

2013-HC-DEM-CIV-W-306

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

BETWEEN:-



PATRICIA GILLIS

Plaintiff

-and-

ONA SIMON, represented herein by
her duly constituted attorney ANN
CAMBRIDGE

Defendant

BEFORE: S. Morris-Ramlall, J.

13th & 25th February, 5th March, 24th June & 19th December, 2019

Ms. S. Ferrell for Mr. J. Harmon for the Plaintiff

Ms. R. Kissoon for the Defendant

JUDGMENT

Introduction

1. The Plaintiff filed this action seeking the following:-

- a) a declaration that she is entitled to possession of a strip of land measuring 4' in width running along and outside of the northern portion of the Defendant's land situate at Lot 28 Main Street, Ann's Grove, East Coast Demerara ("the disputed strip");
- b) damages in excess of \$100,000 (one hundred thousand dollars) for trespass;

c) an injunction restraining the Defendant by herself, her servants and/or agents and every one of them from preventing the Plaintiff from using the said land;

d) a mandatory injunction directing the Defendant to remove a gate placed by the Defendant on the said land that gives the Plaintiff access to the Ann's Grove Main Road, East Coast Demerara;

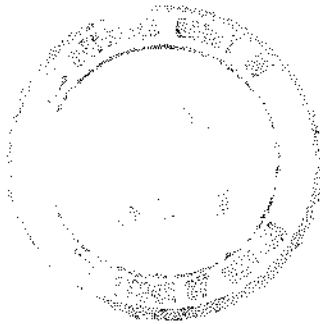
e) Such further or other relief that the court deems just; and

f) Costs.

2. The Plaintiff is the owner by Transport No. 1429 of 2011 of property including the disputed strip. The Defendant accepts that the Plaintiff owns the property but contends that the inclusion of the disputed strip in the transport was fraudulent. The Defendant denies any interference with ingress or egress of the Plaintiff to or from the disputed strip. The Defendant contends that the Plaintiff never occupied or exercised ownership over the disputed strip. The Defendant pleaded that the Plaintiff never used it for access to her property and that she in fact used another access point.

3. The Defendant further contends that the Plaintiff had acknowledged her as owner of the disputed strip and that she and her predecessors were in exclusive occupation for in excess of 30 years. The Defendant claims that the Plaintiff obtained prescriptive title of her property, inclusive of the disputed strip, by fraud.

4. Hence, the Defendant filed a counterclaim seeking to set aside the declaration of title made in favour of the Plaintiff and the transport which was granted pursuant to that declaration. Damages for fraud, a declaration that the Defendant is the sole and absolute owner of the disputed strip and an



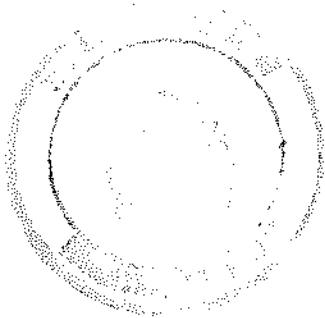
injunction restraining the Plaintiff from entering or remaining on the disputed strip are also sought.

5. In response, the Plaintiff pleaded that both parties had caused their respective lands to be surveyed for the purpose of prescriptive title applications and that the Defendant, in that application, relied on a plan which excluded the disputed strip. The Plaintiff contends that the parties were aware of each other's application and utilised the services of the same surveyor. Further, at the time of the surveys no fence or gate was on or around the disputed strip. The Plaintiff additionally contends that the reliance by the Defendant on fraud is statute barred.

The law

6. By section 22 (1) of the Deeds Registry Act, Cap. 5:01 (hereinafter referred to as "the Act") every transport vests in the transferee full and absolute title subject only to certain claims, encumbrances and interests mentioned therein. The proviso to section 22 (1) contains an exception for fraud in the hands of all parties or privies to the fraud once an action is commenced within twelve months of the discovery of the fraud.
7. The issue for determination is therefore whether the circumstances under which the Plaintiff obtained title to her property amounted to fraud within the meaning of section 22 (1) of the Act.
8. The Act does not provide definitions of either the word 'fraud' or the phrase 'privies to the fraud' or stipulate what is required to establish fraud in the context of section 22 (1). In Jassoda Ramkishun v- Conrad Ashford Fung- Kee-Fung [2010] CCJ 2 (AJ) and Chee Yiu Kwang et anor -v- Tsui Yokkei a.k.a Cheekee [2016] CCJ 9 (AJ) the CCJ examined the meaning of fraud in



