

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil No. 1663 of 2011

EDNA TULL

APPLICANT

AND

LEROY TULL

RESPONDENT

Before The Hon. Mr Justice William J. Chandler, Judge of the High Court

Dates of Hearing: 2013 June 20th, October 8th, 31st

2014: March 3rd, June 16th, December 8th

Date of Decision: 2017 May 12th

Appearances:

Ms. Kim Marshall Attorney-at-Law for the Applicant

Ms. Diana Douglin Attorney-at-Law for the Respondent

Decision

Background

[1] The Claimant, Edna Tull is the sister of the Defendant Leroy Tull.

Both parties reside at Church Village, Chapel, in the parish of Saint

Philip. The portion of land, which the parties occupy, is classified as

tenantry land by virtue of the **Tenantry Freehold Purchase Act Cap. 239B of the Laws of Barbados (TFPA)**.

- [2] The parties previously lived together with their mother and one other sibling (Lyris Tull), and that sibling's daughters and granddaughter, having occupied the land into their adulthood. The parties' mother died in 1984 leaving her three children resident on the property.
- [3] The portion of land had two houses situated upon it, one belonging to the mother of the parties, and the other to their stepfather. During her lifetime the parties' mother instructed the Defendant to live in the house owned by his stepfather as it was vacant, and he did so. Due to conflict, Lyris Tull and her children and granddaughter moved out of the home, leaving Edna Tull there alone.

The Pleadings

- [4] The Claimant filed a claim form on 10 October 2011 claiming a remedy in trespass against the Defendant and perpetual injunctive relief restraining the Defendant whether by himself, his servants and/or agents from entering upon the Claimant's land at Church Village, St. Philip, Barbados.
- [5] The Claim is supported by an affidavit filed on even date with the claim form in which the following was deposed:

- i. The Claimant, Ms. Edna Tull, purchased the land from her own funds and paid all legal fees and expenses attendant on the sale. She exhibited a conveyance to the Affidavit dated the 25th day of June 1990 and made between Carrington Estates (1962) Ltd (as Vendor therein) and herself (as Purchaser therein) and recorded in the Land Registry of Barbados on the 4th day of February 1992 as deed no 992 (the conveyance).
- ii. The Defendant, Mr. Leroy Tull always occupied a portion of the land the subject matter of the action.
- iii. The Defendant's chattel house was without indoor toilet facilities prior to the passage of hurricane Tomas. He broke into her yard for the purposes of using her old outdoor toilet facilities.
- iv. As a result of the passing of storm Thomas (Tomas) the house, which the Defendant occupied, became damaged, he burnt the remains and so he currently occupies a shelter on the land.
- v. The Defendant keeps her yard in an untidy state and has threatened her, causing her to fear for her life.
- vi. The Defendant beat and poisoned her dog and she called the police for him.
- vii. Mr. Tull had damaged the back door of her house causing her to replace the bolt on it.
- viii. The Claimant has claimed that she owns the entirety of the property solely.

The Claimant's Notice of Application for Summary Judgment

[6] On the 25th day of April 2013, the Claimant filed a Notice of Application for an order that the court give summary judgment against the Defendant on the whole of the Claimant's claim. A supporting Affidavit was filed on the 16th day of May 2013. That affidavit repeats what was deposed in the earlier affidavit and that the Defendant entered her yard without invitation or welcome from her; the Defendant, she was advised, had no right to live on her land that he

had no evidence to substantiate his claim that the land belonged to their mother.

The Defendant's Affidavit in Reply

[7] This was filed on 29 October 2013 and in it he deposed that:

- i. He occupied the land without the permission of the Claimant since 1961 and he has never asked nor has the Claimant given him permission to live on the land.
- ii. The land belonged to his mother Enid Tull who died in 1984 leaving three children. He was unaware whether his mother left a will but she had always said that the land was for her children who were to live in peace. He was a beneficiary of his mother's estate.
- iii. There were 2 houses on the land his mother's house and his step-father's house. He lived in his mother's house with his mother, sisters, nieces and his niece Rose-ann Tull's daughter Thea Tull. Pursuant to his mother's instructions before her death, he moved into his step father's vacant house. After the Claimant put pressure on Rose-ann to move she moved taking her mother, her sister and her daughter.
- iv. After his mother's death no one took any steps to remove him from the land.
- v. The Defendant had never acknowledged any other right or title to the land.
- vi. Mr. Tull denied committing the acts of trespass and the other acts complained of.
- vii. He had always occupied a portion of the land. For upwards of fifty-two (52) years he had resided on the said land openly and as of right, and without challenge from anyone and was entitled so to do.
- viii. The Defendant was living on the land in his stepfather's house. However, with the passing of Tomas, that residence was damaged and became uninhabitable. However, even though the house was uninhabitable he has never given up possession or occupation of the property and continued to reside there. He was now living in a shelter on the land.

