

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2011/0180

BETWEEN:

CARIB TRACE LTD.

Applicant

and

SIMON CORION

Respondent

Appearances:

Ms. Shireen Wilkinson for the Applicant
Mr. Ruggles Ferguson with Ms. Anyika Johnson for the Respondent

2012: October 8; 31.

DECISION

[1] **Rhudd, J. (Ag.):** This was an application, filed on 13th July 2012, by the Applicant for an order that an amended defence and counterclaim filed by the Respondent on 9th July 2012 be struck out as an abuse of process. That application was supported by an affidavit filed by Roy Hopper on the said 13th July 2012. The Applicant also sought such other relief as the court considered just and an order for costs.

[2] A brief background of the matter is set out hereunder:
The applicant, a limited liability company registered under the Laws of Grenada, is the freehold owner of two adjacent parcels of land situated at Harvey Vale in the Island of Carriacou in the State of Grenada, having acquired them, respectively, in December 2005 and May 2006. The parcel acquired in December 2005 was

purchased from one Phibiana George, while the parcel acquired in May 2006 was purchased from a Catherine Corion and others, they being the widow and beneficiaries respectively of Hubert Corion, deceased. The Respondent has claimed ownership of a portion of that parcel which the Applicant acquired in May 2006.

- [3] The Respondent had initially relied on the contents of a statutory declaration, sworn to by one Francis Jones, in support of his claim for ownership. The said statutory declaration featured prominently in an action commenced in 1994 (Civil Suit No. 170 of 1994) by Phibiana George against several defendants (including the said Respondent herein) for trespass. Alleyne J in delivering his judgment had ruled, *inter alia*, on 31st July 1998 that the said statutory declaration was not considered to be of any value as a document of title nor as evidence in the case. The judge concluded that the legal title to the disputed land was vested in Phibiana George and accordingly, an injunction was granted in her favour against the several defendants, including the present respondent.
- [4] Notwithstanding that decision, the Respondent has, over the years, continued to assert ownership in respect of the parcel of land acquired by the claimant in May 2006. The basis of his entitlement was stated to be the said statutory declaration that was pronounced upon by Alleyne J.
- [5] The Applicant, having formed the view that the issue of the validity (or invalidity) of the statutory declaration was *res judicata*, made an application on 22nd July 2011 for an order revoking the statutory declaration and declaring it null and void and for an order that the respondent be prohibited from trying to claim ownership to the applicant's land by virtue of the said statutory declaration.
- [6] The Respondent, for his part, countered that the ruling of Alleyne J had related only to the parcel acquired by the applicant in December 2005 and that he was

therefore entitled to assert title to the portion of the parcel acquired in May 2006 by virtue of the said statutory declaration.

- [7] The application having come before Price-Findlay J on 28th November 2011, the learned judge ruled that the statutory declaration could not be used by the Respondent in respect of his defence in ongoing proceedings and that it was of no effect against the Applicant with respect to the lands that the applicant owned.
- [8] On the strength of that ruling, the Applicant, by way of an application filed on 16th January 2002, sought a final determination of the ongoing proceedings on the basis that the Respondent had no substantive defence against the claimant's claim. The Respondent, in turn, then contended that the ruling of Price-Findlay J did not affect his defence of adverse possession in respect of the same lands. That defence, he contended, would rely on primary evidence to be elicited at trial and not on the disputed statutory declaration.
- [9] By an application filed on 2nd March 2012, the Respondent sought leave to amend his defence to specifically plead adverse possession since he was no longer able to rely on the statutory declaration, this having been declared invalid. That application was heard by Ellis J who, *inter alia*, granted leave to the Respondent to amend his defence and ordered that he should delete all references to the statutory declaration appearing in the draft defence filed with his application. The amended defence was to be filed and served on or before 9th July 2012.
- [10] On 9th July 2012, the Respondent filed an amended defence and counterclaim. This was followed shortly thereafter by the Applicant's application for the said defence and counterclaim to be struck out as being an abuse of process. The basis of that application essentially was that, in blatant disregard of the order made by Price-Findlay J on 28th November 2011 and the order made by Ellis J on 21st June 2012, the Respondent had made reference to the disputed statutory declaration of Francis Jones. Additionally, it was contended by the Applicant that

the amended defence contained matters of hearsay which ought not to have been pleaded and should be struck out.

- [11] The Respondent, by way of a notice filed on 1st October 2012, indicated his intention to oppose the application for striking out, primarily on the ground that the reference to the statutory declaration in paragraph 12 of the amended defence and counterclaim had occurred through inadvertence. In his notice of intended opposition, the Respondent indicated that he did not intend to use the statutory declaration to either buttress his defence or as a document of title.

Submissions in Chambers

- [12] During the hearing in Chambers, counsel for the Applicant and the Respondent essentially expanded on the contents of their affidavits and the notice of intended opposition, respectively, in support of their positions.
- [13] Counsel for the Applicant argued initially that the Respondent had filed the further amended defence without leave of the court. Additionally, she submitted that the amended defence and counterclaim was filed in contravention of the order made by Ellis J on 21st June 2012. She pointed out that paragraph 12 of the counterclaim contained a clear and obvious reference to the statutory declaration. She advanced the position that this was obviously an abuse of process.
- [14] She elaborated by pointing out that it was apparent that the Respondent was using the statutory declaration in respect of one parcel on one occasion, and the other parcel on the next. She drew attention to paragraph 10 of the affidavit of the Respondent, filed on 3rd February 2012, and underscored the fact that the Respondent had never previously challenged the deed of gift or the conveyance used to transfer title to the Applicant, and the time for so doing had elapsed. She submitted further that even if it was the intention of the Respondent to merely rely on the plan appended to the statutory declaration, that plan could not stand alone

and in a vacuum. She insisted that both the plan and the accompanying statutory declaration should be considered as *res judicata* and could not be re-litigated.

