THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV No. 2009-02696

Between

CLIVE GILL **Claimant**

AND

JUDE MOSES (also known as JULIE MOSES)

Defendant

And

JUDE MOSES (also known as JULIE MOSES)

Ancillary Claimant

SELWYN MOSES

Ancillary Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

Mr. Sagar instructed by Mr. Ahmed for the Ancillary Claimant

Mr. Blaize for the Ancillary Defendant

Judgment delivered 19th March, 2013

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DECISION

Before the Court is a Notice of Application filed on the 14th September 2012 and the Ancillary Claimant seeks the following orders:

a. Leave be granted to amend the Ancillary Statement of Case filed on the 16th September 2009 and for the Amended Statement of Case to be filed and served within 14 days of the Order.

b. That an Amended Defence be filed by the Ancillary Defendant within 14 days after service of the amended Ancillary Statement of Case.

c. That leave be granted to filed an Amended Reply with 14 days thereafter.

d. That a Supplemental List of Document to be filed and served by both parties within 14 days after the Amended Reply.

e. That a Supplemental Bundle of Document to be filed and served by both parties thereafter.

f. That Supplemental Witness Statement to be filed and exchanged by both parties within 28 days after service of the Supplemental Bundle of Documents.

g. That cost of the Application be cost in the cause.

The Grounds in the Application are set out at pages 2 and 3 of the said Notice of Application and among the grounds are included inter alia:-

1. That the Claimant was not aware prior to the Independent Title Report being submitted that the Ancillary Defendant had further sold lands out of the land re-conveyed to him in 2005 by Mr. Colvin Blaize.

2. That at no time after service of the Ancillary Statement of Case did the Ancillary Defendant state or disclose that he had sold further lands after the lands were re-conveyed to him by Colvin Blaize.

3. The failure of the Ancillary Defendant to give full and frank disclosure led the Ancillary Claimant to believe he was still the owner of both parcels.

4. That at the commencement of proceedings, the Title Search Report obtained by the Claimants Attorney did not reveal any distribution/sale of land out of the 2379.9m^2 or the 2279m^2 parcels.

Procedural History

This matter had been actively Case Managed before another Court and directions which included inter alia the filing of Witness Statements were given and complied with. A Pre-Trial Review was fixed and the matter was subsequently assigned to this Court. At the hearing of the PTR this Court made enquiries of the parties as to the status quo of the lands in question and on the 11th June 2012 the Court directed that a title report be commissioned.

The Law

The instant application is made pursuant to the provision of **Part 20.1(3) of the Civil Proceedings (Amendment) Rules 2011** which provides as follows:

> 3) The Court shall not give permission to change a Statement of Case after the first Case Management Conference unless it satisfied that;-
>
> > a. there is a good explanation for the change not having been made prior to that Case Management Conference and;

b. the application to make the change was made promptly,

3A) In considering whether to give permission, the court shall have regard to –

a. The interests of the administration of justice;

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

c. Whether the change is factually inconsistent with what is already certified to be the truth;

d. Whether the change is necessary because of some circumstance which became known after the date of the first case management conference;

e. Whether the trial date or any likely trial date can still be met if permission is given; and

f. Whether any prejudice may be caused to the parties if permission is given or refused"

It is not in dispute that the instant application for an amendment has been made several years after the first Case Management Conference. In accordance with part 20.1(3) as amended it is important to note that the wording of Part 20.1(3) is similar to the relief of sanctions provisions at **Part 26.7** of the amended CPR and therefore the authorities on the question of promptness and good explanation in relation to **Part 26.7** the CPR as amended can be of assistance in dealing with **Part 20.1 (3) of the Civil Proceeding (Amendment) Rules 2011.**

It is clear that **Part 20.1(3)** mandates that the Court must be satisfied that there is a good explanation for the change not having been made prior and secondly that the application was made promptly.

Provided that these two tests are satisfied the Court must then consider the factors outlined at Part **20.1(3A)** before exercising its discretion and determining whether the relief sought ought to be granted.

Good Explanation

As mentioned earlier the Court is of the view that the considerations that would apply as to whether there is a 'good explanation' and 'promptness' as envisaged under Part 20.1 (3) of the Amended CPR are similar to those that must be considered when determining 'good explanation' and 'promptness' as set out under Part 26.7 of the CPR as amended.

