REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

SUB-REGISTRY SAN FERNANDO

Claim No. CV2016-03627

Between

TREVOR KERRY

Claimant

And

BALLY RAMDIAL

Defendant

Before the Honourable Mr. Justice R. Rahim

Date: Wednesday September 29, 2021

Appearances:

Claimant: A. Ashraph

Defendant: K. Scotland, R. Waldropt and J. Joseph

DECISION ON APPLICATION TO COMMITT FOR CONTEMPT

1. By consent order of March 17, 2017, the parties compromised a claim for trespass. The facts in brief were that the Claimant was the original owner of acres of land, one lot of which was occupied by the Defendant's mother with the permission of the Claimant. The Claimant took no issue with the lot occupied by the mother of the Defendant and then by the Defendant but took issue with the Defendant extending his occupation outside of the boundaries of the land so occupied.

2. The Defendant was at the time of compromise of the case unaware of the precise boundaries of the land given to him by his mother and claimed that part of his driveway, namely a covered area outside of his fence was in fact part of the land given to him by his mother. As a result the parties entered into the following order on March 17, 2017:

> *1) Licensed Land Surveyor Ronnie Ramroop of Tumpuna Road, Arima be appointed Joint Expert under Part thirty three (33) of the Civil Proceedings Rules (1998) as amended to survey Lot 36 Manuel Congo Road, San Carlos Estate, Arima shown on the Plan date 8th day of December, 1984 prepared by Winston Sylvester and annexed to this Order and marked "A" for the purpose of establishing and marking the boundaries thereof.*
>
> *2) The parties hereto shall be bound by the said survey and all instructions to the said Surveyor shall be joint instructions.*
>
> *3) The cost of the said survey and the preparation of the said report shall be initially borne by the Claimant and the Defendant shall refund the said costs to the Claimant in event that it is found*

that the Defendant has occupied and/or used lands outside the said Lot 36.

4) The Claimant shall file a copy of the Survey and the Surveyor's Report within fourteen (14) days of the receipt of same.

5) In the event that, it is found that the Defendant has any structure, chattel and/or things outside the boundaries of the said Lot 36 the Defendant shall break and remove same within twenty-one (21) days of the said Survey Plan and Survey Report and there shall be judgment for the Claimant with costs to be assessed by the Registrar.

6) In the event that it is found that the Defendant has not occupied and/or used lands outside of the said Lot 36 then this Action shall stand dismissed with costs to be paid by the Claimant to the Defendant to be assessed by the Registrar.

7) The parties have liberty to apply.

3. The Defendant therefore agreed to be bound by the survey and to remove any structure, chattel or things that exited outside the boundaries of his Lot number 36. It was the stated intention of the Claimant to create a housing development and to make an access road to what would be a gated community leading to that development. The concreted driveway leading up to the fence of the Defendant and a very small part of his boundary lies in the path of the proposed roadway (road reserve) to be built on the Claimant's land. This was demonstrated by the survey plan attached as RKR1 to the surveyor's report in turn annexed to the affidavit of the Claimant in support of the present application (the Kerry affidavit).

That report was done by the agreement of both parties by Mr. Ronnie K. Ramroop and is dated November 8, 2017 (attached as T.K 2) of the Kerry affidavit. Upon enquiry of this court, the Claimant has indicated in open court that the proposed road will not permit the Defendant to access his property as one side of the roadway will be walled off, thereby allowing only the residents of the development to use the roadway for access to the development only. The report also showed that part of a drain and concrete apron has encroached unto the lands of the Claimant.

4. The Defendant has since failed to remove the driveway leading up to his boundary, the drain and apron. He filed an affidavit in opposition in which he denied that he has breached the order, as he did not cause any structure or chattel to be erected outside of Lot 36. His difficulty is that Lot 36 is landlocked. He has lived on Lot 36 since 1988 and his vehicular access has always been through the road reserve where the roadway is proposed. He admitted that the survey report by Ronnie Ramroop demonstrated that he has encroached upon the road reserve with a portion of a concrete apron, a portion of a drain and a concrete driveway but he has averred that the Claimant has not annexed any photographic evidence of same. It must be noted at the outset that he has also admitted such encroachment under cross-examination when confronted with the said report by Attorney at law for the Claimant.

