

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2020-00718

Between

NICOLE DENISE TAYLOR

Claimant

And

ROBERT MARK

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: September 4, 2020

Appearances:

Claimant: Mr. K. Mc Quilkin instructed by Ms. J. Hosein

Defendant: Unrepresented and in person

DECISION ON APPLICATION FOR INJUNCTION

1. This is a decision on the application of the claimant of February 21, 2020 for an interim injunction prohibiting the defendant from entering onto, clearing or removing things on a strip of land measuring approximately two thousand and sixty eight square feet allegedly belonging to the claimant.

The case of the claimant and the case of the defendant

2. It is the case for the claimant that by deed of April 14, 1991 (DE 16728 of 1991), she purchased two parcels of land from George Wilberforce Craigwell. The two parcels are situated next to each other but the parcel that is much smaller (the disputed land) measured 2,086 square feet and appears to have been a parcel left over from a larger parcel of 11,718 square feet located to the east of it, 9,650 square feet of that larger parcel having been sold prior to the sale to the claimant of the disputed land. When facing north therefore, the large parcel owned by the claimant is to the west, the strip of land in dispute is to the east of that larger parcel and the defendant's land is to the east of the disputed land. The defendant therefore is the person who has had possession of the parcel measuring 9,650 square feet referred to above. Prior to the purchase by the claimant there was a boundary fence along the eastern boundary of the disputed parcel between that land and the land owned by the defendant. The boundary area within the claimant's property contained trees close to the fence which the claimant continued to maintain and to which she added several other trees after she assumed possession in 1991.
3. On October 5, 2017, the defendant who provided her with a copy of a survey plan done by registered Surveyor Hugo Somarsingh on August 2,

2012. That survey plan appeared to be in direct conflict with that set out in the cadastral plan attached to the deed of the claimant. The said plan purports to show the disputed land with the wire fence thereon as being part of the parcel owned by the defendant and not the claimant. The defendant therefore asked the claimant to adjust the fence to align it with what he alleged was her true boundary.

4. The defendant, it appears had obtained the land occupied by him by way of an application to bring the lands under the provisions of the Real Property Ordinance (RPO) he and his parents having owned and occupied another parcel of adjoining lands to the east. So that the defendant would have applied to bring the vacant west of land next to the parcel upon which he and his parents lived under the RPO and in so doing would have included the strip of land which is the subject of the dispute. He therefore in September 2017, obtained a Certificate of Title (CT) for the entire parcel which contained the disputed strip of land as part thereof in total amounting to 11, 719 square feet. The claimant subsequently obtained a survey plan from registered Surveyor Ivan Laughlin which supports her deed. So that the claimant possesses a deed for the disputed land and the defendant is the registered proprietor of the disputed land by way of a Certificate of Title.
5. On February 17, 2020 the defendant removed part of the fence without permission of the claimant and entered the disputed land. Branches of trees were cut, crops were damaged and a trough was relocated. Holes were dug for posts and a fence was partially erected by the defendant in keeping with the plan he obtained. It is the claimant's case that the defendant is attempting to sell the entire parcel owned by him inclusive of the disputed land as a sign was erected to that effect. On February 27,

2020, this court made an interim ex parte order restraining the defendant from further works on the disputed land and entry thereon until further order.

6. The defendant claims that he is the owner by way of the CT and that he obtained planning permission for the construction of five townhouses on the entire parcel comprising 11, 719 square feet and completed same in December 2019. It is therefore his case thus far (he having failed to file a defence within the time prescribed by the CPR) that his RPA title prevails over the deed of the claimant and therefore he is entitled to possession. In February 2020 he proceeded to move his fence, according to him, to correct its location in keeping with his CT which he says must be done because of approvals granted to him for the townhouses it appears by way of inference have already been constructed.
7. The claimant also claims declarations of ownership, damages for trespass, an order for the demolition of structures erected on the disputed land, an order that the Registrar General be directed to amend the CT issued to the defendant or cancel and reissue a CT in keeping with the findings of the court. Alternatively, the claimant seeks an order that she has acquired the disputed land by way of adverse possession and that the Registrar General be ordered to issue a CT to her in respect of the disputed land.
8. This court has tried on several occasions to impress upon the defendant the need to obtain legal representation in this case because of the technical nature of both the legal issues involved and the legal process but to no avail. He has insisted that he represents himself and of course the court must allow him so to do. While the court has a duty to assist the unrepresented litigant, it must be done within the parameters of fairness

