

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

NEVHCV2022/0018

**ADRIAN DANIEL
(As Co-Executor to the Estate of Dr. Simeon Daniel)**

Applicant

AND

**JANICE HODGE
(As Co-Executor to the Estate of Dr. Simeon Daniel)**

1st Respondent

DEON DANIEL

2nd Respondent

Before: His Lordship Justice Ermin Moise

Appearances:

Mr. Brian Barnes of counsel for the Applicant
Mr. Terrence Byron of counsel for the Respondents

2022: February, 17th and 18th

JUDGMENT

[1] **Moise, J:** This is an application for an interim injunction in which the following relief is sought:

1. The Respondents be restrained, by themselves, their servants, or agents or otherwise from:
 - a. The opening of a museum on the Island Main Road, Belmont Estate, St. Thomas Parish, Nevis or elsewhere bearing the name of:
 - i. Simeon Daniel;
 - ii. Dr. Simeon Daniel;
 - iii. Sir Simeon Daniel;
 - iv. Or any other variation in respect of the said Simeon Daniel. (Herein after referred to as Simeon Daniel)

- b. The selling of any items bearing the name and / or image of Simeon Daniel Museum or Simeon Daniel or the Right Excellent Dr. Sir Simeon Daniel or any other variation in respect to the said Simeon Daniel to the general public or to anyone;
 - c. The presentation of or the use of the name of Simeon Daniel in any other forms without the full consent of the Estate of Simeon Daniel or until a full claim before this honorable Court has been determined.
- 2. In any other way from using and or infringing on the rights and ownership of intellectual property belonging to the Estate of Simeon Daniel.

[2] The application was filed along with a certificate of urgency as the opening of the museum in question is scheduled for 19th February, 2022. The matter was therefore heard with an abbreviated time table. The respondents therefore did not file affidavit evidence in response but relied on legal submissions presented by counsel. Having reviewed the evidence filed by the applicant and the submissions of counsel I have determined that the application should be dismissed with costs to the respondents. These are the reasons for my decision.

The Facts

- [3] The parties to this application are all children of the late Sir Simeon Daniel. Mr. Daniel was a prominent politician in Saint Christopher and Nevis. So much so that he has been inducted into the elite group of national heroes of the federation. He also served as the first Premier of Nevis as well as a member of the cabinet of the Federation of Saint Christopher and Nevis. His contribution to the development of the country is well recognised. Mr. Daniel unfortunately passed away on 27th May, 2012. He left a last will and testament in which he appointed the applicant, Mr. Adrian Daniel (Mr. Daniel) and the 1st respondent, Ms. Janice Hodge (Ms. Hodge) as co-executors. Probate was granted by the High Court registrar on 6th December, 2012.
- [4] In his affidavit in support of this application, Mr. Daniel states that sometime in 2018 he was served with an invitation for a ground breaking ceremony for the “Simeon Daniel Museum”. The document was served on him by a bailiff of the high court and the ground breaking ceremony was to take place

on 27th October, 2018. Mr. Daniel stated that he did not attend the event as he was not initially informed of any such plans and that as co-executor in his father's estate he did not consent to opening of any museum. He informed Ms. Hodge that he was not in agreement with any groundbreaking ceremony being held until proper consideration was given to the estate and the entire family.

