the Claimant time to file submissions in response, it has effectively dealt with any issues of ambush occasioned by the point *in limine* being introduced on the day of trial.
10. With respect to the merits of the point *in limine*, the Court does agree with the Defendant's submission that the Claimant has accepted in his pleadings that the Lewis Land was given

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<sup>3</sup> Paragraph 8 of the Claimant's submissions.

to the Defendant excluding the Right of Way<sup>4</sup>. Whether this fact means that the Subject Declaratory Relief cannot be sought against the Defendant is the central issue in this decision.

**The case of *Savitre Lochan*:**

11. Counsel for the Defendant submitted that the dicta in this case is directly applicable to the instant matter and shows that the Subject Declaratory Relief cannot be granted because it affects the rights of the beneficiaries who have not been included in these proceedings. Counsel for the Claimant submitted that this case is distinguishable on its facts and in any event, has been appealed. The learning from the Court of Appeal suggests that, even if it is determined that the beneficiaries should have been added, the trial Judge was entitled to exercise his discretion at any stage of the proceedings to add the beneficiaries if it accorded with the interests of justice.
12. The case of **Savitre Lochan v Keith Farfan** concerns the disputed validity of a Deed of Assignment signed by the claimant to the Ramhits in 1980. The claimant alleged that her signature on that Deed was a forgery and accordingly, all subsequent assignments of the property are invalid as the Ramhits obtained their legal title by a fraudulent Deed. By Deed of 1994, the defendant became the last owner of the property and in the action brought against him by the claimant, the Defendant maintained that he is a *bona fide* purchaser for value without notice and therefore, legally entitled to the property.

The claimant sought several declaratory reliefs including an order to set aside the Assignment to the Ramhits and, inter alia, a declaration that she is the true legal owner of the property. The claim however, was brought against the defendant alone. A pivotal issue to the success of the claim was whether the court can grant the Orders requested when the Ramhits, who had a direct interest in the matter and who would have benefitted from the Assignment, were not joined.

While Justice Rampersad agreed with the defendant that the Ramhits should have been included in the action, his reasoning is significant. He relied on the Privy Council case of

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<sup>4</sup> Paragraph 15 of the Statement of Case.

**Penang Mining Co. Ltd v Choong Sam**<sup>5</sup>, which essentially stated that a party *may* be added if his legal interests will be affected by the judgment. Putting it differently, he viewed that the Court had to ask whether the missing party's rights against, or liabilities to, any party to the action, has been directly affected by any order made in the action.

Applying these dicta, Justice Rampersad deemed the Ramhits as necessary parties to the action “*as their rights as the purchasers to the subject property stand to be affected by an Order sought by the claimant. Indeed if Deed 4242 [of 1980] were to be set aside, this would expose the Ramhits to litigation since they are the ones from whom the defendants would seek compensation.*”

He also viewed that there may be criminal consequences if the claimant's signature was found to be a forgery and that such a finding (i) may have been averted if the Ramhits were called to give evidence; (ii) would suggest that the Ramhits were willing parties to the fraud; and (iii) would prevent the Ramhits from assisting the Court by giving what could be valuable testimony concerning the circumstances surrounding the signing of the Deed.

The Court of Appeal<sup>6</sup> agreed with Justice Rampersad's application of the principle from the Privy Council decision and his determination that the Ramhits' rights would have been affected by his decision<sup>7</sup>. Further, as submitted by the Claimant's counsel, the Justices of Appeal viewed that on a conjoint reading of **Parts 11.4 and 19.5 of the CPR**, the Court was entitled to add a party to the proceedings with or without an application before it.

13. Therefore, as a first step, this Court must ask itself whether the beneficiaries will have their rights concerning the Right of Way, directly affected by the Subject Declaratory Relief if it were to be granted. It therefore follows that, for the beneficiaries to be added to this matter, it must be proven that they had access to use the Right of Way by way of: (i) the fact that the Right of Way is situated on their land; or (ii) permission to use the Right of Way from the owner of the land on which the Right of Way sits.
14. The Claimant's pleaded case makes no reference to any facts evidencing limb (ii). Rather, at paragraph 17 of the Statement of Case, it is averred that the Defendant's father

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<sup>5</sup> (1969) 2 MLJ 52

<sup>6</sup> CA No. 262 of 2010.