to both sides as the court is not the legal representative of the defendant, neither is it his legal advisor. To that end the defendant has chosen to file submissions in this matter on his own, despite what some may consider pleas by this court to seek legal assistance to file those submissions. Further, he has also filed an affidavit in person without, it may be reasonably inferred, recourse to legal advice. The court has strived nonetheless to be as fair as it could be to him in the circumstances but it cannot and ought not to descend into the arena.

The law

9. The well-established and well-known principles for consideration of the court when treating with interim injunctions are set out in the cases of **American Cyanamid v Ethicon** (1975) AC 396, **Jetpak Services Ltd v BWIA International Airways Ltd** (1998) 55 WIR 362, **East Coast Drilling and Workover Services Ltd v Petroleum Company of Trinidad and Tobago Ltd** (2000) 85 WIR 351, **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16 and **Chief Fire Officer and Others v Felix Phillip and Others** (7th December 2013)(Unreported). These principles are widely accepted so that the court does not propose to traverse them in these reasons but directs itself in terms of the cases. However, for the purpose of the unrepresented defendant in this case the court will simplify the test for the grant of injunctions as being that the claimant must demonstrate that there is a serious issue to be tried, that damages are not an adequate remedy and that the balance of justice lies with the grant of the injunction.
10. Further, it is not the court's duty at this stage to make findings of fact so that none has been made. The court is however entitled to examine the

relative strengths of the cases of the parties in making a determination as to whether to grant the injunction.

Serious issue to be tried

11. The claimant claims title by way of a deed registered in the year 1991 and the defendant by way of a Certificate of Title issued in the year 2017 pursuant to an application to bring the said lands under the provisions of the RPO. There is therefore a serious issue to be tried in this case in relation to who possesses the better right to possession based on paper title and further, if the claimant does not possess the better right to title based on her deed then whether she has been in adverse possession of the disputed land.

The competing strengths of the cases

12. The principle of indefeasibility of title becomes a central one in this case as the defendant is the registered proprietor of the disputed land. While the court is yet to hear and determine full submissions on the law which can only be done after evidence is lead, the court is entitled to view the matter in a preliminary manner having regard to general principles of law.

13. In **Smith Lewis v Anjan Sookdeo**, CV App 236 of 2012, Their Lordships of the Court of Appeal set out the law as applies to the legal principle. It is important that the court quote extensively from the decision as it provides sound guidance by which this court is bound. In that case, the competing interests were between that of title by way of a CT and an unregistered lease. In delivering the judgement Mendonca JA said the following:

*“19. The RPA is based on the Torrens system of registered conveyancing. The central feature of that system is that registration confers upon the registered proprietor an indefeasible title. This in essence means that the registered proprietor’s title cannot be defeated by a prior unregistered interest and his title is subject only to what appears on the register. In the words of Edwards J, in **Fels v Knowles** (1906) 26 NZLR 604, at 620 “...the register is everything.”*

*20. Although that is the central feature of the Torrens system, it is nevertheless subject to certain exceptions. As the Privy Council observed in **British American Cattle Co. v Caribe Farm Industries Ltd. and anor** [1998] 4 LRC 547, (at 552-3)*

*“Although the details of the Torrens system vary from jurisdiction to jurisdiction, it is the common aim of all systems to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause. The principle is well stated in relation to the State of Victoria by the Board in **Gibbs v Messer** [1891] AC 248 at page 254:*

‘The main object of the Act, and the legislative scheme for the attainment of the object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, enters his deed of transfer or mortgage on the register,

shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.'