- [5] Mr. Daniel states that it was in 2021 when passing along the island main road that he noticed a sign was put up bearing the name "The Simeon Daniel Museum." His affidavit did not indicate precisely when in 2021 he made this observation. The museum was to be housed at the Belmont Garden Estate along the island main road. Mr. Daniel stated that he wrote to Ms. Hodge on 29th September, 2021 stating that he did not give his consent to this as co-executor of the estate and that the opening of any museum would be met with legal action if such consent was not obtained and the entire family of Simeon Daniel was not involved.
- [6] The 2nd respondent, Mr. Deon Daniel responded to Mr. Daniel's letter and merely inquired as to what legal action would be taken on behalf of the estate and asked that he be informed as to when Ms. Hodge had provided her consent. Ms. Hodge did not respond. As a result Mr. Daniel sent another correspondence through an email on 26th October, 2021. Ms. Hodge then agreed to meet in her office in Charlestown to discuss the matter.
- [7] Mr. Daniel states that in that meeting he highlighted the position of the estate and indicated that no museum bearing the name of Simeon Daniel should be opened, without consideration being given to the estate. He argued that the estate is the rightful owner of the name and image of Simeon Daniel. He was of the view that a venture of this nature should include the entire family and not just a few. He referenced the fact that Simeon Daniel's widow should be involved as well as other members of the family, namely Mr. Simeon Daniel's widow. Ms. Hodge agreed to consider these issues and Mr. Daniel undertook to discuss the issues with other members of the family with whom he was in touch.
- [8] Mr. Daniel goes on to state that it was at another meeting that he was advised that a foundation had been set up to manage the museum in the name of Simeon Daniel. He advised that he would have to review the documents in order to determine what position the estate would take on the continuation of such a foundation. Having reviewed the documents and in further communication with Ms. Hodge, Mr. Daniel indicated that he was of the view that the foundation had to come under the control of the estate with final decisions being made by the estate. He requested information relating to the

capitalization of the museum as well as its liabilities and financial obligations. He enquired as to the estate's approval of the content to be placed into the museum and the overall management structure of the venture. He states that he was not provided with a response to these questions.

[9] Notwithstanding this, Mr. Daniel states that on 3rd February, 2022 he received information from a prominent member of the society in Saint Kitts informing that he was invited to the opening of the museum which was scheduled for 19th February, 2022. Mr. Daniel claims to have been shocked by this and emailed Ms. Hodge to indicate that he would not be supporting this venture as the consent of the estate was not obtained and he had not received the information which he had requested.

[10] Mr. Daniel wrote to the Registrar of Companies in Saint Christopher, informing that he did not consent to the registration of a foundation in the name of Simeon Daniel. He states that a similar attempt had been made in Nevis and he, in like fashion, objected to it. He states that there is a reasonable fear that without proper management and control of the name and image of Simeon Daniel, irreparable damage will be done to them and demands that consent of the estate be obtained before this venture is formally opened. On that basis he seeks this injunction pending an action being brought in the High Court.

The Law

[11] The law on the grant of an interim injunction is very well settled. Section 26 of the Supreme Court Act¹, empowers the court to grant an interlocutory injunction in all cases where it appears to the court to be just and convenient to do so. Rule 17 of the CPR makes provision for an injunction to be granted pending the full hearing of a claim. In particular rule 17.2(3) also states that the court may grant an interim injunction before the filing of a substantive claim only if the matter is urgent; or it is otherwise necessary to do so in the interests of justice.

[12] Case law has also developed certain principles as to how the court goes about exercising this discretion. In the case of ***American Cyanamid v. Ethicon***² it was determined that the factors which the court must consider are:

¹ CAP 3.11 of the Laws of Saint Christopher and Nevis

² HL 5 Feb 1975

- (a) Whether there is a serious issue to be tried; and if the answer is yes, then;
- (b) Would damages be an adequate remedy for the applicant; and
- (c) Whether the balance of convenience is tilted in favour of the applicant.

[13] I will address the issues raised in this application under those 3 heads.

Is there a serious Issue to be tried?

- Commercial Appropriation of Personality

[14] In his initial submissions which were filed in this case, counsel for Mr. Daniel did not address this issue in any detail. However, counsel for the respondents, Mr. Terrence Byron, raised the question in his own submissions as to whether there is in fact a substantive cause of action here. Mr. Byron referred to the cases of *Montgomery v. Montgomery*³ and *Gouriet v. Union of Post Office Workers*⁴, in support of the argument that the court will not grant an interim injunction where the claimant has no right which is recognizable in law. Counsel also referred to the recent decision of this court in the case of *TBAR Ltd v. 1970 HEATHCOTE LLC*⁵ where it was found that there was not likely to be success at trial and as such an interim injunction ought not to be granted in such circumstances.