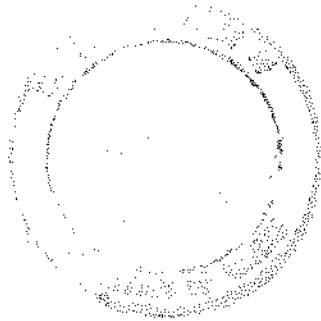


the context of section 22 (1) and posited that it encompassed both legal and equitable fraud, that is to say, the *"more serious and obvious form of fraud, in legal parlance "common law fraud" as well as various forms of "unconscionable conduct" or "improper behaviour" which qualify as "constructive fraud", "quasi fraud" or, a rather curious expression, "equitable fraud."* In Raymond Joseph v Kamal Mangal [2016] CCJ 22] the apex court stated the position thus- *"In order to be classified as fraud, conduct must involve an element of dishonesty. Dishonesty is not to be addressed in a narrow or technical manner and must be looked at in a broad sense."* It is also trite that fraud must not only be pleaded with sufficient particularity but it must also be pleaded with certainty.

9. It is fraud as described above that the Defendant has the onus of proving in order to establish her counterclaim and successfully defend this action. Failing this, the Plaintiff is entitled to the benefit of the indefeasibility of title conferred by the Act.

The evidence

10. The Plaintiff testified that she is the owner of the property described in Transport Number 1429 of 2011. She tendered that transport as an exhibit and gave evidence that she and the Defendant obtained prescriptive title in respect of the lands which they occupy. It is her evidence that, pursuant to the filing of the relevant applications, the parties both caused the respective lands to be surveyed by the same surveyor and they retained the services of the same attorney-at-law. Additionally, both applications were heard at the same time.



11. The Plaintiff stated that her property is directly behind the Defendant's and that she had been entering her property from the disputed strip into the back of her property. After the parties obtained prescriptive title and their respective transports the Defendant, in the year 2012, blocked the disputed strip by erecting a concrete fence and steel gate at the front and a zinc fence at the back. The Plaintiff stated that she has had to depend on the kindness of another neighbour who allows her to traverse on a piece of her land and that the Defendant has refused to accede to her requests and demands that the fences and gate be removed, even in the face of an order of court compelling the Defendant to do so.
12. The Plaintiff denied that she has always used the land that her neighbour, Madeline Billey, had allowed her to use to access the public road and her property. She stated that since her mother was alive her mother had been using the disputed strip and that she only started using Billey's strip of land after the Defendant blocked the disputed strip.
13. During cross examination of the Plaintiff, suggestions were put to her by referring to the disputed strip as a right of way through the Defendant's land. The Plaintiff's response was that she knew nothing about that. However, the Plaintiff's case is not that she has a right of way over the Defendant's land. Her contention is that the disputed strip forms part of her land.
14. I find that whether or not the Plaintiff's neighbour has been facilitating the Plaintiff by allowing her to traverse on a strip of her land and whether the Plaintiff had been using the disputed strip for ingress and egress prior to obtaining title is not germane to a resolution of this matter. The parties have accepted that the disputed strip forms part of the land transported to the

Plaintiff consequent upon the grant of prescriptive title to her. By virtue of section 22 (1) of the Act, the Plaintiff acquired an indefeasible title subject only to a possibility of it being declared void for fraud. The issue is therefore whether the Plaintiff fraudulently misrepresented to the Land Court Judge that she was in adverse possession of the disputed strip.

15. Allegations of fraud are more easily made than proven and findings of fraud cannot be made in a vacuum. The parties have accepted that the plan which demarcated the land which the Plaintiff obtained prescriptive title for includes the disputed strip. Both parties applied for and obtained prescriptive title in respect of their respective lands. They were admittedly pursuing their applications together. They retained the same surveyor and attorney-at-law. The Defendant's Duly Constituted Attorney was present during the conduct of the survey. The Defendant did vacillate about the securing of the plan and her attorney's involvement in the process but at the end of the day, the Defendant was issued with a plan demarcating the land that she was claiming prescriptive title to. It should have been evident to her that the disputed strip was not included in that land.