- ix. The Defendant claimed to have barred the Claimant's title to the land prior to the commencement of the proceedings.
- x. In the alternative, at the time of the alleged trespass or the acts complained of, he claimed that he and the Claimant were together entitled to the property as joint tenants in equity or as tenants in common in equity with their other sister and that the alleged trespasses or the acts complained of were merely an exercise by himself of his rights as co-owner or were acts that he was entitled to do and did by virtue of his rights as co-owner.
- xi. He made no admission to the Claimant's claim that she purchased the land by Conveyance dated the 25th day of June 1990 and further deposed that, if she did, her right to bring an action to remove him from the land was now barred.
- xii. He was occupying on the land in 1990 and had been so residing for a period exceeding 7 years prior to 1990. The Claimant purchased the land without his knowledge or consent even though she knew that he lived on the land all that time and that he and their sister were equally entitled to ownership.

[8] The Defendant asked the Court to make the following declarations:

- a. a declaration that the Conveyance be set aside;
- b. a declaration that the Claimant is not entitled to possession of the premises as prayed for in her Statement of Claim;
- c. a declaration that the Defendant is entitled to a beneficial interest in the said premises;
- d. that the Letters of Administration be issued to the estate of Enid Tull and that the estate be administered;
- e. Costs;
- f. Further or other relief as the Court deems just.

[9] An affidavit of Rose-ann Tull, niece of the Defendant, was filed on 29 October 2013 also in support of the Defendant's claim for relief. She

deposed that:

- i. The land belonged to her grandmother who died in 1984 leaving three children Edna, Lyris and Leroy, the Defendant.
- ii. The Defendant lived in the grandmother's house until her grandmother's death when he moved into her grandmother's husband's house next door.
- iii. She ran a shop on the premises until it was closed due to pressure from the Claimant.

Issues

[10] The issues to be determined in this matter are:

- i. Whether summary judgment ought to be granted on the grounds that the Defendant has no real prospect of success?
and
- ii. If (i) is answered in the affirmative, whether there is any other reason why the case or issue should be disposed of at trial?

The Claimant's submissions

[11] Ms. Marshall submitted that the Defendant had no grounds upon which to resist the application for summary judgment. The Defendant would have to show that he had a greater title to the land than the Claimant. A copy of the conveyance had been submitted evidencing the Claimant's title to the land. The affidavits filed on the defendant's behalf did not show that he was in any position to make a serious

claim to the land. He had not shown any grounds on which the Court could upset the conveyance.

The Defendant's submissions

[12] Ms. Douglin submitted that Part 15 of the CPR set out the grounds upon which the Court could grant summary judgment without a trial. To succeed on the application, it would have to be shown that the Claimant's claim was so clear and unanswerable that the Court could find that there was no prospect of success. The Defendant's affidavit showed that he was always in possession of a portion of the land. The court had to consider his claim to adverse possession and adjudicate on his rights, which could not be ascertained by a summary judgment. Counsel further submitted that the Claimant could not obtain a conveyance alone if the Defendant and the Claimant were both entitled to purchase. The Court also had to consider the issue of fraud upon the owners of the plantation (the Vendors). There were serious issues of law and fact to be tried which could not be resolved by summary judgment.

The Law

[13] **Part 15 of The Supreme Court Civil Proceedings Rules (2008) (CPR)** governs the grounds and procedures under which summary judgment may be given by the court. The CPR states:

15.2 - “The court may give summary judgment against a party on the whole of a claim or on a particular issue if (a) it considers that... (ii) the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at a trial.”

[14] The phrase ‘real prospect of success’ has been defined in the case of **Swain v Hillman and another [2001] 1 All ER 91 CA**. In an analysis of the English CPR Part 24.2 (the equivalent to our CPR Part 15), it was there stated, “the word ‘real’ directs the court to the need to see whether there is a realistic as opposed to a ‘fanciful’ prospect of success.”

[15] The court has a discretion to exercise in relation to an application for summary judgment, described in **Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513** as follows:

“The important words are ‘no real prospect of succeeding’. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a discretionary power, i.e. one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is ‘no real prospect’, he may decide the case accordingly.”

[16] In **Steward, Reid and Bay Roc Ltd v Samuels JM 2005 CA 66 (Jamaica) Harrison JA** described it thus “the prime test being ‘no real prospect of success’ requires that the learned trial judge do an assessment of the party’s case to determine probable ultimate success or failure. Hence, it must be a ‘real prospect’ and not a ‘fanciful’ one.

The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party.” **Harrison JA** distinguished the ‘good arguable case’ and ‘serious issue to be tried’ tests from ‘real prospect of success’ stating that the former tests are a preliminary assessment of the party’s contention in contrast to an ultimate result”. Further in **Walton v De La Haye, BVICA No. 4 of 2014, Blenman JA** stated at paragraph 52 of the decision that “Summary judgment is available in cases where there is no serious factual dispute and, if a legal issue, then no more than a crisp legal question as well decided summarily as otherwise”.

