

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 OF 2007

BETWEEN:

O'HANDLEY McKENZIE

Appellant

and

[1] DORRIS MITCHELL

[2] DONATA MITCHELL

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

Appearances on written submissions:

Mr. Alban John for the Appellant

No appearance by or on behalf of the Respondents

2007: June 4;
August 13.

JUDGMENT

- [1] **RAWLINS, J.A.:** On 4th June 2007, I issued an order allowing an appeal which was brought on behalf of the appellant, Mr. McKenzie, against an order in which a judge of the High Court discharged an interim injunction that was granted to Mr. McKenzie on 2nd March 2007. That injunction restrained the respondents from continuing the construction of a house on the property which is the subject of the claim which Mr. McKenzie brought against them. On 6th March 2007 the judge discharged the interim injunction of 2nd March 2007. My order of 4th June 2007 set aside the order of 6th March 2007. It also restored the interim injunction issued on 2nd March 2007 and extended it until the trial and determination of the claim.

- [2] My order of 4th June 2007 also directed the respondents to pay the costs of this appeal to be assessed if not agreed. The Registrar of the High Court and the parties were directed to take urgent steps to schedule the matter for case management directions to put the claim on track for trial. This judgment is in keeping with my promise to give the reasons for my decision in a written judgment at a subsequent date. I shall first provide a brief background.

Background

- [3] The appellant, Mr. McKenzie, is the grandson of Rose McKenzie, deceased of Carriacou, in the State of Grenada. He resides at Mount Royal. In the claim against the respondents he alleges that he is a beneficiary in the estate of Rose McKenzie under her last Will and Testament, which she made and executed prior to her death in April 1976. The claim further alleges that Rose McKenzie appointed 2 of her children, Augustus L. McKenzie and Melanie McLeod, as her executors. Melanie McLeod is the mother of the appellant, McKenzie. She is survived by 12 children. Rose McKenzie left the residue of her estate to be divided equally among her children named in the Will. Mr. McKenzie alleges that all of the residuary beneficiaries died, save Cecilia John, who is *non compos mentis*, and that they left children or heirs entitled to their share of the estate.
- [4] Mr. McKenzie's claim also states that Rose McKenzie devised a wall house on the estate, and the lands situated around it, to him. According to the claim, she also devised to Nicholas L. John, the father of the first respondent and grandfather of the second respondent the spot of land with the house on the estate in which the respondents now live. However, the boundaries of the respective lands were not specified in the Will. Mr. McKenzie alleges that the boundaries of these lands are indistinguishable and have not been determined because the estate has not been administered. The parties have not agreed on the demarcation of the boundaries and the lands have not been partitioned.

[5] Mr. McKenzie states that Letters of Administration to the estate of Rose McKenzie were issued to Augustus L. McKenzie and Melanie McLeod. Augustus McKenzie died in February 1985. Ms. McLeod died intestate in July 2001. They both left the estate un-administered. In or about November 2006, without the consent of other beneficiaries, the respondents commenced excavation and the construction of a concrete dwelling house on the estate some distance away from the house spot on which they presently live. Mr. McKenzie said that he asked them to cease the work, but they continued. On January 9th 2007, he caused a letter to be sent to them requiring them to stop the construction, but they ignored it, occasioning the institution of the claim herein.

[6] In his action, Mr. McKenzie claims a declaration that the land on which the respondents are constructing the house is a part of the undivided estate of Rose McKenzie, on which they are not entitled to build until the land is properly administered and partitioned. He also sought an interim injunction to restrain them from continuing the construction until the land is properly administered and partitioned or until all of the beneficiaries agree that they could build on the land. He also sought a mandatory injunction to order the respondents to break down and to remove all parts of the building that they constructed and to order them to fill in all excavations and to restore the land to its original condition.

[7] In this judgment I shall first set out the applicable principles, which will then be applied to the facts in the present case.

The applicable principles

[8] Rule 17.4(4) of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000¹ confers discretion upon a court to grant interim injunctive relief. In

¹ Hereinafter referred to as "CPR 2000".

determining whether to grant an interim injunction to an applicant, the primary task of the court is to assess the strength of the applicant's case and determine whether the balance of convenience is in his or her favour. Where an action is instituted because of disputed claims to land an interim Injunction would hold the ring until the court determines the interest that the parties have in the property. An applicant must convince the court that that relief is necessary to preserve the *status quo ante*, pending trial, because there is imminent danger of irreparable damage to the property. The applicant must also convince the court that damages would not be an adequate remedy. The judge who hears the application has a wide discretion to grant or to refuse injunctive relief.² An appellate tribunal will not disturb a judge's decision unless it is shown that the exercise of discretion by the judge was plainly wrong.