<sup>7</sup> Page 2 of the Transcript of the oral judgment at line 48.

bequeathed, by his Will, the Larger Parcel of land to the beneficiaries “...*inclusive of the Right of Way*”. This fact is expressly denied by the Defendant, where he states that the said paragraph 17 of the Statement of Case is admitted ... “*except for the existence of any Right of Way*”.

15. Alternatively, the Claimant avers her entitlement to the Right of Way via an agreement made with the Defendant’s father that, upon undertaking to cut the Right of Way at her own expense, the Claimant would be permitted to use same freely<sup>8</sup>. This pleading was similarly expressly denied by the Defendant who averred that no such Right of Way was ever cut and further, that none existed until 2010, when the Defendant constructed the access road<sup>9</sup>. Accordingly, these remain issues in dispute and findings can only be made after the Court has received the live evidence of the witnesses tested under cross-examination at trial. By asking this Court to decide on the point *in limine* now, the Defendant is requesting that the Court make premature findings on substantive issues, which is an affront to the principles of due process. This is not something that this Court is willing to do.

16. Further, as rightfully submitted by the Claimant, the Defendant’s pleaded case is that there never existed any Right of Way when the lands were conveyed to the beneficiaries or the Defendant. Accordingly, it is contradictory to now challenge the Subject Declaratory Relief on the ground that the Right of Way exists on the beneficiaries’ land, who are not parties to these proceedings.

17. On these bases, the Court views that the point *in limine* submitted by the Defendant should be dismissed.

18. Notwithstanding the above, for the sake of providing clarity on the learning given in *Savitre Lochan* and the application of the provisions cited in **Part 19 of the CPR**, this Court will go on to make the following comments:

**The Appeal decision in *Savitre Lochan*:**

19. The Court of Appeal in *Savitre Lochan* decided that the lower Court should have considered whether to exercise its discretion to add the party to the proceedings. However, after due

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<sup>8</sup> Paragraph 10 of the Statement of Case.

<sup>9</sup> Paragraph 8 of the Defence.

analyses, the Court decided that it was not appropriate to add the party considering the stage at which the matter had progressed and the costs that would be incurred. The reasoning behind this decision is crucial for future guidance.

20. In coming to their finding, the Justices of Appeal (the panel) viewed that the right approach involved weighing the underlying principles in the overriding objective of fairness and expedition embodied in **Part 1.1 of the CPR** with **Part 19.5**, which gives the Court the discretion to add a party with or without an application at any stage of the proceedings. In this light, and considering that the proceedings were at a very advanced stage, the panel was of the view that the addition of a new party would be too costly as it would necessitate a reversion to the pre-trial stage along with a need for further directions, additional disclosure and pleadings and so on. It was their considered view that this would amount to a significant waste of time and resources and would not accord with objectives of justice and expediency.
21. Counsel for the Claimant sought to distinguish the instant matter by submitting that, unlike ***Savitre Lochan***, the point *in limine* was raised before the trial commenced in full and as a consequence, the trial had been vacated. This would therefore eliminate the possibility of a duplicitous trial and accordingly, there was less of a case to be made for the wastage of time and resources if it was determined that the beneficiaries needed to be added.
22. This submission is further enhanced by the fact that the Defendant's counsel's interpretation of **Part 19 of the CPR** was misguided; in particular, the myopic view in the argument that it is too late to add the beneficiaries to the proceedings by application of **Part 19.2**.

**Application of Part 19 of the CPR:**

23. **Part 19.2** deals with the procedure and timing of adding a party to proceedings. It states:
  - (i) *A party may add a new party to proceedings without permission at any time before a case management conference.*
  - (ii) *The court may add a new party to proceedings if—*
    - i. *it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or*



- ii. *there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.*
- (iii) *The court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.*
- (iv) *The court may order a new party to be substituted for an existing one if—*
  - i. *the existing party's interest or liability has passed to the new party; and*
  - ii. *the court can resolve the matters in dispute more effectively by substituting the new party for the existing party.*
- (v) *The court may add or substitute a party at a case management conference.*
- (vi) *The court may not add a party after a case management conference on the application of an existing party unless that party can satisfy the court that the addition is necessary because of some change in circumstances which became known after the case management conference.*

24. **Part 19.3** however states that a claim should not fail merely because a relevant party was not added. It states:

- (i) *The general rule is that a claim shall not fail because—*
  - i. *a person was added as a party to the proceedings who should not have been added; or*
  - ii. *a person who should have been made a party was not made a party to them.*

25. **Part 19.5** allows the Court to add a new party without an application.

