

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2020/0030

BETWEEN

ADMENIA HECTOR

of Cedars, Union Estate in the State of Saint Vincent and the Grenadines
(by her duly appointed Attorney on Record

JANNETTA CYNTHIA TOBY of Cedars, Union Estate)

CLAIMANT/APPLICANT

AND

ANNESHA RICHARDS

of Cedars

RESPONDENT/DEFENDANT

Appearances:

Ms. Samantha Robertson for the applicant/claimant.

Ms. Rochelle Forde for the respondent/defendant.

2020: Apr. 6
Apr. 14 (Re-issued with
correction to paragraph [32] 2)

ORAL DECISION

BACKGROUND

[1] **Henry, J.:** This matter involves opposing claims to ownership of approximately 243 sq. ft. of land situated at Union Estate in Saint Vincent and the Grenadines. Ms. Admenia Hector of Cedars has filed a Fixed Date Claim Form¹ ('FDCF') in which she alleged that she owns that parcel of land by

¹ On March 6th 2020.

Deed No. 3248 of 2000 and has done so since 2000. She claimed that Ms. Annesha Richards trespassed onto her land on 27th January 2020, broke down her concrete wall which enclosed the northern section of her property and started construction of a building on it. Ms. Hector sought a declaration, mandatory injunction, damages for trespass and costs in her claim.

[2] By Notice of Application filed on March 19th 2020, Ms. Hector applied for a mandatory interim injunction compelling Ms. Richards to re-build the wall, replace the topsoil and lawn which had been removed; an injunction to restrain her from entering on, destroying or occupying the disputed property and costs. She contended that there is a serious issue to be tried and that damages would not be an adequate remedy to compensate her for loss and damage occasioned by the alleged trespass.

[3] Ms. Richards opposed the application. She argued that no special circumstances have been brought to the court's attention to justify the grant of the mandatory injunctive reliefs. The application is dismissed, with costs to Ms. Richards.

ISSUE

[4] The issue is whether Admenia Hector should be granted the interim injunctive reliefs sought.

ANALYSIS

Issue - Should Admenia Hector be granted the interim injunctive reliefs sought?

[5] The court may grant an interim injunction if it is satisfied that it is just and equitable to do so in all of the circumstances.² The decision of whether to grant an interim injunction is an exercise of discretion. The court must always seek to give effect to the overriding objective of the CPR to act justly, when exercising discretion.³ In considering an application for injunctive relief the court applies the guiding principles propounded in the *locus classicus* **American Cyanamid Co. v**

² The Civil Procedure Rules 2000 ("CPR") – Rule 17.1 (1) (b).

³ CPR 1.2.

Ethicon Ltd.⁴ The court is required to consider whether there is a serious issue to be tried between the parties and will dismiss the application where there is none. If a triable issue exists, the court assesses whether damages would be an adequate remedy.

- [6] It also explores whether the respective parties have the capacity financially to satisfy an award of damages. In doubtful cases, the court examines the respective needs of the litigants to determine where the balance of convenience lies. The court is not concerned with resolving issues of fact and law at this stage. In the words of Lord Diplock:

‘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 the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.’⁵

- [7] It has been said: ‘The test to be applied for the grant of a mandatory injunction is which course is likely to involve the least risk of injustice if it turns out to be wrong.’⁶ The parties relied on this authority. They cited the cases of **Zockoll Group Limited v Mercy Communications Ltd.**⁷ and **Antigua Aggregates Limited v The Attorney General of Antigua and Barbuda and Antigua Commercial Bank**⁸. The court will apply the foregoing principles in deciding this matter.

Serious Issue to be tried

- [8] Ms. Hector and Ms. Richards submitted that there is a serious issue to be tried. Ownership of real property surrounds one of the most valuable and fiercely defended right and interest in any society. Determination of such matters invariably brings a serious issue into contention. This case is no exception. I agree that the question of who owns the disputed land is a serious one.

⁴ [1975] A.C. 396.

⁵ American Cyanamid case at pg. 407, per Lord Diplock.

⁶ Nottingham Building Society v Eurodynamics Systems Ltd. [1993] FSR 468 at page 474 per Chadwick J..

⁷ [1998] FSR 354.

⁸ [2009] ECSCJ No. 166.