[15] Mr. Byron referred to a number of authorities in support of the proposition that there is no proprietary right in a name or an image. He refers firstly to the case of *Duboulay v. Duboulay*⁶ which was decided by the Privy Council in 1869. This case emanated from a decision of the courts in Saint Lucia in which an order was sought prohibiting the use of the Duboulay family name. The Privy Council upheld the decision of the court of appeal in stating that there were no proprietary rights in a name, sufficient to prohibit someone else from capitalizing on its use.

³ ICLR (1965)

⁴ (1978) A.C. 435 H.L

⁵ NEVHCV2019/0037

⁶ 2 LRPC 430 (1869)

[16] Reference was also made to the case of ***Dockrell v Dougall***⁷ where it was stated that there is no authority for the proposition that the unauthorized use of the plaintiff's name created a cause of action in law. As such, Mr. Byron argues that the applicant has no discernable cause of action here as the estate does not have any proprietary rights over the name and image of Mr. Simeon Daniel, sufficient to prevent its use in the opening and operation of the museum in his honour.

[17] Counsel for the applicant responds by stating firstly, that the authorities referred to by Mr. Byron are all archaic and do not reflect recent developments in the law. Mr. Barnes argues that indeed the common law is evolving to develop a separate tort of appropriation of personality. He cites the case of ***The Robert Marley Foundation v. Dino Michelle Limited***⁸ as a Caribbean authority in which this issue was addressed. That case touched and concerned the issues of passing off and moneys had and received. However, a third issue was raised as to whether Jamaican law recognized the appropriation of personality as a separate and existing tort in its own right. Clarke J, who heard the arguments, noted that the common law is not static and was quite prepared to entertain a further development in the law which had not been fully established in the courts in Jamaica before. He was of the view that the law as it had developed in Canada and the United States was applicable, or perhaps desirable, to the development of jurisprudence in Jamaica. He went on to state as follows:

“Although no West Indian or English decisions recognize property in personality per se, dicta in cases such as Clark v. Freeman and Dockrell v. Dougal support the concept of a property interest as distinct from a privacy interest attached to personality. Just as the law recognizes property in the goodwill of a business so must the law recognize the property rights attached to the goodwill generated by a celebrity’s personality.”

[18] Clarke J went on to define the tort by stating that it consists of ***“the appropriation of a celebrity’s personality (usually in terms of his or her name and likeness etc.) for the financial gain or commercial advantage of the appropriator, to the detriment of the celebrity or those claiming through him.”*** It would seem to me to be quite clear from a reading of this case, that the court in Jamaica was seeking to expand whatever restrictions had been placed on this area of law before. In fact, academic writing in the region and beyond had welcomed such a development and a recent

⁷ 80 LTR 556 (1899)

⁸ JM 1994 SC 032

article published in American Journal of Law and Legal Studies⁹ referred to the underutilization of this development.

[19] In the United States, this area of law dates back to the decision of Frank J in the 1953 case of ***Haelan Laboratories Inc. v. Topps Chewing Gum Inc***¹⁰. It has developed over the years in that jurisdiction into a recognized tort which is independent from the right to privacy. It is the appropriating of a celebrity's name and image for commercial gain.

[20] However, Mr. Byron would not be in isolation in reliance of the authorities he referred to. Despite Mr. Barnes' admonition that his authorities are outdated, it would seem to me that in an assessment of English law, the propositions put forward still stand as good law; at least in that jurisdiction. From my rather brief research on the issue, given the urgency with which this application was litigated, it would seem that the English have not only been reluctant to develop the law along the lines of a separate tort of appropriation of personality, but the courts have appeared to be somewhat hostile to that very idea. It has been likened to the creation of a monopoly over one's image, which was not desirable as a tool to fill in the inherent gaps between the laws of copyright and passing off. In the case ***Elvis Presley Enterprises Inc. v. Sid Shaw Elvisly Yours***¹¹ the English court of appeal came to consider arguments along the lines of appropriation of personality. At the very end of his contribution to that judgment Lord Justice Simon Brown noted the following:

On analysis, as it seems to me, all the English cases upon which Enterprises seeks to rely (Mirage Studios not least) can be seen to have turned essentially upon the need to protect copyright or to prevent passing off (or libel). None creates the broad right for which in effect Mr. Prescott contends here, a free standing general right to character exploitation enjoyable exclusively by the celebrity. As Robert Walker LJ has explained, just such a right, a new "character right" to fill a perceived gap between the law of copyright (there being no copyright in a name) and the law of passing off was considered and rejected by the Whitford Committee in 1977. Thirty years earlier, indeed, when it was contended for as a corollary of passing off law, it had been rejected in McCulloch v May [1947] 2 AER 845. I would continue to reject it.