*That principle has been repeatedly affirmed in the various jurisdictions most recently in relation to the law of New Zealand by the Board in **Frazer v Walker [1967] AC 569.***

To achieve this objective, it is critical to keep to a minimum the number of matters which may defeat the title of the registered proprietor. However, it is well established that there are certain exceptions..."

21. Sections 45 and 141 of the RPA are of relevance having regard to the issues raised in the Court below. While speaking to the conclusiveness of registration under the RPA, these sections recognize certain exceptions. They are as follows:

45. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the State or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this Act, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land

holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value.”

141. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the proprietor of any estate or interest shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for which, such proprietor or any previous proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

*22. Section 45 provides that the registered proprietor of the land or any interest therein shall hold the same subject to such mortgages, encumbrances, estates or interest as may be notified on the register but otherwise free from all other encumbrances, liens, estates or interests whatsoever. The section however recognizes certain exceptions to this and these are: (i) cases of fraud; (ii) in the case of a registered proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of the RPA; (iii) any rights subsisting under any adverse possession (see Civ Appeal No. 268 of 2014 **Republic***

Bank Ltd, v Manichand Seepersad and ors); (iv) the rights of any tenant under a term not exceeding three years; (v) where there is an omission or misdescription of any right of way or other easement created in or existing upon the lands and (vi) where lands are included in the grant or other instrument evidencing the title of the proprietor by wrong description not being a purchaser or mortgagee thereof for value or deriving title from or through a purchaser or mortgagee thereof for value.

23. Section 141 also recognizes the fraud exception. It provides that except in the case of fraud no person contracting or dealing with or proposing to take a transfer from the proprietor of any estate or interest shall be required to enquire or ascertain the circumstances under which the proprietor or any previous proprietor came to be registered. The section also provides that no one dealing with proprietor shall be affected by direct or constructive notice of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge of any such trust and registered interest is in existence shall not of itself be imputed as fraud.”

14. Being the first instance court in *Lewis v Sookdeo* and also *Republic Bank Limited v Manichand* (set out by their Lordships above), this court is acutely familiar with the principles discussed in both cases and while it notes that the facts of *Lewis v Sookdeo* are someone different in that the opposing title was that of an unregistered interest the principles set out in both *Sookdeo* and *Manichand* are of equal applicability to the present case.

15. In that regard, the interest of the claimant was registered by way of deed some 26 years prior to the issuance of the CT. However, section 45 of the RPA sets out that the exceptions to indefeasibility in the case of someone claiming to be the owner of the same land, is that of a prior grant or CT registered in keeping with the provisions of the RPA, neither of which is possessed by the claimant in this case. To put it another way, prior registration of a deed in respect of the same land is not in law an exception provided for in the section as to be able to mount a successful challenge in law the claimant would have had to have been a registered proprietor claiming the same land under a prior grant or CT.

Other exceptions to indefeasibility under section 45 RPA

Fraud

16. It must be noted that fraud has not been pleaded. So that it is clear that the claimant is not relying on this exception.

Where lands are included in the grant or other instrument evidencing the title of the proprietor by wrong description not being a purchaser or mortgagee thereof for value or deriving title from or through a purchaser or mortgagee thereof for value.

17. This in essence is one of the pillars of the case for the claimant. It is her case that the disputed lands ought never to have formed part of the application of the defendant to bring the whole of the lands under the provisions of the RPO as it was always the case that she was the legal title owner of the disputed lands pursuant to her registered deed of conveyance. To this end she claims that application of the defendant would have incorrectly identified the boundaries of the parcel of land in

respect of which the application was brought. Further, she has averred that she was not given notice of the survey that was conducted by Mr. Soomarsingh and so was not given the opportunity to appear on the date of conduct of the survey and raise relevant objections.