Adequacy of damages

[9] Ms. Hector initiated her claim and application by her lawful attorney on record Ms. Jannetta Toby. Ms. Toby filed two affidavits⁹ in which she attested to a number of assertions on Ms. Hector's behalf. In the final paragraph of both affidavits she averred:

'That the facts deposed to herein are true to the best of the Applicant's knowledge and belief.'¹⁰

[10] At the beginning of each affidavit, Ms. Toby identified the applicant as Ms. Hector. She did not state what if any impediments or difficulties prevented Ms. Hector from attesting to the matters in the affidavit, and she did not indicate whether she witnessed any of them herself and if so which ones. Ms. Hector supplied no testimony of her own. The matters about which Ms. Toby purported to provide affidavit testimony are central to the application. In this regard, she outlined details about the chronology of ownership of the disputed land and the adjoining land on the northern boundary; and what transpired on the disputed land between January 2020 and up to the filing of the claim and application.

[11] The lack of specificity about what if any, of those acts were witnessed by Ms. Toby creates problems in evaluation of this application. In this regard, the court is mindful of the strictures stipulated by CPR 30.3. It establishes that the general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge. The affidavits fail to comply with that procedural requirement. Because of the omission of this element from Ms. Toby's statements, the court is not in a position to determine what she can prove from her knowledge.

[12] The referenced CPR rule permits an affiant to include statements of information and belief in her affidavit but only if any of the Rules permit it; and if it is being used in any procedural or interlocutory application. However, the affidavit must indicate which of the statements in it are made from the deponent's own knowledge and are matters of information or belief. Furthermore, the affiant must disclose the source of any matters of information and belief. Ms. Toby has attributed all of her statements to Ms. Hector's 'knowledge and belief'. This is at best hearsay and

⁹ Respectively on 19th and 26th March 2020.

¹⁰ Paragraph (28) of the first affidavit and paragraph 8 of the second affidavit.

at the lowest level speculative, because for obvious reasons Ms. Toby is not in a position to state what another person knows or believes.

- [13] More fundamentally, she is purporting to give evidence for Ms. Hector as if she is Ms. Hector. I am not aware of any rule of evidence which permits this. It appears to be the case that Ms. Toby and Ms. Hector are laboring under the mistaken belief that a lawful attorney on record may take the place of her principal as a witness in court. The rules of court do not permit this. The court is therefore precluded from considering the affidavit testimony as basis for determining the instant application. I refrain from doing so.
- [14] Under cross-examination she accepted that Ms. Hector's septic tank is built partly on Ms. Richards' land. She indicated to the court that about 20% of the septic tank is on Ms. Richard's property. She also stated that she attended the meeting held with Ms. Richards on January 25th 2020. No survey plan was entered into evidence to support this assertion. The court takes into account that the injunctive reliefs being sought would if granted, place restrictions on Ms. Richards' use of part of her property. It does not appear that in Ms. Hector is being prevented at present from accessing all of her own property. No special circumstances have been urged which would justify a restraint on Ms. Richards' use of her property. In view of the foregoing, I am satisfied there is no adequate evidentiary basis which would warrant grant of the interim orders sought. The application is therefore dismissed.
- [15] For what it is worth and for completeness, I will examine the factual contentions in light of the applicable legal principles. It is noted that Ms. Toby and Ms. Hector rely on the affidavits to establish that damages would not be adequate. The factual allegations are that Ms. Hector purchased her property including the disputed lands in 2000, fenced them and has since occupied them as owner to the exclusion of others. It is further averred that Ms. Richards bought the adjoining land in 2017 and visited it in January 2020 to lay it out for construction work to commence. It is also alleged that Ms. Richards accused Ms. Hector of encroaching on her lands.
- [16] It is alleged further that a surveyor was brought to the site, conducted a survey and indicated to Ms. Hector that she had encroached on 243 sq. ft. of the neighbouring land, being the disputed lands. Further averments are that Ms. Richards caused officials from the Physical Planning Unit and the police to speak to Ms. Hector to advise her that she had encroached on Ms. Richards' land, to get

her to sign documentation to such effect, and to grant written permission to Ms. Richards to break down the wall.