- [9] By granting the interim injunction on 2nd March 2007, it is obvious that the learned judge was of the view that the claim form, the statement of claim and the affidavit which Mr. McKenzie deposed up to that date disclosed sufficient grounds that rendered it necessary to preserve the *status quo* pending the hearing on the returnable date.
- [10] There was no application on behalf of the respondents to discharge the injunction. There was no allegation, for example, that counsel for Mr. McKenzie did not disclose material information, which he was duty bound to do at the *ex parte* hearing. Rather, the *ex parte* interim injunction was brought up on the returnable date to afford the learned judge a better opportunity to determine whether the *ex parte* injunction should have been maintained on a better assessment of the relative positions of the parties with respect to the land after the respondents filed their affidavit evidence and Mr. McKenzie filed his affidavit in response. The judge would then have considered whether the demands of justice in the circumstances meant that Mr. McKenzie's claim raises any serious issues of fact and law to be

² See *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396.

tried; whether the balance of convenience favoured the continuation of the injunction or whether the injunction should have been discharged because damages would be an adequate remedy to compensate Mr. McKenzie in the event that he prevails on his claim.

- [11] The decision of the judge was an exercise of discretion and this court will not disturb that decision unless it was shown that there existed one of the bases on which the exercise of that discretion may be disturbed.

The bases

- [12] In **Michel Dufour and Others v Helenair Corporation Ltd.**,³ Sir Vincent Floissac, CJ, explained the conditions upon which an appellate tribunal may interfere with the exercise of such discretion as follows:⁴

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

- [13] The learned Chief Justice pointed out that the first condition was explained by Viscount Simon LC in **Charles Osenton & Co. v Johnston**,⁵ who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellate tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. The Chief Justice further noted that the second condition was explained by Asquith LJ, in **Bellenden (formerly**

³ Civil Appeal No. 4 of 1995 (12th February 1996.).

⁴ At pages 3-4 of the judgment.

⁵ [1941] 2 All E.R 245 at 250.

Satterthwaite v Satterthwaite)⁶ in language which was approved and adopted by the House of Lords in **G v G**.⁷ Asquith LJ stated that it is of the essence of judicial discretion that on the same evidence 2 different minds might reach widely different decisions without either being appealable. He said that it is only where the decision of the judge is plainly wrong, that an appellate body is entitled to interfere.⁸ The question then is whether the decision of learned judge to discharge the injunction was plainly wrong in the circumstances of the present case.

The present case

[14] I have seen no reasons for the decision on which the order to discharge the interim injunction that was granted on March 2nd 2007 was made. In the absence of reasons, it is not possible to determine exactly what principles or facts the learned judge took into consideration in order to arrive at his decision. However, when Mr. John and Mr. Stewart appeared before me on 29th March 2007,⁹ the common ground that emerged was that the learned judge stated that damages would adequately compensate Mr. McKenzie and the other beneficiaries should it be found, on the trial of the claim, that the respondents have unlawfully constructed the house on the disputed land. Additionally, in his submissions, Mr. John stated that one of the issues raised by the learned judge was whether Mr. McKenzie, being merely a beneficiary under the estate, had any standing to bring the claim. However, even if I were to take it that these matters were present in the judge's mind, there are no reasons from which to determine how the facts were applied in the light of the applicable principles relating to the grant or the discharge of injunctive relief. In the circumstances, it became necessary for me to assess

⁶ [1948] 1 All E.R. 343 at 345.

⁷ [1985] 2 All E.R. 225.

⁸ See page 4 of the judgment.

⁹ The case came before me on an application for leave to appeal and for stay of the order of 16th March 2007, which discharged the initial interim injunction. The respondents both appeared. Mr. Stewart, who was their lawyer in prior proceedings, informed me that although he was present, he was not actually appearing for the respondents because he was not briefed for the purpose of the appeal proceedings. In light of the urgency of the matter, I issued directions to facilitate a speedy determination of the appeal.

the statements in the claim and the affidavit evidence in the light of the principles in determining whether the injunction should have been discharged.