- (i) *The court may add, substitute or remove a party on or without an application.*

26. On a conjoint reading of the decision in **Savitre Lochan** and **Part 19 of the CPR**, the following principles emerge when dealing with the exercise of the Court's discretion to add a party to the proceedings:

- (i) Whether or not the party should have been added to the proceedings requires an analysis of whether the party's rights would be affected by the decision that the Court is asked to make;
- (ii) If it is determined that the party's rights would be affected by the decision, the failure to add the party does not automatically defeat the Claim;
- (iii) The Court has the discretion to add a party to the proceedings with or without an application at any stage of the proceedings;
- (iv) In deciding whether to exercise that discretion, the Court must have regard to the **overriding objective, the facts of the case and Part 19 of the CPR;**

27. Based on the above, this Court finds that the point *in limine* cannot be determined without having all the evidence and issues ventilated at trial. As it stands, the Court is unable to determine whether the beneficiaries have any rights that would be affected by the Subject Declaratory Relief without first determining the existence and location of the Right of Way. However, upon completion of the trial, if it is determined that the beneficiaries should have been added, the decision in **Savitre** suggests that it would not be in the interests of justice and expediency to exercise the discretion to add the beneficiaries at that late stage of proceedings.

28. In light of the foregoing, the Court is faced with a unique situation where, on one hand, it is unable determine the beneficiaries' nexus to the matter so as to exercise its powers to unilaterally add them to the proceedings as per **Part 19.5;** and on the other, pursuant to **Part 19.2(7),** it **may** not, upon an application from the Claimant, add the beneficiaries at this stage because the Claimant would have known of their interest, if any, prior to the case management conference.

29. In resolving this dilemma, the Court first notes that the provision in **Part 19.2(7)** is discretionary and accordingly, is of the view that there are some unique features to this case that would allow the Court to permit such an application from the Claimant, even at this late stage, notwithstanding the longstanding knowledge of the beneficiaries' possible interest in the matter.

30. For one, because of the nature of this case (which involved urgent injunctive relief) and the parties' rights that were at stake, the Court with the consent of counsel for both parties' took a truncated approach to the case management process in an effort to move speedily ahead to trial. As a result, the opportunity for the Claimant to be minded to apply for the addition of the beneficiaries may have been justifiably overlooked.
31. Secondly, in applying the noble principles embodied in the overriding objective, it appears that there would be greater prejudice to the beneficiaries if they are not added as parties to this claim as their opportunity and ability to represent their interests in a matter that potentially affects their rights would be lost. Moreover, their testimony, which could be valuable to resolving disputed issues in this matter, would also be missing. On the other hand, there is little prejudice to either party in adding the beneficiaries now, save for the issue of costs, which, in any event, in my estimation, both parties would have incurred had the Court invoked the full case management and pre-trial review procedures instead of dispensing with the pre-trial review and rushing to fix the trial. Further, the trial has not yet begun so neither party has as yet led any evidence.

**V. Disposition:**

32. Accordingly, having considered the learning in *Savitre Lochan*, **Part 19 of the CPR** and the **overriding objective of the CPR**, this Court is of the view that the most appropriate method of proceeding with the matter at this stage is to permit the Claimant to apply to have the beneficiaries added to these proceedings under **Part 19.2(7)**. Consequently, the order of the Court is as follows:

**ORDER:**

- (i) **The Defendant's point *in limine* is dismissed.**
- (ii) **The Claimant is hereby permitted to apply to add the Beneficiaries as parties to the proceedings pursuant to Part 19.2(7) of the CPR.**
- (iii) **The said application is to be filed and served on or before the 5<sup>th</sup> May, 2017 and shall be considered by the Court without a hearing after consultation with the**

**Defendant's attorney-at-law whereupon all consequential directions will be given as to the future progress of the Claim.**

- (iv) The trial is hereby vacated to accommodate the said application and the subsequent compliance with all consequential directions and orders.**

**Dated this 12<sup>th</sup> day of April, 2017**

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**Robin N Mohammed**  
**Judge**