

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2020-01766

Between

RAPHAEL MACHADO

CECILIA MACHADO

LAWRENCE MARCANO

Claimants

AND

STARGATE MANAGEMENT LTD

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson

Date of Delivery: November 6, 2020

APPEARANCES:

Mr. Alan Anderson instructed by Mr. Dons Waithe Attorneys at law for the Claimant
Mr. Michael Coppin Attorney at law for the Defendant

REASONS

1. On 9 September 2020 I dismissed the claimants' Notice of Application filed on 7 July 2020 for the grant of an interim injunction. The written reasons are now provided.

2. The first and second claimants are husband and wife. The third claimant is the brother of the second claimant. In their Notice of Application, the claimants seek, among other things, an injunction requiring the defendant to remove a fence that is constructed on the boundary of an area of land described as the green space (the Greenspace). They allege that the fence interferes with their continuing occupation of the Greenspace and prevents access to their livestock and agricultural crops. They assert that they and their family members have been in continuous and undisturbed possession of the Greenspace “from the 1940’s” and have treated it as their own until the defendant unlawfully constructed the fence that now hinders their access.
3. In their Fixed Date Claim Form filed on 6 July 2020 the claimants seek various forms of relief against the defendant. Primary among them, is an order for possession of the Greenspace and an order that the defendant’s title thereto is extinguished by virtue of the claimants’ adverse possession.
4. The history of ownership and occupation of the Greenspace is relevant to the proceedings.
5. The Greenspace forms part of a larger parcel of land comprising 3.3569 Hectares (the larger parcel) that is now a residential development (the Development). The Development is divided into two areas - (i) a tenanted area comprising 2.4 Hectares which is sub-divided into nine plots of different sizes; and (ii) the Greenspace, comprising 1.17 Hectares of open space, which is reserved as a park.¹
6. The larger parcel on which the Development now stands was formerly owned by Gordon Grant Investments Ltd and was sold by them to Stargate Limited by deed

¹ See paragraph 13 of the affidavit of Ian Abraham sworn on behalf of the defendant

dated 7 July 1998.² Stargate Limited was put into voluntary liquidation and, by deed dated 26 June 2003, the Development was transferred to the defendant company. The defendant was established for the specific purpose of holding the freehold reversion in the larger parcel and to issue shares to new tenants of the Development.³ Each tenant holds one share in the company.

7. The claimants allege that when the larger parcel was sold by Gordon Grant Investments Limited to Stargate Limited in 1998, the title of the vendor had already been extinguished by virtue of their adverse possession. They allege that Trifano Marcano, the father of the second and third claimants, had occupied the Greenspace from 1940 to the date of his death in 2004 without the payment of rent for his continued occupation. They state that on or around 20 March 1984, Trifano Marcano received a letter of offer by Gordon Grant Investments Limited for the sale of the “house spot” occupied by him as a statutory tenant under the Land Tenant (Security of Tenure) Act. The letter stated specifically that the agricultural land that was rented at the time by Mr. Marcano would not form part of the proposed sale but that Mr. Marcano could continue to rent it on a yearly basis. The claimants state that Mr. Marcano did not at any time pay rent for the continued use of the agricultural land referred to in the letter. They rely on his failure to do so as evidence to support their claim for adverse possession of the Greenspace. The full terms of the letter are discussed further below.
8. The defendant’s evidence is that when Stargate Limited purchased the larger parcel in 1998 there were three persons who planted crops on the lands – Trifano Marcano, Jerry Marcano (the son of Trifano Marcano) and Arnold Chasteau. The defendant states that Trifano Marcano and Arnold Chasteau were compensated for their crops and moved off the lands while Jerry Marcano sought permission to

² Ibid at para. 6

³ Ibid at para. 8

continue his cultivation until required to vacate the lands. When such a request was made in or around 2015, Jerry Marcano refused to vacate the lands without compensation for his crops.⁴ He was paid compensation in the sum of \$15,000.00⁵ and temporarily ceased cultivation only to resume thereafter.