In **Civil Appeal No. 52 of 2012 Roopnarine and others v Kissoon and others** (a case dealing with an application for relief from sanction) the Court considered the meaning of "good explanation" at paragraph 33 of the Judgment Mendonca JA stated as follows:-

> "An explanation therefore that connotes real or substantial fault on the part of the person seeking relief cannot amount to a good explanation for the breach. On the other hand a good explanation does not mean the complete absence of fault. It must at least render the breach excusable. As the Court of Appeal observed in Regis, supra what is required is a good explanation not an infallible one. When considering the explanation for the breach it must not therefore be subject to such scrutiny so as to require a standard of perfection."

The Court must examine the history of the matter and take into account the evidence filed in support of the application to determine whether the explanation renders the application to amend at this stage excusable and whether the explanation advanced is a good one.

The Court having conducted this exercise noted *inter alia* the following:

1. A title report was obtained by the Ancillary Claimant prior to the institution of these proceedings but same did not reveal any conveyances subsequent to the Blaize re-conveyance.

2. At paragraph 8 of the Ancillary Defendant's Defence he admitted paragraph 5 of the Ancillary Claimants Statement of Case wherein it was pleaded that Lot 17 and Lot 17A were re-conveyed to the Ancillary Defendant by Mr. Blaize. Further the said defence never revealed that any portions of the re-conveyed lands were sold subsequent to the re-conveyance.

3. Included *inter alia* among the reliefs sought by the Ancillary Claimant was an alternative relief that she be paid the market value of any lands sold by the Ancillary Defendant.

4. The issue as to any sale after the Blaize re-conveyance was first revealed at the PTR hearing on the 11th June 2012 when this Court enquired as to the status quo of the lands in question and ordered that a report on title be prepared, the said report was prepared by Chadeesingh and Company in late August 2012 and the application to amend was filed on the 14th September 2012.

The Court formed the view that the nature of the pleadings clearly called on the Ancillary Defendant to account for all the lands sold by him and therefore it was incumbent on him to reveal if any lands were sold after the Blaize re-conveyance.

Part 10.5(1) and (2) of the Civil Proceedings Rule as amended stipulates that a Defendant must include in his Defence a statement of all the facts on which he relied to dispute the claim against him and that such a statement must be as short as practicable.

In **Civil Appeal No. 238 of 2011 Real Time System Limited and Renraw Investments Limited** Jamadar JA in dealing with **Part 10.5(1) and (2)** stated as follows:

> "The thrust of the Civil Proceedings Rule 1998 is towards litigation with full disclosure at the earliest opportunity and against tactical non-disclosure for the purpose of giving strategic advantages in the conduct of litigation."

And at paragraph (10)

> "Moreover the duty of both Claimant and Defendant to set out fully all facts which ought to be stated in the Statement of Case and Defence respectively, so to allow a judge to properly manage the matter in the context of the Civil Proceeding Rules 1998."

Having consider the pleadings, the history of the matter, the fact that the title report was obtained at the Court's request in August 2012, as well as the Affidavit in support of the instant application, this Court is of the view that the explanation advanced by the Ancillary Claimant is a good one, the explanation as to why this application was not made prior to the first Case Management Conference is in these circumstances understandable and that the failure to do so previously is excusable. Although the information contained in the Court ordered Chadeesingh

Title report could have been obtained previously it was not. The Ancillary Claimant did however obtain a title report prior to the institution of the proceedings and a copy of same was annexed to the Affidavit in support of the instant application. The said report did not mention the sale of lands that took place subsequent to the Blaize re-conveyance. This Court is cognizant of the fact there is inaccuracy and uncertainty that surrounds the investigation of title with respect to common law lands in this jurisdiction and problems such as the absence and or unavailability of Deed books are not uncommon. In this case the Ancillary Defendant failed and or refused to disclose the fact that he had sold lands subsequent to the Blaize re-conveyance and this issue only materialized when the Chadeesingh Title report was obtained in August 2012. In the circumstances the application to amend could not have been reasonably made prior to the first CMC and the issue of an amendment was only crystallized when the said report was obtained.

Having found that there is a good explanation the Court is mandated to consider whether the instant application was made promptly. In considering this issue the Court is of the view that the same considerations with respect to Part 26.7 (1) of the CPR as amended are relevant and of assistance when considering promptness under Part 20.1 (3) of the CPR as amended. At paragraph 21 of **The Roopnarine decision (supra)** Mendonca JA in dealing with promptness observed:-

> "I will first consider the issue of promptness. Whether an application for relief is made prompt in one situation may not be so considered in other circumstances. Promptness is therefore influenced by the context and facts of each case (see Civil Appeal No. 914 of 2009, Trincan Oil Limited v Schnake)"

The Court at paragraph 26 of the said judgment further stated:

> "But whether an application is prompt does not depend simply on the time that has elapsed from the date the sanction took effect to the date the application for relief was made. It depends on the factual context and there are other relevant and more significant matters in this case that the judge did not consider."