5. He annexed some photographs he took to demonstrate that he has no other access. It is his evidence that the access has existed for some 30 years and was there during the time his mother lived there prior to his moving in. It is also his evidence that the apron, drain and concrete driveway were not constructed by him.

6. The Claimant filed his application to have the Defendant committed to prison on April 5, 2019. This court was of the strong view that this was a matter in which the parties ought to have made every effort to settle thereby finding a solution that would augur to the benefit of both parties having regard to the unique circumstances of the case. It is for this reason that several adjournments were granted all in an effort to accommodate the talks between the parties but alas no such resolution was forthcoming and the application proceeded to trial, both parties having cross-examined the opposing party on the affidavit evidence.

Cross-examination

7. The Claimant was the first to be cross-examined. He explained the meaning of aprons drains and that a portion of the driveway runs unto the road reserve. It was also his evidence that the concrete area is not the only access that the Defendant uses. According to him, he has access through his brother's property.

8. The Defendant was then cross-examined. He admitted entering into the consent order and that he agreed to jointly appoint the surveyor. He admitted the presence of part of the driveway, concrete apron and drain outside of Lot 36. He testified that he did not build them. He stated he could not remove the encroaching portion of the drain as that is where his water has to pass. In relation to the driveway, it is his evidence that he had no choice but to disobey the order of the court because he is landlocked. It was his testimony that he did not deliberately disobey the order, that he disobeyed because it was convenient to him and it is the only way out for his family.

Findings of fact

9. The Defendant appears to have initially made an issue of the fact that the concrete driveway, the drain and the apron were not structures, chattels or other things in the sense used at paragraph 5 of the order. This goes against the grain of what would have been the pellucid understanding of the terms of the order held by all parties including the Defendant in the court's view. This is so in light of the subsequent admission of the Defendant that he did in fact breach the order of the court.

10. The court also finds that Lot 36 occupied by the Claimant is land locked so that the evidence of the Claimant of the purported access through the property of a relative is not accepted as evidence on an alternative access.

11. The court does not accept the evidence of the Defendant that he did not build the structures complained off is such as affords him a justifiable defence when the terms of the order are considered. In that regard firstly, paragraph 5 of the order imposes no such requirement. The paragraph reads that "in the event that it is found that the Defendant has any structure, chattel or things outside the boundaries of the said Lot 36". Whether the Defendant was the one responsible for placing same that is therefore irrelevant according to the terms of the order.

12. Further, the Defendant appears to have attempted to rely on the technicality of whether or not the portion of the concrete driveway, the apron and drain were structures, arguing initially that they were not. With respect, in the court's view this is a disingenuous argument, as the clear inference is that the existence and situation of these items were the

contentious matters between the parties and the services of the surveyor were retained for the very purpose.

13. In that regard the Claimant was cross-examined at some length about the meaning of the word "structure" among other things. His answers are of layman's origin at the highest and are not binding on this court. The Oxford English Dictionary 10th Ed., defines structure as being the arrangement of and relation between the parts of something complex or a building or other object constructed from several parts. "Chattel" is defined as a personal possession and one of the definitions of the word "thing" is that of an inanimate object. While the drain, apron and driveway may or may not fall within the definition of structure, certainly they are inanimate objects affixed to the land and so would fall under the definition of the word "things' and the court so finds.

14. In any event the Defendant has admitted in cross-examination that he knew what he had to do, namely to remove those things but he did not do so.

Breach

15. Paragraph 5 of the order cannot and ought not to be read in isolation as it is contextualized by paragraph 6, which provides that in the event it is found that the Defendant has not occupied and/or used lands outside of Lot 36, the action stands dismissed. To put it another way, if the Defendant has encroached by occupying and using lands of the Claimant outside Lot 36, paragraph 6 would not apply. It follows that the order required the Defendant to remove any thing that was present outside of his boundary which he occupied and used. It was clear therefore to the court that on the evidence the Defendant admitted using the drain, apron and driveway

which were all partially situated outside of Lot 36 and therefore situated on the lands of the Claimant.