THE ADJOINING LANDS

9. The evidence shows that the first and second claimants have occupied lands adjoining the Greenspace prior to 1981. This is borne out in the recital to a deed dated 23 November 1998, under which Gordon Grant Investments Limited, as vendor, sold the freehold reversion of three parcels of land to the first and second claimants and one Judy Walcott, as purchasers. The claimants' evidence is that the lands are located to the east of the Greenspace. The First Schedule to the deed shows that the three parcels comprise 1416.8 square metres, 528.8 square metres and 605.3 square metres, respectively.
10. The recital to the deed provides insight into the history of occupation of the three parcels by the first and second claimants. It states that:

“WHEREAS:-

- 0.1 The Vendor is seised and possessed in fee simple of all and singular those three parcels of land described in the First Schedule hereto (hereinafter referred to as “the said Lands”) subject to the Statutory lease hereinafter recited but otherwise free from encumbrances.

⁴ Ibid at para. 17

⁵ See para 6 of affidavit of Christian Hadeed sworn on behalf of the defendant

- 0.2 Prior to and at the time of the enactment of the Land Tenants (Security of Tenure) Act No. 11 of 1981 (hereinafter referred to as “the Act”) the Purchasers were annual tenants of the Vendor in respect of the said Lands.
- 0.3 Under and by virtue of the Act the annual tenancy of the Purchasers was converted into a Statutory Lease (hereinafter referred to as “the Statutory Lease”) for the term of thirty years from the first day of June, one thousand nine hundred and eighty-one with an option to purchase the freehold reversion expectant on the determination of the same term of thirty years.
- 0.4 The Purchasers have requested the Vendor to sell to them such freehold reversion in the said Lands expectant on the determination of the Statutory Lease together with the right of way described in the Second Schedule hereto (hereinafter referred to as “the said right of way”) which the Vendor has agreed to do at and for the price or sum of fifty-four thousand eight hundred and ninety-two dollars and have requested that the sale be effected by the Conveyance of the said lands to the Purchasers.”

11. As indicated above, in or around 20 March 1984, Gordon Grant Investments Ltd made an offer of sale of a parcel of land to Trifano Marcano. The offer letter was in the following terms:

“Dear Mr. Marcano,

It has now been decided by this Company that we are in a position to sell to you the house spot which you currently occupy.

As you have been a Tenant of these lands for a number of years we are prepared to sell these lots to you in the following terms:-

- 1) Sale Price - \$2.00 per sq. ft.
- 2) Total Area to be determined by survey but not exceeding 5,000 sq. ft.
- 3) All expenses, including legal and survey, to be for the purchaser's account.

Should you be interested in the above, please contact this Office when final arrangements for the purchase can be made.

Please note that any agricultural lands which you currently rent for a garden will not be included in this transaction but you may continue to rent the land on a yearly basis.

Yours faithfully,

GORDON GRANT INVESTMENTS LTD.

.....
W.KEIR
DIRECTOR

12. There is no evidence whether Trifano Marcano purchased the lot of land that was offered for sale or whether the said lot was included among the parcels that were subsequently purchased by the first and second claimants.

LEGAL PRINCIPLES

13. The legal principles that apply to the grant of an interim injunction are well established. First, there must be a preliminary assessment of the merits of the

case to determine whether there is a serious issue to be tried; second, it must be determined whether the applicant would suffer irreparable harm if the application for an interim injunction were refused; and third, an assessment must be made as to which of the parties would suffer the greater harm from the grant or refusal of the remedy pending a decision on the merits: ***Seepersad v Ayers-Caesar and others*** [2019] UKPC 7.

14. The approach to the balance of harm assessment was discussed in the following way by Lord Hoffman in the Privy Council decision of ***National Commercial Bank Jamaica Ltd v Olint Corporation*** (2009) 1 WLR 1405 at paragraphs 16 to 18:

“16. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether the granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if

it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:

“It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.”

