

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2018-02128

BETWEEN

S.M JALEEL & COMPANY LIMITED

Claimant

AND

KRISHNA MAHABIR

Defendant

Before the Honourable Mr. Justice R. Rahim

Delivered: 22nd November 2019

Appearances:

Mr. P. Deonarine instructed by Mr. J. Maxime for the claimant

Mr. A. Ramlogan SC, Mr. A. Pariagsingh and Mr. R. Abdool-Mitchell instructed by

Mr. V. Siew saran for the defendant

RULING ON APPLICATION TO AMEND THE DEFENCE AND COUNTERCLAIM

1. The defendant by application of the 16th May 2019, seeks to amend his defence and counterclaim to include the findings made on a recent survey in which he purports to set out that the area of land he occupies is less than that which he has averred in his defence.
2. The claim is one on the part of the claimant for possession of 7.961 Hectares of land on the basis of legal title. The defence as filed on the 18th July 2018 is that of adverse possession of the land by the defendant who entered into the said lands in 1978 (some 50 years before the claim) and began cultivation. A reading of paragraph 2 of the defence demonstrates that the defendant alleges that he in fact occupied the entire parcel of land. However, in the particulars of continuous and exclusive possession set out at paragraph 17 the defendant avers that he in fact began cultivation on the lands on a small scale in 1978 but has expanded his activities on the land to large scale farming over the years. Nowhere in the defence or counterclaim does the defendant aver that he has only occupied a part of the entire parcel of land.
3. The first CMC was held on the 30th November 2018 and directions for disclosure were given. A CMC was then held on the 15th March 2019 and full directions up to trial were given and the trial dates were set for January 2020. Those directions included the filing of applications to lead expert evidence by both parties which they both in fact filed on the 3rd June 2019 and which applications were granted. Essentially both parties were given permission to call surveyors at the trial.

4. The defendant now wishes to amend to plead the survey which is dated the 24th April 2019.
5. The history of the process of obtaining the survey is set out for context. Although the defence as pleaded does not specify that different portions of the lands within the larger parcel were occupied by the defendant, the issue was raised through questions being asked of the parties by the court during the CMC on the 5th October 2018.
6. It is the evidence of the claimant that on the 30th November, some one month and twelve days thereafter to be precise, the defendant wrote to the claimant's attorneys and notified them that Mr. Somarsingh would be conducting a survey on the 15th February 2019, no doubt for the purpose of defining the precise area of alleged occupation by the defendant.
7. But this version of events set out by the claimant appears to be not the complete version of what transpired between the lawyers on the 30th November 2018. According to the unchallenged evidence of Attorneys for the claimant, it appeared that the property had already been surveyed by Mr. Soomarsingh for the defendant by the date of the CMC on the 30th November 2018. The defendant's attorneys says that that occasion in court was the first time they were being informed by the claimant about a survey having been conducted.
8. Attorneys for the defendant therefore indicated their objection as the claimant being the paper title owner had not been given notice of the survey. Attorneys for the claimant then indicated that they would have to re-survey with proper notice and so wrote to attorney for the defendant giving notice of the re-survey. So that the contents of the affidavit of the

claimant in so far as it seeks to give the impression by way of omission of information, that the discussion between the lawyers on the 30th November had to do with a first time survey on its part is incorrect.

9. Some two and a half months after what was effectively the first CMC, by letter of the 13th February 2019, Attorney for the defendant confirmed attendance on the 15th February, the date set for the re-survey. However, the following day, the 14th February the claimant's attorneys wrote to the defendant's attorneys indicating that they would not be attending as the period of notice provided was two days instead of three clear days.
10. The defendant rescheduled the survey to the 7th March 2019 and informed the claimant's attorneys by letter of the 27th Feb 2019.
11. By letter of 1st March 2019 the claimant's attorneys confirmed attendance. The survey was conducted by an agent of Mr. Somarsingh who is also a licensed surveyor and employee of Somarsingh.
12. By letter of the 8th March 2019, the claimant objected to the survey on the basis that the survey was not conducted by Somarsingh personally.
13. The defendant as a consequence, retained Voltec Engineering and Surveying Services Limited to conduct the survey on the 17th April 2019 which was done with notice and the survey issued on the 24th April 2019. The survey purports to show that the area occupied by the defendant is 4.7248 Hectares so that his case is now that he in fact occupies considerably less than that which he pleaded in his defence.