Other criteria for committal for contempt

Standard of Proof

16. The onus is upon the claimant to prove the elements of contempt beyond a reasonable doubt.

17. In ***Glanville and Walcott v Heller Security Services***, CV2013-03429 Rampersad J at paragraph 9 referred to the procedure set out in Borrie and Lowe: The Law of Contempt ,Chapter 6, Civil Contempt:

> "Borrie and Lowe: The Law of Contempt, Chapter 6 'Civil contempt' highlights that the penal sanctions that apply to civil contempt has been said to 'partake of a criminal nature' and many of the rules that normally apply when seeking to prove an accused guilty of a criminal offence apply when seeking to show that the defendant has committed civil contempt. As such, breach of the court's order must be proved beyond all reasonable doubt and courts are reluctant to exercise their powers and will do so only in the clearest cases. Thus, although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt upon adequate proof of the following matters. First, it must be established that the terms of the injunction are clear and unambiguous; second, it must be shown that the defendant has had proper notice of such terms; and third, there must be clear proof that the terms have been broken by the defendant."

18. The procedure governing committal proceedings is set out in Part 53 of the Civil Proceedings Rules 1998, as amended ("the CPR").

Service and endorsement

19. With regard to service and the endorsement of a penal notice, the relevant Rules read:

> *53.3 Neither a committal order nor a confiscation of assets order may be made unless—*
>
> *(a) the order requiring the judgment debtor to do an act within a specified time or not to do an act has been served personally on the judgment debtor;*
>
> *(b) at the time that order was served it was endorsed with a notice in the following terms:*
>
> *"NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to be imprisoned or to have your assets confiscated.", or in the case of an order served on a body corporate in the following terms:*
>
> *"NOTICE: If you fail to comply with the terms of this order you will be in contempt of court and may be liable to have your assets confiscated."; and*
>
> *(c) where the order required the judgment debtor or do an act within a specified time or by a specified date, it was served on the judgment debtor in sufficient time to give him a reasonable opportunity to do the act before the expiration of that time or before that date.*

53.6 (1) This rule applies where the judgment or order has not been served.

(2) Where the order requires the judgment debtor not to do an act the court may make a committal order or confiscation of assets order if it is satisfied that the person against whom the order is to be enforced has had notice of the terms of the order by—

(a) being present when the order was made; or

(b) being notified of the terms of the order by facsimile transmission or otherwise.

(3) The court may make an order dispensing with service of the judgment or order under rule 53.3 or rule 53.4 if it thinks it just to do so.

53.8 (1) The application must specify—

(a) the precise term of the order or undertaking which it is alleged that the judgment debtor has disobeyed or broken; and

(b) the exact nature of the alleged breach or breaches of the order or undertaking by the judgment debtor.

(2) The application must be verified by an affidavit.

(3) The applicant must prove—

(a) service of the order endorsed with the notice under rule 53.3(b) or rule 53.4(b);

(b) if the order required the judgment debtor not to do an act, that the person against whom it is sought to enforce the order had notice of the terms of the order under rule 53.3(b) or rule 53.4(b); or

(c) that it would be just for the court to dispense with service.

20. In addition to the requirement at Rule 53.3, the learned authors of Borrie and Lowe[1] stated the following:

> *The object of such indorsements is, in the words of Luxmoore J, Benabo v W Jay and Partners Ltd, [1941] Ch 52, 'to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences'.*
>
> *In accordance with its general power to dispense with service (see below), the court has a discretion to dispense with the failure to incorporate a penal notice in a prohibitory, but not a mandatory, order.*

21. In ***Nicholls v. Nicholls***[2] Lord Woolf MR set out some guidance at pages 326 to 327:

> *1. As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with...*
>
> *2. As long as the contemnor had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except insofar as the interests of justice require this to be done.*
>
> *3. Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended...*

[1] **Borrie and Lowe: The Law of Contempt, Strict Liability, Chapter 6 Civil contempt, para. 6.7**

[2] [1997] 1 WLR 314

22. In ***Carlene Denise Adams v Milly Ramkissoon***[3] Kokaram J (as he then was) opined that the court would insist upon the scrupulous observation of the prescribed steps antecedent to the exercise of this jurisdiction. At paragraph 25, His Lordship observed the words of Lord Donaldson in ***M v P and others (contempt: committal); Butler v Butler [1992]*** 4 All ER 833:

> *(1) no alleged contemnor shall be in any doubt as to the charges which are made against him; (2) he shall be given a proper opportunity of showing cause why he should not be held in contempt of court;*
> *(3) if an order of committal is made, the accused (a) knows precisely in what respects he has found to have offended and (b) is given a written record of those findings and of the sentence passed upon him*.