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases.”
15. The application for the grant of an interim injunction must be considered against the backdrop of these guiding principles.

SERIOUS ISSUE TO BE TRIED

16. As stated above, in their Fixed Date Claim the claimants seek an order for possession of the Greenspace on the ground of their adverse possession.
17. The evidence shows that the first and second claimants purchased three parcels of land adjacent to the Greenspace approximately five months after the

Greenspace was sold to Stargate Limited. In my view, having regard to the common ownership by Gordon Grant Investments Limited of both the Greenspace and the three parcels that were sold to the claimants, the physical proximity of the lands, and the relative contemporaneity of the respective dispositions, it is highly unlikely that Gordon Grant Investments Limited would not have been aware of the use and enjoyment of the Greenspace by third parties, including the claimants.

18. In my assessment, the statements in the offer letter of 20 March 1984 to Trifano Marcano, when considered in conjunction with the recitals to the deed under which the claimants purchased the freehold reversion in the three parcels, suggest an intention by Gordon Grant Investments Ltd to facilitate the ownership by the claimants and their family members of the lands on which they lived to the exclusion of the lands on which they may previously have grown crops or reared livestock.
19. There was otherwise no independent evidence to support the claimants' alleged continuous and undisturbed possession of the Greenspace from the 1940s and going forward. The letter of 20 March 1984 to Trifano Marcano makes it clear that whatever farming activity may have taken place in the past on lands owned by Gordon Grant Investments Limited was undertaken with the knowledge and approval of the owner and pursuant to a lease. The letter confirms that the lands under cultivation were not available for sale to Mr. Marcano, although he was permitted to continue to use them for agricultural purposes. There is nothing to suggest that the position was any different in relation to the claimants up to and including the date on which the three parcels were sold to the first and second claimants.

20. In light of the above, I formed the opinion that the claimants' evidence to support a claim for adverse possession was tenuous and that the merits of the case had not been sufficiently established.

WHETHER DAMAGES ADEQUATE

21. The claimants' evidence is that they cultivate long and short term crops on the Greenspace and rear livestock on it. When pressed by the court to provide details as to the value of the crops and livestock, Counsel for the claimants' response was that there were six to seven rabbits and twenty game fowls. It was admitted that no crops are grown for commercial purposes.
22. It is significant that in their Fixed Date Claim the claimants seek compensation in the sum of one million dollars in the event that they were deprived of the use of the Greenspace. In light of the evidence that has been provided this level of compensation may only be described as aspirational, if not illusory.
23. In the circumstances, the claimants failed to demonstrate that if the injunction were refused they would suffer irreparable loss for which they could not be compensated in damages.

BALANCE OF CONVENIENCE/ JUSTICE

24. The evidence shows that there have been incidents between family members of the claimants and residents of the Development that gave rise to the involvement of the police. The claimants' family members have resisted the defendant's efforts to construct the fence that is the subject of dispute. The defendant maintains that a fence is necessary to protect the security of the residents of the Development and that the sum of \$81,590.00 was expended on its construction with an

additional sum of \$55,000.00 being paid to provide security services to the contractors.⁶

25. Balancing the respective interests of the parties, it is clear that if an order were made requiring the defendant to remove the fence, and the claimants were ultimately unsuccessful on their claim, additional expenditure would be required to restore the fence.
26. It is relevant that upon the dismissal of the claimants' application for an injunction I made an order granting permission to the claimants to remove bearing crops from the property provided that "the dates, parties in attendance and a representative of both sides are agreed and present." The objective of the order was to prevent a risk of avoidable loss and injustice to the claimants in the event that they were to succeed on the claim.
27. In the circumstances, I came to the conclusion that the balance of justice weighed in favour of maintaining the fence until a final determination is made regarding the rights of the parties.
28. It was for the above reasons that I dismissed the claimants' application for the grant of an interim injunction.

Jacqueline Wilson QC
Judge

⁶ See para. 16 of the affidavit of Carolyn Mowser sworn on behalf of the defendant