THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV2012- 04694

Between

LACKHAN BINDRA SAMAROO

CAMILLE BOODOO SAMAROO

Claimants

And

RAMDEO KRISHNA SAMAROO

Defendant

Before The Honourable Mr. Justice R. Rahim

Appearances:

Mr. S. Salandy for the Claimants.

Mr. K. Sagar instructed by Ms. D. Sankar for the Defendant.

RULING ON INTERIM APPLICATION

1. By application without notice of the 16th November, 2012, the claimants sought both a mandatory injunction and a prohibitory injunction. The notice was supported by the affidavit of the first named claimant also filed on the 16th November 2012. In respect of the mandatory injunction, the claimant sought an order that the defendant breakdown and remove from a certain parcel of land, a galvanize chain-link fence erected along both the western boundary and the southern boundary of the claimant's dwelling house. This fence appeared to the court to be somewhat temporary in nature having regard to the material used in its construction. In relation to the prohibitory injunction the claimants sought an order that the defendant be restrained from entering upon the said land.

2. By order of the 28th November 2012 this court granted the mandatory injunction in part, and thereby commanded the defendant to breakdown and remove the said galvanize and chain-link fence erected along the southern boundary of the claimants house only, thereby clearing the access way for the Claimants to their front door in the event of an emergency until the next date of hearing of the application or until further order. At the time the court granted this order the defendant appeared to be outside of the jurisdiction and therefore in an effort to give effect to the order the court permitted the claimants to break down the said fence and to store the material there from safely.

3. The defendant having subsequently secured representation and filed an affidavit in opposition to the interim application, full arguments in relation to continuation of the injunction were heard on the 21st February 2013.

History

4. The history of another claim related to this claim is of particular significance and forms the basis of objection by the Defendant to the grant of the orders being sought. By claim number HCA 3558 of 2002, converted to CV2006-01763, the first claimant herein commenced an action by way of writ of summons against four defendants, one of whom is the defendant in the present matter. In the present claim, the first claimant and the defendant are brothers and the second claimant is the wife of the first claimant.

5. As set out in the amended statement of claim, filed in the first action, the claimant sought a declaration that he was the owner of a house situate on a particular parcel of land described in the claim, that he had a tenancy or in the alternative a licence coupled with an "interest" in respect of the said lands, an order for possession of the said house and injunctive relief.

6. The trial was heard the Honourable Mr. Justice Ventour and judgment was given on the 29th July 2008. The order granted by Mr. Justice Ventour was both declaratory and prohibitory. The court need only concern itself with the declaratory aspect of the order at this stage. The order declared that the claimant is entitled to 50% equity in the said house and that the claimant had acquired an irrevocable licence to remain in the said house and an order for possession thereof. No order was specifically made in relation to the land.

7. The affidavits show that the area of land measures approximately 36 feet by 143 feet and is bounded by the Satar road on the south. The house occupied by the claimant lies closer to the northern boundary of the said land or in common language to the back of the land. The land in contention therefore comprises the portion of the said land which lies to the front of the claimant's house and which forms the only access for the claimant to the roadway. The said front portion of the land is in large measure unoccupied save and

except for one part upon which a motor vehicle repair business is situated. That occupation is irrelevant to this claim. The entire parcel of land is vested in the defendant by way of deed of conveyance made the 22nd May 2001 made between the first claimant and the defendant.

The test for injunctive relief

8. There is no dispute between the parties as to the applicable law in relation to the test to be applied at this stage of the proceedings if the claimants are to succeed on their application. In considering whether to grant the interim remedy sought the court is guided by the following considerations:
   a. Is there a serious issue to be tried. In relation to the grant of a mandatory injunction in some cases it may be necessary for the claimant to show on a balance that he is likely to succeed.
   b. Further, where does the greater risk of injustice lie, in granting or refusing the injunction. In some cases damages may not be an adequate remedy. The Claimant may not have a strong case but nonetheless the consequences of the refusal to grant the injunction may have consequences which far outweigh the consequences to the defendant of wrongfully granting it. See ***East Coast Drilling and Worker Services Ltd v Petroleum Co of Trinidad and Tobago Ltd*** (2000) 58 WIR 351, ***Jet Pak Services v BWIA International Airways*** (1998) 55 WIR 362.

Res Judicata and abuse of process

9. As a point in limine, the defendant submits that it would be an abuse of process for the claim to proceed having regard to the trial court's previous consideration of the same issues that now present themselves to this court. It is accepted by both sides that the nature of the point goes to the very root of jurisdiction to hear the claim and that should

the court find favour with the submissions of the Defendant, the result would be the dismissal of the claim.