The information as to the subsequent sale of portions of land after the Blaize re-conveyance was only confirmed when the Chadeesingh and Company report dated the 23rd August 2012 was obtained. The instant application was filed on the 14th September 2012.

Having considered all the facts and circumstances of this case the Court is of the view that the application was made promptly.

The Court having found that there was a good explanation for the proposed change not having been made earlier and having found that the application was made promptly, the Court must now consider all the factors laid down at Part 20(1) 3A of the CPR as amended to determine whether it would exercise its discretion to grant the instant application.

> The provisions of Part 20.1(3A) a, b and e of the CPR as amended are similar to the provisions of Part 26.7 (4) a, b and d of the CPR as amended and consequently the learning as it relates to said provisions at Part 26.7 (4) a, b and d are of great assistance when considering the matters at Part 20.1 (3A) a, b and e of the CPR as amended.

The relevant provisions under **Part 26.7 (4)** (relief from sanctions were considered by the Court of Appeal in **Roopnarine case (supra)** and Mendonca JA at paragraph (43) of the judgment stated as follows:-

> "Rule 26.7 (4) sets out four factors which the Court must have regard to in deciding whether relief should be granted. The Court should consciously go through the list of factors to b considered, I however do not think that the list is meant to be exhaustive and the Court should ask itself if there are any other relevant circumstances that need to be taken into account. Having done so the Court has to engage in a balancing exercise taking into account all the circumstances and determine whether it is in accordance with the overriding objective that relief shall be granted."

The Court then went on to consider the provisions starting with the administration in justice requirement. At paragraph (44) of the judgment the Court stated as follows:-

> "The administration of justice is not assisted when orders are not obeyed and it is burdened with application for relief from sanctions and extension of time……The late application for relief could not therefore have affected the fairness of the trial so far as the Respondents are concerned nor could it have affected the trial date. I think in all the circumstances the interests of the administration of justice favour the grant of relief."

Similarly from the facts and circumstances in the instant case it is the view of this Court that the interest of the administration of justice favours the granting of the application to amend since no trial date has yet been fixed and the application does not affect the fairness of the trial.

At paragraph 45 of the said judgment, Mendonca JA then considered whether the failure to comply was due to the party or his Attorney at Law. In the instant case the necessity for amendment arose when the ordered Report a Title was obtained. Prior to this, the issues were crystallized in the Pleadings and the matter was fixed for a pre Trial Review. Fault in the circumstances cannot be attributed to the Ancillary Claimant or her Attorney at Law. Failure to

allow the amendment would mean that issues which were not contemplated on the original pleadings and which now surfaced will go unanswered and unaddressed by the Ancillary Claimant. Further in the circumstances the Ancillary Defendant will suffer no prejudice if the application is granted since he can be afforded the to amend his case accordingly.

The other consideration as to whether the trial date or any likely trial date can still be met if permission is given is of little significance in this case as no trial date has yet been fixed. The Defendant will suffer no prejudice by the grant of the application and would be at liberty to amend his Defence.

The other factors to be considered in relation to **Part 20 (3A)** application are:-

i. Whether the change is factually inconsistent with what is already certified to be the truth:

An examination of the proposed draft amendment reveals that what is sought to be put forward is the sale of the respective parcels of land by the Ancillary Defendant subsequent to the Blaize re-conveyance. The only relief that has been added is the allegation that the Ancillary Defendant acted fraudulently by dealing with the lands as he did. The relief sought and the allegations set out in the proposed amendment are not fundamentally at variance with the original claim. They deal with issues arising from the same set of facts and circumstances. The Court is therefore of the view that the proposed is not factually inconsistent with what is already certified to be the truth.

ii. Whether the change is necessary because of some circumstances when became known after the date of the first Case Management Conference:

It is evident that from the history of events outlined earlier that the issue of lands being sold subsequent to the Blaize re-conveyance was revealed when the Chadeesingh title

report was received in August 2012. This therefore was clearly circumstance that became known after the first Case Management Conference.

iii. Whether any prejudice may be caused to the parties if permission is granted or refused:

This Court is of the view that no prejudice will be occasioned by either party since the appropriate directions be given so as to ensure that both sides can properly put forward their respective case.

In the circumstances the Court having considered all the factors listed at Part 20.1 (3A) a-f, and in the exercise of its discretion hereby grants to the Ancillary Claimant permission to amend her Statement of Case as proposed and the Court shall give further directions for the management of this matter.

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FRANK SEEPERSAD

JUDGE