Assessing the circumstances

- [15] The testamentary and probate documents which are exhibited to the statement of claim and to the affidavits of Mr. McKenzie seem on their face to lend some support to his assertions that the disputed land falls within the estate of Rose McKenzie, which estate has not been administered or partitioned. In their evidence in opposition, the respondents state that they have lived on the property all their lives. They insist, however, that the area on which they live was owned, as far as they could remember by Cannelta Mitchell whose only child was Nicholas John, their father and grandfather, respectively. They depose that Nicholas John, who now resides in England, became the owner of the property when Cannelta Mitchell died in 1984. Their affidavits identify this as the land on which they are now building. They depose that it measures about 1 acre and was formerly a part of the estate of Rose McKenzie, deceased. They further depose that the land is clearly identifiable on the ground and is bounded on each side by lands of Mitchell Lawrence, Fedman Mitchell, Lenny Benjamin and Elcita McLeod.
- [16] The first respondent, Dorris Mitchell, deposed that for as long as she could recall, her grandmother, Cannelta Mitchell, owned the land on which they are now building, and owned it up to the time of her death. She further deposed that she has always known the house in which she lives, which was built by her grandmother, to be on the land. According to her, she was born and grew up in that house. It was a wooden house, but in or about 1998 she changed a portion of it into a wall structure. She deposed that there is an outside building which is the main cooking area, which is about 5 to 10 feet from the house.

[17] Dorris Mitchell further deposed that for as long as she could remember, her grandmother kept sheep and cultivated the land around these buildings. She stated that although her father migrated to England in the 1960's, she maintained contact with him, and she has lived in the house on the land with her 8 children who were born and grew up on there. She insisted that she lives in the house, continues to cultivate the land, and renovated the house in 1998 with approval and permission of her father, on the understanding that he owns the property. The affidavits of the respondents state that the second respondent, Donata Mitchell, is now constructing the house on the property with the permission of her grandfather, Nicholas John. Unfortunately, the respondents have not exhibited any documents which support their claim to an interest in the disputed land or to support their claim that it was owned by Cannelta Mitchell and is now owned by Nicholas John. They submitted no plan of the land which shows, for example, the ownership of adjoining lands.

[18] Mr. John, learned counsel for Mr. McKenzie, submitted that even if it were taken that the respondents do have the permission of Nicholas John to construct the house, they are not entitled to expand on the devise to him in the Will of Rose McKenzie, by building in a location other than the spot devised in the Will. Mr. McKenzie indicates that he would not complain if the respondents were to construct the new house on the spot which is occupied by their present house. He is concerned that the respondents are erecting a concrete building and they have not even sought to show that they really have the permission of Nicholas John to build on the land. In my view these are understandable concerns, as is the concern that was expressed by Mr. John that the decision by the respondents to embark upon the construction without the due administration of the estate may amount to an act of unilateral partition which section 3 of the Partition Act¹⁰ does not contemplate. Section 3 provides, inter alia, that all joint tenants and tenants in

¹⁰ Cap. 225 of the 1990 Revised Laws of Grenada.

common of any estate of inheritance of any land in Grenada may be compelled to make severance and partition the land in accordance with the provisions provided in the Act.

- [19] In effect, therefore, it appears that there is a genuine dispute as to the ownership of the land on which Donata Mitchell is constructing her house. In the absence of a prior settlement of the dispute, which is always encouraged in matters that relate to family land dispute, it is apparent that Mr. McKenzie has a good and arguable case. Whether he will prevail on his claim would only be determined after a trial. It is noteworthy, however, that the notes of evidence reveal that the question arose during the *inter partes* hearing whether Mr. McKenzie as a mere beneficiary has any *locus standi* to bring the claim against the respondents.¹¹

Locus standi

- [20] Actions concerning the lands of un-administered estates would usually be instituted by an executor or an administrator. The uncontroverted statements in the affidavits seem to suggest that the estate has not been administered and there is no executor or administrator to do so. This is an unhappy state of affairs, which should be remedied. However, a person in the position of Mr. McKenzie whose beneficial or equitable interest could be diminished or extinguished by the actions of the respondents could institute action to protect his interest and to preserve the estate pending administration. He may also obtain interim protection of the estate by way of injunctive relief. Thus it is stated:¹²

“Where a plaintiff is merely the equitable owner, and not the legal owner of property which is the subject matter of the proceedings, he may obtain interim protection for the property in the form of an interlocutory injunction. However, before a perpetual injunction can be granted the legal owner must usually be joined as a plaintiff or, in the case of his refusal, to be so joined as a defendant.”

