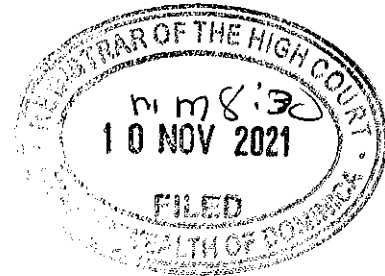


IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CIVIL NO. DOMHCV2020/0147



BETWEEN:-

DENNIS BELLE

LAURINA LAWRENCE

Claimants/Applicants

and

RODRIGUEZ PANTHIER

Defendant/Respondent

Appearances:

Glen Ducreay of CASAROPA Chambers for the Claimants/Applicants

David Bruney for the Defendant/Respondent

2020: December 11,

2021: September 30.

DECISION ON APPLICATION TO CONTINUE INTERIM INJUNCTION

[1] **Stephenson J.:** This is an application that an ex parte interlocutory injunction obtained by the claimants be dismissed on the ground that there is no meritorious substantive cause of action before the court. There is also a corresponding application filed by the claimants for the interlocutory injunction to be continued until the hearing and outcome of the substantive matter.¹

¹ Application filed on 7th October 2020

- [2] Essentially the claimants contend that there are great grandchildren and heirs of the owner of the land located at Bennet Estate in Portsmouth containing 104.7 acres.
- [3] It is their claim that the defendant trespassed on 4.96 acres of land which is part of the said estate and has fraudulently acquired title to the said parcel of land which title is registered in Book of Titles C21 Folio 3M registered in his name. The claimants in the substantive claim seek to have the said certificate of title cancelled. The claimant by their amended statement of claim are also seeking to have an interlocutory injunction restraining the defendant by himself, his servants, agents workmen or otherwise from placing or constructing or allowing to be placed on or otherwise obstructing the public right of way thereby restricting or preventing or otherwise interfering with the reasonable enjoyment of the public right of way and passage through and across the public right of way by the claimants, their servants and guests.²
- [4] The parties were ordered to file written submissions and at a subsequent hearing they agreed to rest on those written submissions. Both parties filed their written submissions on the 27th November 2020. This is the court's ruling.
- [5] In the matter before me, at this time we are only concerned with the interlocutory injunction already in place and the defendant's discharge application.
- [6] In the case at bar the claimants obtained an injunction prohibiting the defendant from blocking a public right of way and directing the defendant to remove all items or materials placed on what the claimants claim to be a right of way.
- [7] In this case the claimants having applied for an injunction must have a valid underlying claim and they must be able to show that they have legal rights which have been or are likely to be undermined by the defendant's action or that the defendant has behaved or is likely to behave in an unconscionable manner. It is established law that a substantive cause of action which is capable of founding an action before the court must exist.

² It is noted that the statement of claim was amended to include the prayer for an interlocutory injunction.

- [8] It is to be noted that quite unusually there are a total fourteen affidavits sworn thus far in this matter in support of and against the application for the continuation of the injunction. This is in addition to the affidavits sworn to by the parties themselves.
- [9] The defendant Rodriguez Panthier swore to and filed an affidavit in opposition to the claimants' affidavit and contended that he took possession of his property since 1974. That when he took up possession of the property it was with the intention of dispossessing the true owner of the land. That he has remained in sole continuous undisturbed possession and occupation of the parcel of land from then to the present time.
- [10] Mr Panthier further averred that prior to hurricane Maria he planted crops and kept livestock on the parcel of land. He said that the road being claimed by the claimants and the persons who swore affidavits in support of their case was a road that was built by him in 2006 and that he has not given the claimants or the other deponents licence or permission to traverse the land to access to or traverse to or from any land occupied by them.
- [11] That this access road is not a public access road and that the ownership of this access was already decided on by the High Court by Mr Justice Albert Matthew in a case which was before the court involving him and Mr Delphin Peter³. That in that matter **DOM NO. 2010/038** the court found in favour of the defendant in that the said access road now being claimed by the claimant was part of his land which he occupied and that the said parcel of land was not available as a public right of access.
- [12] A perusal of the exhibits presented to the court does not on the face of it give this court any details of the order in support of the statement by the defendant. This detail will have to be fleshed out either through discussion between counsel representing the parties or by viva voce evidence.
- [13] In spite of the number of affidavits filed on both sides of this case the evidence remains untested.