10. It is submitted that when considering the issue of Res Judicata, the courts now apply a much broader approach than that advanced by the claimants in their submissions. According to the defendant, it has been accepted as good authority that a court does not have to be satisfied that the previous court had specifically considered a particular issue and ruled on it, but it is sufficient that the claimant had the opportunity of putting the issue before the court at the previous proceedings and he should therefore be prevented from raising the issue on that basis. See Lush J in ***Ord v Ord*** [1923] 2 KB 432 at 439;

"The words 'res judicata' explain themselves. If the res — the thing actually and directly in dispute — has been already adjudicated upon, of course by a competent court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the court in the earlier proceedings and which he chose not to put forward …"

Then at page 443;

"The maxim 'Nemo debet bis vexari' prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been."

11. In commenting on the authority (supra) in ***Khan v Goleccha International*** [1980] 1 W.L.R. 1482, Brightman LJ at page 1489, reiterated the dicta of Lord Shaw in ***Hoystead v. Commissioner of Taxation*** [1926] A.C. 155;

"In the opinion of their Lordships, it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

12. In ***Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*** (No. 2) [1967] 1 A.C. 853 , 964–965 Lord Wilberforce opined:

"The doctrine of issue estoppel generally is not a new one. It can certainly be found in the opinion of the judges delivered by De Grey C.J. in The Duchess of Kingston's Case (1776) 20 St.Tr. 355 , 538n., a passage from which has been quoted by my noble and learned friend, Lord Reid, and an accepted re-statement of it was given by Coleridge J. in Reg. v. Inhabitants of the Township of

Hartington Middle Quarter (1855) 4 E. & B. 780 , 794, which is also quoted by my noble and learned friend. Mr. Spencer-Bower, in his work on res judicata states the principle as being 'that the judicial decision was, or involved , a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised' (Res Judicata , p. 9) — a formulation which invites the inquiry how what is 'involved' in a decision is to be ascertained. One way of answering this is to say that any determination is involved in a decision if it is a 'necessary step' to the decision or a 'matter which it was necessary to decide, and which was actually decided, as the ground-work of the decision' (Reg. v. Inhabitants of Hartington Middle Quarter Township). And from this it follows that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence (Brunsden v. Humphrey (1884) 14 Q.B.D. 141) and if necessary other material to show what was the issue decided (Flitters v. Allfrey (1874) L.R. 10 C.P. 29). The fact that the pleadings and the evidence may be referred to, suggests that the task of the court in the subsequent proceeding must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it."

13. The submissions of the defendant can therefore be summarized as follows;

    a. The issue of the claimant having equity or a licence in the said land was raised in the pleadings and relief was sought in respect of same by the claimant.
    b. The issue having been pleaded it follows that the opportunity to have the issue litigated was given to the claimant and it would now be an abuse of the court's process to have the issue re-litigated. This is so despite the fact that the court order does not appear to include the land.

c. Even if the claimant failed to treat with the issues of equity and licence at the trial, his abandonment of those aspects of the claim does not affect the fact that he had the opportunity to treat with it and opted not to. See ***SCF Finance Co Ltd v Masri and another (No 3)(Masri, garnishee)*** [1987] 1 All ER 404.

d. That by his very admission in the evidence filed in the first claim of a fact material to its determination *(paragraph 17 of the witness statement of the claimant annexed to the affidavit of the defendant)*, the claimant admitted that the defendant would own the land and he, the claimant, would own the house and that in pursuance of this arrangement he transferred the land to the defendant. As a consequence the claimant ought not to be allowed to resile from such an admission and apply an interpretation that is now favourable to him with a view to commencing fresh litigation in respect thereof.

e. That as a consequence, the doctrine of Res Judicata by way of issue estoppel should operate to prevent the claimant from further litigation.

14. The claimant submits inter alia, that there has been no adjudication on the merits of the issue of the equity in the land or the grant of a licence as there is no judgment in existence from which the court can come to such conclusion. See ***Res Judicata and Double Jeopardy*** by Paul McDermott, chapter 4 pages 31 and 32. Further, that the court is restricted to this approach and ought not to apply any broader approach when considering the issues which were decided upon previously.

15. The court finds the arguments by the defendant to be very compelling and to be in keeping with the principles applicable in relation specifically to the principle of issue estoppel. According to Halsbury's Laws of England/CIVIL PROCEDURE (VOLUME 11 (2009) 5TH EDITION/(iii) Res Judicata/C. ISSUE ESTOPPEL/1179;

"Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with

certainty determined against him. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies. Issue estoppel will only arise where it is the same issue which a party is seeking to re-litigate. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.