¹¹ See page 10 of the Record of Appeal, at lines 8-9.

¹² By the authors of Halsbury's Laws of England, 4th Edition Volume 24, at Paragraph 828.

[21] This last sentence indicates the urgency which must now be given to the appointment of an administrator or to a representative under Part 21 of CPR 2000. The parties should be guided by rules 21.2 and 21.4 of CPR 2000 in particular. It is noteworthy that when the question arose at the *inter partes* hearing as to whether Mr. McKenzie had the necessary *locus standi* to institute the action, Mr. Stewart, learned counsel for the respondents informed the court that the issue of the joinder of the personal representative would have been critical at this stage if the application was for a perpetual rather than an interim injunction.¹³ It is clear that, at this juncture, *locus standi* is not a threshold issue that would defeat Mr. McKenzie's application for interim injunctive relief. What then of the question of adequacy of damages?

Adequacy of damages

[22] With respect to the issue whether damages would be an adequate remedy in this case, I agree with the submission by Mr. John, learned counsel for Mr. McKenzie, that damages may not be an adequate remedy to compensate either Mr. McKenzie or any of the other beneficiaries because this would effectively compel them to dispose of their property for money when they do not intend to do so. I would add that it could have the effect of conferring ownership of land for the payment of money upon the respondents in circumstances in which the court might find that they in fact had no right of ownership. This would be inimical to good principle, as the following statement in **Dent v Auction Mart Co. & Others** suggests:¹⁴

“... where substantial damages would be given at law, as distinguished from some small sum of £5, £10 or £20, the Court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any act of parliament for that purpose having

¹³ See page 10 of the Record of Appeal, at lines 12-14.

¹⁴ [1866] LR 2 Esq. 238, at page 246.

been obtained. It appears to me it cannot safely be held that this Court will allow parties so to exercise the rights which they may have in their soil as to inflict an injury on their neighbour, if the neighbour is unwilling to take any compensation; or even though he be willing to take compensation, if he is not ready to submit to the valuation of a jury, but insists on his own right to determine what the value of his property is."

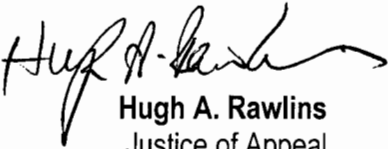
- [23] In the premises, I concluded that damages would not be an adequate remedy in the event that after the trial of the claim it is found that the respondents have no entitlement to the disputed land.

Conclusion

- [24] In summary, having assessed the circumstances of the case in the absence of reasons for the order that discharged the injunction, I found that Mr. McKenzie has a good and arguable case on the documents and affidavits which are filed thus far in these proceedings. If on the trial, the court were to find that the respondents have no proprietary interest in the area of land on which the second respondent has embarked upon the construction of her house, damages would not be an adequate remedy to compensate the beneficiaries of the estate of Rose McKenzie. It was my view that on the evidence thus far brought into the proceedings, the balance of convenience favoured the grant of injunctive relief to Mr. McKenzie, and there is no principle that operated in favour of discharging the interim injunction that was granted on 2nd March 2007. In the order of 2nd March 2007, Mr. McKenzie entered an undertaking to abide by any order which the court might make as to damages in the event that the respondents suffer any damage by reason of the issue of the injunction. The respondents have not alleged that the undertaking is inadequate or worthless.

- [25] The circumstances reveal the dire need for a speedy resolution of the dispute between the parties. Accordingly, pursuant to rule 17.8 of CPR 2000, I directed that the matter should be set for case management directions as a matter of

urgency. I think, however, that all attempts should be made to settle the case at case management. Finally, however, having now had the opportunity for further reflection, I think that if, having obtained the order restoring the injunction, Mr. McKenzie decides to rest on it and does not take reasonable steps to prosecute the claim the court should have some discretion, on the application of the respondents, to consider whether the injunction should be discharged. I shall accordingly reflect this by amending paragraph 2 of the order which I issued on 4th June 2007, by adding, at the end of that paragraph, and after the word "claim", the words "or until further order by the court."


Hugh A. Rawlins
Justice of Appeal