Analysis and Discussion

[17] In the instant case, the Claimant has produced a conveyance establishing, on its face, her ownership of a parcel of land. The defendant alternatively, has provided affidavit evidence to support a claim to a portion of the property on the following legal bases:

- i. Limitation: He claims that, by virtue of his unchallenged occupation of the land from 1961, which he occupied along with the Claimant and their other sibling, he has barred the claim of the Claimant to the portion of the property on which he resides.
- ii. Succession: He claims further or in the alternative that, the land having previously been tenanted, under the **Tenancies**

Freehold Purchase Act of Barbados, by their mother before her death, that she was the qualified tenant and her rights devolved upon her estate of which, the Defendant, himself and their sister are the beneficiaries.

- iii. The **TFPA**: The Defendant claims that their mother and not the Claimant was the qualified tenant under the **TFPA**. This has not been disputed by the Claimant. This raises the issue of the validity of the conveyance to the Claimant under the **TFPA**.

The Law as it relates to the Tenancies Freehold Purchase Act

[18] The **Tenancies Freehold Purchase Act Cap. 239B (TFPA)**

stipulates at **section 10 (1)** that, subject to sections 19 and 25, a qualified tenant may exercise his right to purchase the freehold of the lot of which he is the tenant by giving notice to the landlord, in accordance with this Part, of his intention to do so. A tenant means an individual who occupies a lot comprised in a tenantry pursuant to a tenancy, whether that tenancy exists by virtue of a lease, contract or licence and either at law or in equity (Section 2):

.....

(5) When a qualified tenant gives his landlord notice under subsection (1), it becomes the duty of the landlord to convey the freehold of the lot **to the tenant (emphasis added)** at a price to be determined pursuant to section 4(1).

[19] The person entitled to purchase a lot under the **TFPA** is the qualified tenant. The Defendant has challenged whether the Claimant is a

qualified tenant alleging that their mother was entitled to the lot. He has filed affidavit evidence from his niece and his own affidavit to support his claim. That evidence remains untested. In the circumstances, there is a real, not ‘fanciful’ issue to be determined. The evidence in support of the opposing positions cannot be regarded as other than compelling.

[20] **Section 17 (1)** of the **TFPA** provides that:

“Notwithstanding the **Property Act** or any other enactment, a conveyance of freehold of a lot made pursuant to this Part (a) vests in the purchaser a good and marketable title for a fee simple absolute estate in the lot **free of all encumbrances**; and (b) except as stipulated in the conveyance, **discharges the interest specified in the conveyance from all estates, rights, interests, liens and encumbrances of all persons including the Crown.**” (emphasis added)

[21] The conveyance, if valid, discharges all rights and interests of all persons save those stipulated in the said conveyance. The discharge of rights ought never to be done arbitrarily and as such the purport and intent of the **TFPA** is to ensure that, prior to the execution of the conveyance, any rights and encumbrances ought to be made known. It is important, therefore, to ensure that the purchaser of the property is the qualified tenant within the meaning of the **TFPA**. The Claimant’s title has been challenged by the Defendant who has produced affidavit evidence to support his claim.

- [22] It must be noted that the Defendant has counterclaimed for, *inter alia*:
- i. a declaration that the Conveyance be set aside;
 - ii. a declaration that the Claimant is not entitled to possession of the premises as prayed for in her Statement of Claim;
 - iii. a declaration that the Defendant is entitled to a beneficial interest in the said premises;
 - iv. that the Letters of Administration be issued to the estate of Enid Tull and that the estate be administered.

[23] The facts presented therefore raise questions about the validity of the Claimant's title. The affidavit evidence cannot be described as spurious or lacking in substance. That evidence provides a basis for a possible finding that the Defendant has legal rights to a portion of the property which he occupies and that those rights subsisted at the date of the conveyance. It must be stressed that this affidavit evidence is untested and that this view is not a finding of fact based upon untested evidence. There is, in effect then, a serious legal issue to be adjudicated, requiring a full inquiry, analysis and testing of evidence in a full trial. In this regard, the Defendant's prospect of success is not a mere fanciful thought.

Conclusion

[24] The overriding objective of the **CPR Part 1.1** states that the court must deal justly with cases ensuring that parties are on equal footing,

saving expense, dealing with cases proportionately, with fairness and expedition and allotting the appropriate share of the court's resources.

Part 15 of the CPR gives the court power to ensure that where, on the basis of the evidence before it, there is no real prospect of success, that the court's resources are not wasted. The court is however bound to consider the rights of both parties in weighing an application for such an order. In instances where there exists more than a fanciful prospect of success, the court ought not to, without a full trial and examination of the evidence before it, draw a conclusion, which would impinge on the property rights of persons. This would be the antithesis of justice.

[25] From an analysis of the evidence before the court it appears that the Defendant has a real prospect of success, and therefore a deeper analysis of the evidence after cross-examination than would be possible at a summary stage, is necessary. In other words, I consider that a full ventilation of the issues is required to properly determine this matter. The first question is therefore answered in the negative, which obviates the need to consider the second question.

Disposal

[26] In the circumstances, the court orders as follows:

1. That the application for summary judgment filed on the 25th day of April 2013, against the Defendant is dismissed, and
2. The decision on costs is reserved until, 30th October, 2017.

William J. Chandler
Judge of the High Court