16. At paragraph 1180;

"The conditions for the application of issue estoppel require a final decision on the issue by a court of competent jurisdiction and that:

(1) the issue raised in both proceedings is the same; and
(2) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

Deciding if the issue is the 'same' in both cases will depend upon whether the court takes a narrow or a wide view of the extent of the issue determined in the earlier case. It is now established that the question whether the raising of an issue in subsequent proceedings amounts to an abuse of process is one to be decided in a broad, merits based way in the light of all the circumstances". See ***Johnson v Gore Wood & Co (a firm)*** [2002] 2 AC 1, [2001] 1 All ER 481, HL

17. There appears to be two separate areas of claim. One is the claim of a licence being granted to the claimant. The court is satisfied in light of all the circumstances that the defendant is able to argue from a very strong position that this issue was raised in the first claim specifically and is the same issue being raised in the present claim. Further, that while the second claimant was not a party to the first claim, her claim for a licence appears to be founded solely on the grant of a licence to the first claimant. It would have been necessary for the court to determine this issue as pleaded in order to determine the matters in dispute between the parties.

18. The court is of the opinion that the issue of a licence in respect of the land was in fact raised in the pleadings in the first claim but does not appear to have been dealt with in the witness statement filed by the claimant in that claim. In this respect the court notes with that the claimant clearly sets out in his witness statement in the first claim that the arrangement was for the defendant to own the land and for he the claimant to own the house. His averment in his statement of case in the present claim at paragraph 9 ***is not*** to the contrary. He in fact avers in the present claim that it was always the understanding throughout that he and his family would have exclusive possession and the use of the said land. He therefore does not resile from his assertion of fact that the defendant was supposed to own the land. It means that the particulars he has raised in the present claim as regards the licence are the same as those raised in the first claim.

19. Further, the fact that that aspect of the claimant's claim was not specifically pronounced upon in the order of Ventour J, is not in the court's view a sufficient basis for alleging that that aspect of the claim was not considered. As stated at paragraph 1180 of Halsbury's (supra);

"A claimant who has two heads of claim and recovers judgment for one only, full relief not being open to him on the other, is not barred in a subsequent claim as to the latter. ***Where, however, relief is properly asked of a competent court, and after trial is not noticed in a judgment granting other relief, or, where in a claim brought for several demands there is judgment for one only, the other relief is presumed to have been refused, and its refusal is a bar to a subsequent claim for the same cause****."* See ***Hadley v Green*** (1832) 2 Cr & J 374 following ***Seddon v Tutop*** (1796) 6 Term Rep 607; cf ***Lord Bagot v Williams*** (1824) 3 B & C 235.

20. Further, even if the claim for a licence was abandoned by the claimant in the first claim by reason of his failure to treat with it in his witness statement, it is abundantly clear that the claimant was given a full opportunity to have that particular issue tried and would have by his abandonment chosen not to pursue it. Where a claimant, having two inconsistent claims, elects to abandon one and pursue the other, he may not afterwards choose to return to the former and sue on it. See ***Halsbury's*** on Estoppel vol. 16(2) (Reissue) para 962. In this regard, the defendant submits and the court agrees that the relief sought at paragraph 14.b in the first claim for a declaration of a tenancy or licence were inconsistent with each other and were therefore pleaded in the alternative.

21. The position with respect to the claim of equity in the said land is the same as that set out at paragraphs 16, 17, 18, and 19, hereof. The relief sought by the claimant in the first claim clearly included a claim of an "interest" in the said land in the alternative. This could only, in the court's view, have meant an equitable interest as distinct from all the other pleaded interests. In that regard also, both parties agreed before this court that the phrase "lands upon which the house stands" when used in the claim, made no distinction between the precise area of land upon which the house stands and the vacant portion of land situate at the front of the claimant's house. So that the claim for an interest or equity in the land related to the entire parcel of land. Further, relief 14.d and 14.e of the statement of claim sought injunctions restraining the defendants in that action from interfering with the claimant's enjoyment of not only the house but also the entire parcel of land. Similarly orders were sought prohibiting the defendants from entering unto the entire parcel of land. Thus orders would have been sought *consistent* with the claims as set out in the said statement of claim in relation to a tenancy, licence or equity.

22. The court is therefore of the opinion that the broader approach advocated by the defence is in fact the approach that has been used by these courts for many years and is no way a departure from the applicable general principles in relation to issue estoppel. Not only did the claimant have the opportunity to raise these issues for determination in the first claim but he went further. Having raised them, he appeared to have abandoned them.

Disposition

23. The parties having agreed (and correctly so in the court's opinion) that the court's ruling would affect the entire claim, the court must dismiss this application and the claim. However before so doing, the court must add that in so doing it is appreciative of the fact that the claimant may now be placed in a peculiar set of circumstances. But in so saying the court notes that at least two opportunities were given to the parties to attempt to settle, one of those being on the urging of the court. Further, this is not a claim for a right of way or an easement in its own right so that the entire claim stands or falls on the ruling of this court.

24. The injunction is therefore discharged and the application is dismissed. The claim is also dismissed. Parties shall be heard on the issue of costs.

Dated the 12th day of March 2013.

Ricky Rahim
Judge