⁹ "Appropriation of Personality in the Commonwealth Caribbean", Kalisa Greaves-Fearon, AJLLS (2020) 3:10

¹⁰ 202 F2nd. 866 (Cir. 1953)

¹¹ CHANF 1997/0686/3 E No 1337

In addressing the critical issue of distinctiveness there should be no a priori assumption that only a celebrity or his successors may ever market (or licence the marketing of) his own character. Monopolies should not be so readily created.

[21] There therefore seems to be divergent views in this issue in various common law jurisdictions. The only Caribbean authority, emanating out of Jamaica, argues for its introduction into Jamaican, and perhaps by extension Caribbean, jurisprudence. For my part, I do not think it is necessary to determine whether this tort actually exists without the full benefit of a case grounded on that argument. What is important to note here is that there is a dearth of authority in our own jurisdiction. The English authorities are not necessarily binding on us and it is important for us to continue to contextualize our laws to fit the peculiar circumstances of our existence as a distinct polity. As helpful as English jurisprudence has been to us we must not be shy in developing our laws along the lines of what best fits the needs of the people of our region. We do have our own developing entertainment industry and a tort along the lines of appropriation of personality is worth considering.

[22] Mr. Byron argues that the ***Duboulay*** case was a privy council case and therefore binding. However, I agree with Mr. Barnes where he states that the issues in the case, its age, as well as the fact that it did not emerge from Nevis all make it persuasive, rather than binding. As a Saint Lucian myself I find the case of ***Duboulay v. Duboulay*** to be interesting legal history and the right decision in the circumstances of that case. But it doesn't stand as binding authority against the development of the law of appropriation of personality. The law in Nevis can in fact be developed along the lines of this tort and it would be a serious issue to be tried if it were raised by a litigant.

[23] I do however have some lingering doubts in my mind as to whether the right which the tort seeks to protect fits within the general facts outlined in this case now before me. When one examines the test as articulated by Clarke J, the question of whether Mr. Simeon Daniel, a now deceased politician, fits the description of a celebrity for the purpose of the tort is an issue to consider. I say so with no disrespect, but the tort seems to recognize the commercial value of the celebrity's name and its marketability as opposed to the mere fame of the person. The name and image of a celebrity like Bob Marley for example has some measure of commercial value to be traded. Something which his estate can certainly claim a proprietary interest in. I can see little evidence to suggest that there has

been any trading or commercial value inherent in the use of Mr. Daniel's name. No doubt such persons as politicians and public servants are respected and revered. However I am not sure, at this stage, that the opening of a museum by some of Mr. Simeon Daniel's children in his honour necessarily stands out as capitalizing on his name and image for commercial gain to the detriment of his estate in the way the tort appears to envisage. However, issues of that nature are perhaps best left to trial if it comes to that point. I would nonetheless find that, despite my own doubts, there is a serious issue to be tried here and would not dismiss the application for an injunction on that ground.

- **Part 67.4 of the CPR**

[24] The application for an interim injunction also refers to part 67.4 of the CPR which empowers an executor to issue a claim for any relief or the determination of any question without bringing an administration claim. I take this ground of the application to mean that Mr. Daniel intends to make use of this jurisdiction in order to seek clarification on the rights he claims the estate to have. Mr. Bryon argues that this is not a cause of action for which an interim injunction can be granted. I however, do not agree with that submission. Bearing in mind that the ultimate authority to grant an injunction is contained in section 26 of the Act, the court can grant an injunction in any circumstance in which it is found to be just and convenient to do so. I see no reason the court would be unable to prohibit an act which affects an estate until such time as it can clarify the issues raised by a claim under part 67.4; as long as it is just and convenient to do so.