The Requirements under Part 20.1 (3)

(a) Good explanation for the change not having been made prior to the first CMC;

14. The court is of the view that any explanation purportedly provided when the evidence is read as a whole appears to be as follows:

a. That on the 12th February 2019, the defendant purported to give notice to the claimant of the conduct of the survey to be held on the 15th February 2019 and there was objection to that course by the claimant on the ground of insufficiency of the period of notice.

15. However, the unchallenged evidence of the claimant is that when both parties appeared before the court on the 5th October 2018, the court made observations about the burden of proof being on he who alleges and claims adverse possession to prove the extent of his possession having regard to the pleadings. While this date was listed for a CMC no directions were given as far as active case management was concerned and so the CMC was then set for the 30th November 2018, on which day case management directions were given. It follows that the first CMC was in fact held on the 30th November 2018.

16. So that between the 5th October 2018 and the first CMC on the 30th November 2018, almost two months had elapsed within which the defendant may have had a survey report commissioned with a view to amending prior to the first CMC.

17. The unchallenged evidence of the claimant is also that at the first CMC on the 30th November 2018, attorney for the claimant was in fact informed that a survey plan dated the 17th November 2018 had in fact been prepared by Mr. Soomarsingh. This conversation between the attorneys has not been denied by the defendant who has not disclosed same in his affidavit in support of his application.

18. It means therefore that consistent with his duty the defendant did in fact at that stage make the necessary arrangements to have the report done in anticipation of amending. However, on that occasion, attorney for the claimant indicated that it was the first time he was being informed that a survey report was in fact prepared and that his client had received no notice of the survey. The claimant was therefore objecting to the use of the survey on the basis that he had received no notice, he being the paper title owner.

19. Some over two months thereafter came the notice of intention to survey of the 12th February 2019 and the survey was eventually done and a report issued on the 17th April 2019 by Voltec EGINEERING. In the meanwhile, full directions for trial were given on the 15th March 2019 and the application to amend was made in May 2019. Additionally, permission has been given by the court to the defendant to call the survey as an expert at trial and permission has been given to file the report of the expert. There was no objection to that application made by the 3rd June 2019, in keeping with the court's order of the 15th March 2019 for the filing of applications to lead expert evidence.

20. A good explanation is not an infallible one. In this regard the court does not accept the submission of the claimant that the defendant must have

known that he was not in occupation of the entire parcel of land. This is so because the case for the claimant is not that the land is demarcated by a fence or other marker that is visible to the public or the defendant. It follows that it would have only been when the pre action protocol letter was sent that the claimant would have set out the physical extent of his ownership. Therefore the facts of this case are readily distinguishable from that of **Raj Used Cars and Ramcumar Choya**, CA S214 of 2014 (relied upon by the claimant) as in that case, it would have been clear from inception that the claimant was not the owner of the vehicle. However, the matter does not end there.

21. The claimant set out the full description of the land in its pre action protocol letter so that it would have been incumbent on the defendant to enquire into the exact area of his own possession from the date of receipt of the letter of the 21st March 2018, but he failed so to do and instead simply maintained that he was in occupation of the entire parcel.
22. Further, it is abundantly clear that the defendant remained blissfully unaware of this aspect of his case despite the fact that the claim was filed on the 13th June 2018, served on him and he entered a defence and counterclaim in which he averred possession of the whole.
23. It would therefore have been only when the court raised the issue with the parties on the 5th October 2018 that the defendant's attorney apparently became aware of the deficiency in his case.
24. So that in sum, no explanation has essentially been given for failing to make the change before the first CMC was held on the 30th November 2018, despite the court's discussion with the parties on the 5th October

2018 and despite the fact that the report had been issued by Soomarsingh since the 17th November 2018. The intimation of attorney at law for the claimant on the 5th October 2019 that he would object to the report because his client had not received notice cannot and does not provide an explanation as to why the amendment was not made prior to the 30th November 2018, the claimant having only been made aware of the report on the day of the first CMC in any event.

25. It means that the application fails under Part 20.1(3)(a)

Part 20.1(3)(b) Promptitude

26. The defendant submits that the time must be reckoned from the preparation of the Voltec Engineering Report in determining the issue of promptitude, namely from the 17th April 2019. That it means therefore that it would have been one month from the date of that report to the date of filing of the present application. The claimant submits that time must be reckoned from the date of filing the defence and counterclaim, namely the 28th September 2018.

27. The court is of the view that the attorneys in this case, ought to have realized from before the defence was filed that while the defendant was in fact alleging that he was in possession of the whole, that the photographs attached to the statement of case appear to show cultivation of parts only of the lands. Attorneys for the defendant therefore ought to have been put on reasonable enquiry that a survey may have been needed to define the exact area of alleged occupation by their client. Certainly, this would have been obvious by the time the

court raised the issue with attorneys for the defendant in court on the 5th October 2018.