³ Mr Peter swore to an affidavit exhibiting the order of court of Mr Justice A N J Matthew dated 27th July 2011 and entered 27 April 2012

[14] It is to be noted that an injunction is an equitable remedy which in essence means that there is no obligation on the part of the court to grant an injunction. The court will act using its discretion to grant an injunction only where it appears to be just and convenient to do so.

[15] The granting of an injunction is subject to the usual equitable rules, in particular:

- a. Any delay in applying for an injunction can damage seriously the prospects of obtaining one;
- b. The party applying for the injunction must have "clean hands" (i.e. they must have acted properly themselves); and
- c. damages must not be an adequate remedy,

[16] The Court has the power, at all times, to vary or set aside an injunction on the application of any party.

[17] The issue for me to determine is given the circumstances in the case at bar whether the court should grant the defendant's application to strike out the interlocutory injunction obtained by the claimants on the pleaded ground that there is no substantive cause of action pleaded or in existence by the claimant upon which the interlocutory injunction can be pegged. In other words, should the interlocutory injunction granted in favour of the claimants be discharged?

[18] The court should not go into the merits of the matter in determining whether or not to discharge the injunction. It is no part of the court's function to determine at this interlocutory stage of the proceedings whether there exists a right of way or whether or not the defendant obtained his Certificate of Title fraudulently. The court can do no more than examine the evidence placed before it and determine whether the claimants have established a cause of action upon which the grant of the injunction can be sustained.

[19] The gravamen of the defendant's contention is that the claimant has failed to establish a cause of action before the court and in the circumstances of the case the injunction should be discharged. The defendant also submits that the claimant has solely sought to obtain an interlocutory injunction in his statement of claim and that an interlocutory injunction is not a cause of action. Counsel David

Bruney in his submissions cites and relies on **The Siskina**⁴ and quoted the statement of Lord Diplock when he said

“A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.”⁵

[20] The defendant contends that the claimants do not have a pre-existing cause of action as they have not provided any evidence to demonstrate the elements to establish prescriptive rights as is required by section 3 of the **Prescription Act**⁶

Claims of right of way, or other easement, or water

3. No claim which may be lawfully made at common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water belonging to the State or being the property of any ecclesiastical or lay person or body corporate, when such way, or other matter as herein last before mentioned, has been actually enjoyed by any person claiming right thereto, without interruption, for a period of twenty years, shall be defeated or destroyed by showing only that such way, or other matter, was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and, where such way, or other matter as herein last before mentioned, has been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

⁴ [1979] AC 210

⁵ Ibid at page 256

⁶ Chapter 7:02 of the Law of the Commonwealth of Dominica

Is there a Cause of Action?

[21] It is now well-established law that the approach stated and taken by Lord Diplock in **The American Cyanamid Co v Ethicon Ltd** case⁷ is the correct approach to be adopted by a Court hearing an application for an interlocutory injunction.

[22] Lord Diplock had this to say

"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are questions to be dealt with at the trial... so unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunctive relief that is sought."

[23] It is also well settled law that a right to obtain an injunction is not a cause of action. In **Siskina (Cargo Owners) v Distos Compania Naviera S.A.**⁸ The principles were laid down by Lord Diplock as follows:

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the Court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the Court of the rights of the parties and the grant to the plaintiff of the

⁷ [1975] 1 All E R 504

⁸ [1979] A.C. 210

relief to which his cause of action entitles him, which may or may not include a final injunction" (emphasis mine)

[24] The principle expounded by Lord Diplock at page 256 in the **Siskina**⁹ applies to all injunctions including the one obtained in the case at bar. The injunction sought must have its foundation in a cause of action before the court.