18. In the court's view, it appears that provided the evidence at trial on this issue is reliable and credible, the claimant would be in a strong position to argue that her entitlement to the disputed land by way of her deed falls squarely within the exception to indefeasibility of the title of the defendant. To successfully rebut the argument, the defendant would have to show that he had been in exclusive possession of the said disputed land for 16 years or more so that the description he provided was correct on that basis. This would of course be a significant challenge for him having regard to the claimant's case being that there has existed a fence on the eastern border of the disputed lands which separated it from the lands possessed by the defendant since before the date of her purchase in 1991. This of course is a matter for evidence at trial suffice it to say that from a purely preliminary view of the respective cases the claimant appears to be in a stronger position on the issue.

Rights existing under adverse possession

19. In **Manichand** supra, His Lordship Mendonca JA, after treating with the relevant legislation (which for the limited purpose of this decision will not be set out herein), added as follows at paragraph 33;

"The same can be said in relation to section 45 of the RPA. The rights subsisting under any adverse possession when acquired, rank as if they were registered encumbrances. This I think is clear from the language of section 45, which states that the registered proprietor

holds the land subject to such encumbrances etc. noted on the register but otherwise free from "all other encumbrances" except, inter alia, "any rights subsisting under any adverse possession of such land." The section appears to me to regard those rights as if they were registered encumbrances to which the lands are subject. It is relevant here to note that encumbrances include interests, rights and demands which can or may be had, made or set up in or upon or in respect of the land (see s 2(1) of the RPA). As rights in possession are to be regarded as if they were registered encumbrances, it cannot be that anyone dealing with the registered proprietor can take free from those encumbrances. As was noted in Chisholm v Hall the rights would be binding not only upon the proprietor but cannot be displaced by any subsequent transfer or transmission."

20. His Lordship then set out at paragraph 34;

“ Chisholm v Hall was applied in the Jamaican case (a decision of the Court of Appeal of Jamaica) of Recreational Holdings Jamaica Limited v Carl Lazarus & Registrar of Titles (Supreme Court Civil Appeal No. 127 of 2012). After reviewing the decision of the Board in Chisholm v Hall the Court noted that: “On the face of it, therefore Chisholm v Hall is clear authority for the proposition that rights acquired by limitation in respect of registered land rank as if they are encumbrances noted in the certificates; and that the purchaser of registered land, such as RHJL, therefore takes a transfer of the property subject to such rights”. It should be apparent from what I have said above that I agree with that statement. When therefore the first and second defendants acquired the disputed lands in 2011 they would have acquired the lands subject to those encumbrances noted on the register but also

subject to any rights subsisting under any adverse possession of the lands as those rights are to be regarded as if they were registered.”

21. His Lordship then went on to add that a bank as mortgagee is in no better position and is subject to the adverse possession of a third party on the lands in respect of which it provides a mortgage as if the interest of the adverse possessor was registered under the RPA as an encumbrance. The principle therefore is of equal applicability in this case. It follows that should the claimant demonstrate on the evidence at trial that she had been in exclusive possession of the disputed land adverse to the owners for more than 16 years, she would be in a strong position to argue that when the defendant acquired the disputed land by the issuance of his CT in 2017, he would have acquired it subject to the encumbrance of the rights of the claimant under the principle of adverse possession. Once more the evidence of his occupation and her occupation thereof would come into focus, the distinction being once again the fence which separated the disputed land from the defendant’s land and which the claimant alleges demarcated her area of possession and control before 1991 up to the date the defendant broke it down.

Damages an adequate remedy

22. The court accepts the submissions of the claimant that damages would not be an adequate remedy as the actions of the defendant would deprive the claimant of the use of her land. The court notes that the effect may well be that the defendant erects a wall on the boundary he has claimed which may then change the character of the land and its usage by the claimant. In that regard the defendant has stated that he intends to make it part of the lands upon which the town houses are constructed so that in the

court's view the land will transition from the green space that it is to part of a walled compound of townhouses.