28. It appears on the evidence that they were so in fact put on enquiry by the 5th October 2018, they having secured a survey report by the 17th November 2018. However, all efforts to have the survey properly done proved futile until finally another surveyor was retained to do so and the report was completed on the 17th April 2019. The reasons for the non preparation of the survey are adequately set out at paragraphs 8, 9, 10, 11 and 12 of the affidavit in support of the application and the court does not propose to repeat them in detail suffice it to say that it appeared to have been several procedural errors in the conduct of the surveys and the objections by the claimant. It also appears on the evidence that the defendant kept the claimant abreast of all of the developments as they occurred and this in fact is why the claimant was able to indicate its objections on each occasion that there was an error of process.

29. It follows therefore that the application could not have been made until the process was corrected and so the application having come twenty one days after the issue of the report, the application was made promptly and the court so finds.

Other Considerations

30. The matters set out at **Part 20.1(3)(a)** and **(b)** are cumulative and mandatory. Despite the fact that the defendant has failed to satisfy the court that it has fulfilled the criteria set out in **Part 20.1(3)(a)**, the court

is of the view that it is important to examine the other considerations in this case.

The interest of the administration of justice

31. The court accepts that it is in the interest of the administration of justice to ensure that a party is permitted to set out its case as it should according to law.

Whether the change has become necessary because of the failure of a party or his attorney

32. There is no direct evidence in this case of which one applies. There is ample information by way of inference that it must be one or the other. There are three possibilities. Firstly, it may be that the defendant changed his instructions having originally instructed that he occupied the entire parcel. Secondly, it may be that the lawyers did not appreciate that the defendant is obliged to prove the extent of his occupation in the case where he relies on adverse possession of part only of the subject lands claimed by the claimant¹ but this would have to be the case where the defendant has in fact changed his instructions. This is unlikely as the defence and counterclaim avers quite clearly that the defendant is alleging occupation of the whole. The third is quite simply that the client gave erroneous instructions and the attorneys failed in their duty to seek out expert evidence to confirm or dispute the instructions prior to the filing of the defence and

¹ See Quintin ***Padia v mayor, Aldermen, Councillors and Citizens of the City of Port of Spain and another*** CV2007-01562, Rampersad J at paragraph 42 (affirmed by the Court of Appeal in CA Civ App. No. 54 of 2012). See also ***Inez Charles-Sarjeant v AG of Trinidad and Tobago*** CV2017-00876, Kokaram J paragraphs 17 to 29.

counterclaim to ensure that they were making out the correct case in keeping with the law on proof of adverse possession.

Whether the change is factually inconsistent with what has already been certified to be the truth

33. This is clearly the case here, the defendant having certified in his defence and counterclaim that he has been in occupation of the entire parcel of land for over fifty years. He now wishes to change this to about one half of the area of the parcel.

Whether the change is necessary because of some circumstance which became known after the date of the first CMC

34. The answer to this is a resounding no. It is presumed that the attorneys may have known the law and there is no evidence before the court that the defendant changed his instructions. In fact, the affidavit in support of the application sets out that the defendant maintains his defence. This averment itself seems inconsistent with the pleaded case that the defendant has been in possession of the entire parcel having cultivated on different parts over the last fifty years and having expanded his occupation over that time.

Whether the trial date is likely to be met if permission is given

35. Permission at this stage may not adversely affect the trial dates which are set for the 21st, 22nd and 23rd January 2020 as the claimant has already been given permission to call its own surveying expert to give evidence and its defence to the counterclaim is that the defendant has

not been in occupation of its lands at all. In that event there may be no need to have its expert file a supplemental report and if there is such need there is ample time so to do.

Whether any prejudice may be cause to the parties if permission is given or refused

36. There can be no discernable prejudice to the claimant in this case. There may in fact be some prejudice to the defendant should he not be permitted to amend his defence in that he may be unable to prove the exact area he allegedly occupies by way of the report same not having been pleaded.

37. When the discretionary considerations are weighed, it may well be that the balance lies in favour of the grant of the application on those considerations only. However, Part 20.1(3) CPR makes it clear that for the court to exercise such a discretion it must be satisfied that there has been a good explanation for the change not having been made before the first CMC and the defendant has failed to so satisfy the court. The provision is not dissimilar to the provisions set out at Part 26.7 CPR in relation to relief from sanctions.

38. The court must therefore dismiss the application.

Ricky Rahim

Judge