[25] **What then is the cause of action?** Is there material before this court to maintain the claimants'/applicants' submission that there are serious questions to be tried? Have the applicants a real prospect of being granted a permanent injunction for which they have prayed in their claim?

[26] The Privy Council in **ENG Mee YONG and Others v Letuchasan**¹⁰, in an opinion delivered by Lord Diplock, stated **that in the grant of an interlocutory injunction;**

"the guiding principle in granting an interlocutory injunction is the balance of convenience, there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability,' a 'prima facie case' or 'a strong prima facie case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, **American Cyanamid v Ethicon Ltd. (1975) AC396.**"

[27] Considering the balance of convenience, it is well established that the purpose of an interlocutory injunction is to improve the chance of the Court to do justice after a determination of the merits at trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding is more likely to produce a just result. (emphasis mine)

[28] The admonition of Lord Kerr in the case of **Cambridge Nutrition Limited –v-BBC**¹¹ is to be noted when he said that "... The American Cyanamid Case is no more than a set of useful guidelines which

⁹ 1979 A.C. 210

¹⁰ 1979 UKPC 13 (4th April 79)

¹¹ 1990] 3 All E R 523 34 Ibid at page 534 paragraph j 35 Ibid at pages 406 to 409 18

apply in many cases it must never be used as a rule of thumb, let alone as a straight jacket ...The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the substantial issues can be resolved by the parties at a trial"

[29] The claimant in the case at bar contends that the defendant is currently the registered proprietor of a piece and parcel of land registered in Book of Titles C21 Folio 3M which title was obtained fraudulently by the defendant. This claim has been made in the claimant's Fixed Date Claim and Amended Statement of Claim filed by claimant on the 20th August 2020. The claimants are asking this court in the substantive matter to set aside the Certificate of Title obtained by the defendant on the ground that it was wrongly obtained and obtained fraudulently.

[30] The claimants also contend that there is a public right of way located on and crosses the land to which the defendant has claimed. The claimants further contend that the said right of way is not noted on the survey plan held by them or the defendant. The Claimants also contend that this right of way has been in use by the claimants, their relatives and other farmers over the last 40 years. The claimant has filed a number of affidavits in support of their case in this regard; the deponents all claim to be users of the said right of way.

[31] The claimant also claims that the defendant has by several means blocked the said right of way and they are seeking an interim injunction from this court prohibiting the defendant from persisting to block the road until the hearing and determination of this matter.

[32] The claimant contends that they and the deponents on their side of the case have never used the access road as claimed by the defendant in his affidavit in response to the application before the court. That they have never used the said purported access road. The claimant and their witnesses maintain that the access utilised by them is a public right of way which exists on the land of Robert Bell and is situated on the 4.96 acres of land claimed by the defendant and registered in his name

[33] It was submitted by Counsel Glen Ducreay on behalf of the claimants after seeking to take issue with the affidavits served on behalf of the defendants that there is a public right of way across the 4.96 acres of land.

[34] It was further submitted by Counsel Glen Ducreay that the defendant and the evidence adduced on his behalf have failed to show and prove that there is no public right of way or access road on the 4.96 acres of land purportedly owned by the defendant. Counsel on behalf of the claimant further submitted that the *"defendants have mistakenly or otherwise deemed that the access road that is used by the claimants and others, is the very same access road across the 2.02 acres of land when in fact the affidavit filed and sworn to on the 16th November 2020 and the exhibit "DBLLDDDAMRM-1" debunks the forgoing expressed by the Defendant and other affidavits and confirms the existence of the public right of way on part of the 4.96 acres."*¹²

[35] It was finally submitted on behalf of the claimant that the injunction should in the circumstances be extended and maintained until there is a determination in the substantive matter.

[36] It is noted by the court that nowhere in counsel Mr Ducreay's submissions is there any reference whatsoever to any legal authorities in support of his submissions neither has he sought in this court's view to address the application made by Counsel Mr. David Bruney on behalf of the defendant that the injunction sought and obtained by the claimant should not be continued on the ground that there is no substantive legal claim laid before the court upon which the injunction could be pegged.