[15] For his part, counsel for the Respondent, Mr. Ferguson, submitted that the points raised by counsel for the Applicant were irrelevant in respect of the application before the court. He submitted that the contents of the amended defence and counterclaim had not deviated from the order allowing him to file. He submitted further that the case was really about adverse possession and that the acknowledgment of the existence of a "paper document" was of no moment in cases involving adverse possession. He stated that in an adverse possession case the court has to make a determination on the facts before it as to whether the title owner of land is entitled to the land.

[16] Mr. Ferguson sought to clarify the decision of Alleyne J as not being a declaration of the invalidity of the document. Rather, he submitted, it was recognition by the trial judge that the statutory declaration was not a document of title and could not be used as such. He pointed out that the judge had merely recognised that Francis Jones, the maker of that statutory declaration, was not a witness in the case and thereby not being subjected to cross-examination.

[17] In respect of the decisions of both Price-Findlay J and Ellis J, he submitted further that he accepted that the court had said that the document was of no moment as a matter of law. This was not an attempt by the respondent, he said, to "slip anything through the back door". He said the reference to the statutory declaration was merely to introduce the plan, which said plan was a diagram of the property in dispute. He maintained that essentially the matter was one of adverse possession and that had to be determined based on evidence at trial. He reiterated that, as a matter involving adverse possession, it was not the respondent's intention to place any reliance on the statutory declaration but to seek to establish his case through other evidence.

[18] Counsel for the Applicant, Ms. Wilkinson, in response to Mr. Ferguson's submissions drew attention to paragraphs 6(g), (j) and (o) of the amended defence filed by the Respondent on 9th July 2012. She pointed out that, in each of those sub-paragraphs, the Respondent had referred to his "title documents". She advanced the view that the "title documents" referred to must flow from the statutory declaration that the respondent was not allowed to plead by virtue of the decisions of both Price-Findlay J and Ellis J. She submitted that if the Respondent was claiming property by way of adverse possession, he could not also rely on "title documents". For this, she referred to the Grenadian Court of Appeal decision in **Arnold Celestine (Administrator of the Estate of O'Ferril Celestine) v Carlton Baptiste**¹ as the authority in support of her position.

[19] In that case, the Court of Appeal had held, *inter alia*, that:

"Adverse possession can only arise where it is recognised by the "adverse possessor" that the paper title is vested in someone else. In essence, the adverse possessor seeks to say that he has dispossessed the paper owner. It is inconsistent ... to claim to be in possession of land "as of right" whilst at the same time claiming to be in adverse possession."

[20] Ms. Wilkinson referred to the fact that the Respondent had not filed any affidavit rebutting the affidavit of Roy Hopper, the Applicant's representative, filed on 16th July 2012. Such an affidavit filed by the Respondent's should have stated that the inclusion of the reference to the statutory declaration occurred through inadvertence.

[21] To this, Mr. Ferguson admitted that he did omit to file a further affidavit. However, it was his view that by filing the notice of intended opposition (on 1st October 2012) he had taken a legal approach to the issue of the inclusion of the reference to the statutory declaration.

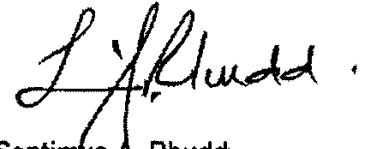
¹ HCVAP 2008/0011

Ruling

- [22] Having considered the arguments advanced by both counsel and having reviewed the documents referred to in those submissions, I form the view that the sole reference to the statutory declaration contained in the amended defence and counterclaim – and which counsel for the Respondent admitted had occurred entirely through inadvertence – was not fatal to the Respondent's position. I felt that the reference did not rise to the level where it could properly be described as an abuse of process.
- [21] I accept Mr. Ferguson's arguments that the inclusion of that reference occurred through inadvertence. A close reading of paragraph 12 of the amended defence and counterclaim revealed that the primary reference in that paragraph was to the "survey plan marked A", which, of necessity, was identified by virtue of it being annexed to the statutory declaration. The mention of the statutory declaration, in my view, was merely incidental to identifying proper identification of the plan. Indeed, if the reference to the statutory declaration was omitted, the paragraph could stand without losing its efficacy.
- [22] Having reviewed the amended defence and counterclaim filed on 9th July 2012, I did not think that it was so radical a departure from the draft that had earlier been submitted by the Respondent and from that which had been approved by the court on 21st June 2012. In my view, the drastic step of striking out the amended defence and counterclaim is not warranted.
- [23] I am also cognizant of the earlier rulings of both Price-Findlay J and Ellis J which, taken in their totality, demonstrated a clear indication by the court that the matter was being allowed to move forward to trial. I am of the view that there were matters which ought properly to be heard and determined during the course of a

trial. I do not consider that the Respondent, by including that singular reference to the statutory declaration, was in flagrant violation of the courts' orders.

[24] Accordingly, the application to strike out the amended defence and counterclaim is dismissed and I make no order as to costs.

A handwritten signature in black ink, appearing to read 'S. A. Rhudd', with a stylized flourish at the end.

Septimus A. Rhudd
High Court Judge (Ag.)