16. Additionally, the Defendant is asking this court to find that the Plaintiff made certain false statements in the prescriptive title proceedings but no record of the proceedings has been produced. There is therefore no evidence of those proceedings or of the precise statements made by the Plaintiff in those proceedings which the Defendant seeks to have set aside. It was also never suggested to the Plaintiff that she made any false statements in the prescriptive title proceedings. The approach of the Defendant was to merely interrogate the Plaintiff as to user of the disputed strip prior to obtaining

prescriptive title. This approach was inconsistent with the Defendant's own testimony in that she spoke to the prior user of the disputed strip by the Plaintiff dating as far back as before 1971. Her husband had erected a gate to facilitate this prior to his death in 1971. It is the Defendant's evidence that the Plaintiff's mother had also used the disputed strip to gain access to the land she had been occupying with the Plaintiff and that she would exit the land, in the opposite direction, via the strip on Billey's land.

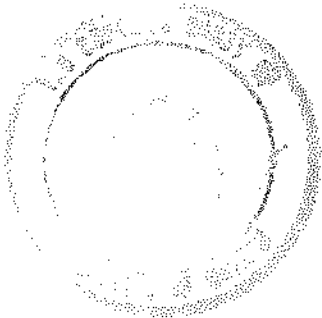
17. There is also the Defendant's evidence that at some point she had divested herself of management or involvement in the land that she prescribed for. In such circumstances, she could not have had personal knowledge of user of the disputed strip. The Defendant stated that it was her daughter who informed her that the Plaintiff had prescribed for the disputed strip. She claimed ignorance of many of the details and procedures undertaken in respect of her prescriptive title application. However, she was represented by a Duly Constituted Attorney and she acknowledged that her attorney was acting on her behalf. Matters are compounded further by the Defendant's testimony that the disputed strip was only fenced off after she obtained title and that prior to this it had been a thoroughfare.

18. The evidence of Gordon Glasgow, a witness called by the Defendant, does not support her case in any material particular. His evidence is limited to user of the passage next to Madeline Billey's property and he did not state that that user was exclusive. Further, I am unable to place any reliance on the untested evidence of Billey.

19. In these circumstances, I am unable to find or impute any fraud on the part of the Plaintiff. There is no evidence before this court to support the Defendant's

claim that the Plaintiff obtained prescriptive title and the ensuing transport by fraud. As Wooding, CJ emphasised in Roberts v Toussaint (1963) 6 WIR 431 at 433-

"[b]ut fraud is not proved by the wanton use of the label "fraudulent", nor is a transaction negatived by a cavalier description of it as "alleged". Moreover, in actions in which a registered title is being impeached, fraud means some dishonest act or omission, some trick or artifice, calculated and designed to cheat some person of an unregistered right or interest."



20. I have found no evidence of dishonesty, trick or artifice on the part of the Plaintiff neither have I found any evidence of unconscionable or improper conduct on her part. The Defendant's Counterclaim therefore fails.
21. On the contrary, given the Plaintiff's absolute ownership of the property described in Transport number 1429 of 2011, I find that the Plaintiff is entitled to the permanent injunction sought. I find it unnecessary to make the declaration sought as the transport speaks for itself. Although the plan which is referenced in the description of the Plaintiff's transport was not tendered in evidence, the particulars of the plan are set out in the transport.
22. In relation to the claim for damages for trespass, I find that the Plaintiff is entitled to succeed given the evidence of interference with her possession and right to exclusive use and occupation of a portion of her land: Hugh Charles v Wattley (2013) (St Christopher and Nevis). In arriving at an appropriate award, I have considered that, notwithstanding the grant of an interlocutory injunction in this matter, the Defendant has maintained the obstruction to and interference with the Plaintiff's access to her property.

23. I have assessed costs on a discretionary basis taking into consideration the relevant factors set out in Part 64.02 of CPR, 2016. I find that an appropriate sum is \$200,000 (two hundred thousand dollars).

THE ORDERS

I therefore make the following orders-

- a) a declaration that the Plaintiff is entitled to possession of the property described in Transport Number 1429 of 2011;
- b) an injunction restraining the Defendant by herself, her servants and/or agents and every one of them from preventing the Plaintiff from using any part or portion of the said property;
- c) a mandatory injunction directing the Defendant, within two days from the date of this order, to remove a gate placed by the Defendant on the portion or parcel of the said property that affords the Plaintiff access to the Ann's Grove Main Road, East Coast Demerara, failing which the Plaintiff shall employ self-help measures and remove the said gate;
- d) the Defendant shall pay to the Plaintiff damages in the sum of \$900,000 (nine hundred thousand dollars) for trespass;
- e) the Defendant shall pay costs to the Plaintiff in the sum of \$200,000 (two hundred thousand dollars).
- f) The Counterclaim is dismissed.



Simone Morris Ramlall

Simone Morris Ramlall

Puisne Judge

Dated this 18th day of May, 2020