Would damages be an adequate remedy for the applicant?

[25] The question of whether damages would be an adequate remedy was not extensively canvassed before the court. As I indicated to counsel at the hearing, I can generally see no reason to believe that damages would not be an adequate remedy if the applicant is successful in his claim, if it is based primarily on the tort of appropriation of personality. If the respondents, or the foundation they have set up, have benefited financially from the use of Mr. Daniel's image in the interim, I see no reason to find that they would not be liable to simply pay over the benefit they have derived to his estate and perhaps cease or moderate all operations thereafter. Mr. Daniel states in his affidavit that irreparable damage may be done to Mr. Simeon Daniel's name and image before we even get to that point. However, based on the evidence I doubt that very much. He has not highlighted exactly what

that damage would be and I have no reason to believe that a museum in Mr. Simeon Daniel's honour is likely to affect his reputation in any way. Perhaps it can be argued that some form of financial impropriety or mismanagement of the museum or the foundation may be attributed to the estate, sufficient for Mr. Daniel as a co-executor to be concerned. However, I doubt that this is enough to invoke the court's equitable jurisdiction to put a hold on what is the planned opening of an event which seems to have been in the making at least as far back as 2018.

Whether the balance of convenience is tilted in favour of the applicant

[26] It is on this ground that I find myself most disinclined to grant the injunctive relief which Mr. Daniel seeks. Whilst I agree that there is an issue to be tried, I am not of the view that it would be just and convenient to prevent the respondents from proceeding with the opening of the museum as planned. There are two reasons for my conclusions.

[27] Firstly, there is a question of time and the delay in bringing this application; especially in light of rule 17.2(3) which highlights the basis upon which the court may grant an injunction before a claim is actually filed. Given the nature of the facts presented I find it difficult to accept that there is any urgency, or that it is in the interest of justice to do so. Although the opening ceremony is in a matter of days, Mr. Daniel states that he was invited to the ground breaking ceremony sometime in 2018. Whilst he had expressed his views on the issue and did not attend the ceremony, he took no legal steps to prevent it from the outset. He must surely have known that a venture of this nature would cost money and time. To have allowed the plans to have gone on without moving the court in the first place weighs against the use of this equitable jurisdiction prior to a full ventilation of the case.

[28] Mr. Daniel also states that he only became aware of the opening in 2021. I doubt that very much. I am not suggesting that he is being dishonest here as he may be referring to the formal or direct nature of what was communicated to him. Mr. Daniel is a competent attorney whose integrity before this court is not questioned and I would not wish for my comments to be interpreted this way. But it would appear to me that this museum and its potential opening has been public knowledge for quite some time; a factor which the court is entitled to take judicial notice of, given the widespread publicity around it. To come at the 11th hour to place a moratorium on its opening in order to pursue a legal right which in itself is rather novel and underdeveloped is neither just nor convenient at this stage.

[29] Secondly, I do not think it is necessary to place a hold on the opening ceremony so close to its expected date in order for Mr. Daniel to pursue the legal rights he claims on behalf of the estate. Contrary to what has been stated in the affidavit I do not find any evidence that irreparable damage would be done to Mr. Simeon Daniel's name and image in the meantime. On balance it would seem that the museum is being opened by a foundation set up by some of his own children. A museum opened in honour of their father can hardly be said to likely result in the dishonouring of his name. I appreciate that as a co-executor Mr. Daniel has expressed certain concerns, which are not at all illegitimate and perhaps should be addressed by Ms. Hodge with some measure of expedition. But is not convenient, neither it is in the interest of justice, to prevent the opening of the museum at this stage in the process. Mr. Daniel can litigate his concerns without such a drastic step being taken.

[30] In the circumstances it is ordered that the application for an interim injunction is dismissed with costs to the respondents in the sum of \$1,000.00EC.

**Ermin Moise
High Court Judge**

By the Court

Registrar