23. The learned authors of Borrie and Lowe[4] stated the following in relation to court's discretion:

> *… The need to serve notice of the motion may also be dispensed with where the grounds upon which committal are sought are grave or where the need for relief is urgent, provided it is shown that the person sought to be committed has knowledge of the committal proceedings….*

24. In the present case, there is no evidence of the service of the order on the Defendant. However, it must be noted that the order was entered into with the consent of the Defendant so that he would have known of and approved the contents thereof. In fact, he has admitted in cross-examination that he did in fact enter into the consent order. He also

[3] CV2012-00884 at para. 3

[4] **Borrie and Lowe: The Law of Contempt, Strict Liability, Chapter 6 Civil contempt, para. 6.50**

admitted that he knew that which he was obligated to do under the terms of the order after the survey report had been issued but that he did not do it as a matter of convenience and out of necessity. Pursuant to Part 53.6(2)(b), the court is satisfied that the Defendant was notified of the terms of the order by other means. Further and in any event, the court finds that in all of the circumstances it is just to dispense with service of the order. This discretion is set out at Part 53.6(3).

25. The court is therefore satisfied beyond reasonable doubt that the Defendant knowingly and intentionally breached paragraph 5 of the order made March 17, 2021.

Disposition

26. The court is not insensitive to the reason provided by the Defendant for not obeying the order in relation to the driveway. It is clear that he is landlocked, but this cannot be a reason to disobey the court in light of the fact that the Defendant would have gone into the transaction surrounding the order and the survey report with open eyes as it were. It says to the court that he may have done so not with bona fides as there was always the possibility that the report would not have gone in his favour and he knew that. So that there appears an equal inference that he intended not to abide by the order if the report did not favour his position.

27. Additionally, the Defendant failed to utilize the option of applying under the liberty to apply provision of the order to have the order amended so as to scour the terms of the order.

28. Fundamentally though, while the court appreciates that he has provided a reason for not removing the driveway, he has failed to provide any basis for not removing or re-routing his drain and breaking that part of the apron that encroaches on the land of the Claimant, save and except that is was inconvenient for him not so to do as stated in cross-examination. This demonstrates to the court in no unsure terms that the Defendant set out to intentionally and deliberately flout the order after the contents of the survey report by which he agreed to abide was revealed to him. These actions ought not to be sanctioned by the courts.

29. Attorney for the Claimant has graciously commended to the court that if it should find the Defendant guilty of contempt that it gives the Defendant the opportunity to purge the contempt. Having regard to the facts of this case, the court is minded so to do.

30. The order of the court is as follows;

    a. The Defendant Bally Ramdial is found to be in contempt of court for disobeying the order of this court made on March 17, 2017 and is committed to the Golden Grove Prison, Arouca or such other facility under the jurisdiction of the Commissioner of Prisons to serve a term of seven (7) days simple Imprisonment and the Marshal of the Supreme Court is hereby ordered and empowered to arrest Bally Ramdial of Lot 36, San Carlos Road, Guanapo, Arima for his contempt of court and to convey him to the Golden Grove Prison, Arouca or such other facility under the jurisdiction of the Commissioner of Prisons and to hand him over to the custody of the Commissioner of Prisons or his designate to serve the term of seven (7) days simple Imprisonment and to be released thereafter.

b. The order at paragraph (a) hereof is suspended until October 27, 2021 to enable the Defendant Bally Ramdial to break the portion of the driveway, drain and apron lying outside of his property at Lot 36 as shown in the survey report of Ronnie Ramroop dated November 8, 2017 and remove and carry away therefrom all rubble left over after removal.

c. Should the Defendant comply fully with the requirements set at paragraph (b) hereof the order made at paragraph (a) shall be stayed permanently.

d. Should the Defendant not comply whether partially or fully with the requirements set out at paragraph (b) hereof the power of arrest conferred on the Marshall at paragraph (a) hereof shall be executable and exercisable by the Marshall of the High Court from 12:01 a.m. on October 28, 2021 without further order.

e. The Defendant shall pay to the Claimant the costs of the application for contempt to be assessed by a Registrar in default of agreement.

Ricky Rahim

Judge