[37] Having read the submissions and authorities cited on behalf of the parties, I remind myself that at this interlocutory stage I am required to make no factual finding. I therefore do not agree with the submissions made by Mr. Ducreay that the main issues for consideration by the court is whether a public right of way ever existed on or across the said 4.96 acres in favour of the defendant and whether the public right of way that the claimants contend does exist over the land of Robert Bell deceased and the access road that traverses the defendant's land comprising of 2.02 acres of land which the defendant claim that the claimants have no legal right to use are one and the same public access road.

¹² Paragraph 18 of the submissions filed on behalf of the claimant

[38] It is incumbent on the court to apply to the case at bar the principles set out in **American Cyanamid Co-v- Ethicon Ltd**¹³.

[39] **Is there a serious issue to be tried?** The issues raised in the submission appear to be of serious importance. This involves the question of prescriptive rights by the claimants (and indeed the other affiants). The cases as placed before the court does disclose that there are basic disputes of fact which must be resolved at trial.

[40] **Are damages an adequate remedy?** Based on the evidence adduced there is no threat of the claimants losing their interest in their land owned by the estate of Robert Belle deceased at Bell Hall Estate comprising they claim 104.7 acres. What has been threatened is the claimants' right of access to their property and the rights of other persons in the immediate area who are farmers and some also heirs of the estate of Robert Bell.

[41] The claimants claim that the access which is subject of this dispute is a public right of way that traverses on 4.96 acres which the defendant is seeking to lay claim to. It is to be noted that the claimants contend that the defendant is not the owner of the parcel of land but is in fact a trespasser thereon. The claimants in fact seek to have the Certificate of Title held by the defendant set aside on the grounds that it was obtained fraudulently.

[42] Having reviewed the cases stated thus far by the parties there is doubt in this court's mind as to the adequacy of damages that will be payable to each party and this is based primarily on the doubt of the existence of the case on both sides. This takes us to consider the "balance of convenience". In **Nottingham Building Society –v- Eurodynamics Systems PLC and others**¹⁴. The court in that case set out what was meant by the test for the 'balance of convenience': Chadwick J said

'In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffmann J. [as he then was].

¹³ [1975] 1 All E R 504

¹⁴ Times 02-May-2003 [1993] F S R 468

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

[43] Is there a high confidence that the claimants would succeed in establishing their claim at trial. Taking into consideration the entirety of the evidence adduced thus far before the court added to which the claimants have in this court's considered view not properly constituted their matter before court in that there is the concern as to the capacity of the claimants to bring this action at all which may based on the established law be a nullity.¹⁵ This court also takes into consideration that this case may as it regards the right of way the subject of this injunction application may well be res judicata as decided by Matthew J as if indeed that is so this court is not competent to interfere with that decision it being a decision of a court of co-ordinate jurisdiction.¹⁶

[44] This court is not satisfied that the claimants have formulated a claim with a sufficient prospect of success to go forward against the defendant and it is in the interest of justice that the interim injunction granted here in should not be continued.

[45] It is therefore the order of this court that the interlocutory injunction granted herein will not be continued. This is not the end of the matter. It is clear to this court that there is an issue to be

¹⁵ See: Carlton Bedminster et al v The Queen HCRAP 2008/002; HCRAP 2008/003

¹⁶ See: Strachan (Leymon) v. The Gleaner Company Ltd. and Stokes (Dudley) SCCA 54/97

considered between the parties and all the persons who swore to affidavits on both sides of this case that in this court's consideration can be resolved by a surveyor or surveyors visiting the site with the persons to resolve the issue of the right of way. The claimants also have to consider their ability whether or not to bring or continue their case properly or correctly in light of the legal authorities.

M E Birnie Stephenson

High Court Judge



BY THE COURT

A handwritten signature in black ink, appearing to be "H. Steene", written over the word "REGISTRAR".

REGISTRAR