23. Further and in any event the court notes that the claimant has provided an undertaking as to damages.

Balance of convenience/justice

24. The court must examine the prejudice likely to be suffered by the claimant should the injunction not be granted and she be ultimately successful on the claim and weigh that against the prejudice likely to be suffered by the defendant should the injunction be granted and he be ultimately successful on the claim.

25. In the case of the defendant, he has set out in his affidavit that his approvals for the townhouses includes outdoor living space on the western side and so he wishes essentially to reclaim the space and build a high quality fence. He has not stated whether his no possession of the disputed lands have placed him in a position that he has breached the conditions of approvals and whether it is even necessary to move the fence in order to comply. In other words, he has not submitted that he does not have enough land on the western side to comply with Town and Country requirements or that he is in breach of those requirements. In the court's view therefore he is unlikely to suffer any hardship by the grant of the injunction until determination of the claim.

26. In relation to the claimant, it appears that she is likely to suffer the hardship of losing her fruit trees and fence, of being deprived of the use of the land and having it alienated from her by way of the erection of a

permanent fence. Moreso, the claimant has set out in her affidavit that the defendant has erected a new chain link fence enclosing the disputed land and is attempting to sell the entire property inclusive of the disputed land at the price of \$2.5 million to \$2.9 million dollars per townhouse. In support she has deposed to the erection of a sign on the property to that effect. This of course, should it be the case is likely to result in complete deprivation of the disputed land especially in the case where the purchaser may be a bona fide purchaser for value without notice. These averments were contained in the supplemental affidavit of the claimant filed on February 26, 2020 however, the defendant has failed to deny them or treat with them in any other way in his affidavit in opposition filed some five months later on July 6, 2020.

27. When weighed therefore it is abundantly clear that the balance lies in favour of the grant of the injunction so as to ensure that matters remain unchanged and preserved until the court determines the case.

28. The court therefore makes the following order:

- a. Until determination of the claim, the defendant whether by himself or through his servants and/or agents whosoever is restrained from;
 - i. Remaining or continuing in occupation of, clearing and removal of anything from, ALL AND SINGULAR that certain piece or parcel of land situate at Gordon and Ragbir Streets St. Augustine in the ward of Tacarigua comprising TWO THOUSAND AND SIXTY-EIGHT SUPERFICIAL FEET (2,068 SUPERFICIAL FEET) (being the remaining portion of the parcel of land comprising ELEVEN THOUSAND SEVEN HUNDRED AND EIGHTEEN SUPERFICIAL FEET (11,718 SUPERFICIAL FEET) as shown in plan annexed to Deed registered as No. 13203 of 1939 after the sale thereon of portion comprising NINE THOUSAND

SIX HUNDRED AND FIFTY SUPERFICIAL FEET (9,650 SUPERFICIAL FEET) uncoloured on the plan marked "X" annexed to Deed registered as No. 254 of 1964 and bounded on the North by the Lands formerly of Stephen Bennet and Clair Stephen William Golding Castagne now Harry Prithraj Gobinsingh and Maevan Heely-Singh and on the South by Gordon Street on the East by Lands formerly of the said Bernard Rupert Smart and on the West by the other lands of the said Bernard Rupert Smart which two parcels of land formerly formed portion size of two several pieces or parcels of land mentioned and described in Deed dated the 5th day of February 1956 registered as No. 498 of 1936 (hereinafter referred to as the disputed land)

- b. The costs of the injunction proceedings are to be assessed by a Registrar upon determination of the claim and paid by the unsuccessful party to the claim to the successful party to the claim.
- c. The defendant being unrepresented and the time for filing a defence having expired, the time limited for the defendant to file and serve a defence is extended to the 18th September 2020. In default no such defence shall be filed and the claim shall be heard as an undefended claim.

Ricky Rahim
Judge