- [17] Other assertions are that Ms. Hector refused each such entreaty, as a consequence of which Ms. Richards entered the disputed lands, broke down the wall and commenced works preparatory to construction and has began erecting a structure there. It was also averred that the alleged trespass has exposed the 'soak away' and septic tank on Ms. Hector's property. Copies of photographs of what was described as the subject property were attached to the affidavit. No originals were presented to the court as mandated by CPR 30.4, the Evidence Act and associated rules of court.¹¹
- [18] Ms. Hector argued that in matters involving disputes over property rights, that the courts have held that the person whose rights are being affected and/or infringed is always *prima facie* entitled to an injunction to prevent further infringement. She cited the case of **Regan v Paul Properties Ltd. No. 1 and Others**¹² in support. She accepted that it is open to the court to award damages in appropriate circumstances, instead of an injunction. She contended that damages are appropriate where the trespass or injury is likely to be temporary, not where as in the case at bar, the infringement is likely to be permanent.
- [19] Ms. Hector and Ms. Richards submitted that mandatory injunctions are draconian and that the court must therefore exercise its power to grant one with the utmost care. This is a correct statement of the law. Ms. Hector relied on a number of legal authorities including the **Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act**¹³, **Ersie John and Andrea John v Marian Cupid**¹⁴, **Redland Bricks Ltd. v Morris**¹⁵ and **Elisabeth Robertson and Christina Washburn and Alfredo Callwood**¹⁶.

¹¹ Cap. 220 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹² [2006] 3 WLR 1131.

¹³ Cap. 24 of the Laws of Saint Vincent and the Grenadines, Revised Edition 2009.

¹⁴ SVGHCV2004/0215.

¹⁵ No citation was provided.

¹⁶ BVIHCV2011/0158.

- [20] She submitted that the court in the latter case held 'A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in absence of special circumstances, it will not normally be granted.' She contended that the special circumstances in this case are the destruction of the northern boundary wall, the removal of the top soil and lawn covering the septic tank and soak away, thereby leaving the same exposed and the removal of boundary wall, leaving the property open and properly secured. Ms. Richards countered that no special circumstances arise in the case at bar. I do not find that those advanced by Ms. Hector qualify as special circumstances for present purposes.
- [21] Ms. Richards submitted that 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 steps 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. She argued that it is legitimate, where a mandatory injunction is sought, for the court to consider whether it feels a high degree of assurance that the plaintiff will be able to establish this right at trial; 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.
- [22] She contended that 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. She concluded that those circumstances will exist where the risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted. She argued that the course of least risk of injustice is to let the status quo remain.
- [23] Ms. Richards submitted that this is a land dispute and is really a matter for a surveyor to determine. I agree that the assistance of a qualified and licensed surveyor would be indispensable to resolving the dispute. I am also of the view that the parties can quite reasonably arrive at an amicable resolution to this matter if they involve the necessary expertise as part of discussions and negotiations.
- [24] Ms. Richards argued that from the evidence and the photographs exhibited to the affidavit filed on

the 19th March 2020, that Ms. Hector's septic tank is in great part on her (Richard's) land, as admitted to under cross-examination of Ms. Toby. She submitted that to permanently restrict her from using the land which may well turn out to be her own, allows for the possibility of a great risk of injustice to her. She reasoned that if the injunction is granted, in effect Ms. Hector will be allowed to tell her what she can and cannot do on her own land. I agree that this is one possible outcome of an injunction in the circumstances of this case. Ms. Richards submitted further that in light of Ms. Toby's admission it is clear that she would be at the greater risk of injustice if the injunction was granted and it turns out to have been wrongly made.

[25] She submitted too that it is doubtful that the Court could feel a high degree of assurance that Ms. Hector will be able to establish this right at trial especially after Ms. Toby's testimony and in light of the physical evidence, captured by the photographs of the septic tank on her (Richard's) land. Ms. Richards argued that even if the court is unsure whether it feels that high degree of assurance, then it must weigh whether the risk of injustice of not granting the injunction outweighs the risk of the injustice of granting it. Having considered the factual assertions on which Ms. Hector relies the court neither feels a strong assurance that Ms. Hector will be able to establish ownership of the disputed land at trial; nor that that the risk of injustice to Ms. Hector by a denial of the injunctive relief outweighs the risk of injustice of granting them. On the contrary, the court is of the view that the greater risk of injustice would be to Ms. Richards.

[26] Ms. Richards contended that the learning from **Halsbury's Laws of England** is:

'... if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application.'¹⁷

She submitted that she did not try to steal a march; but rather, even prior to the start of construction, and in early January 2020, engaged a surveyor who made certain determinations;

¹⁷ 4th Ed. Vol 24 at para 848.

that she convened a meeting with Ms. Hector on January 25th 2020 regarding the encroachment and did not start work in earnest until a month later.

- [27] She argued that the possible injury to Ms. Hector's legal right is small and is one capable of being estimated in money given that the size of land in dispute is small. She submitted that the cost of the removal of the wall and replacement of the lawn grass on the septic tank and soak away are easily quantifiable.
- [28] Neither party provided evidence of the value of the disputed land. The court takes notice that it is a relatively small area and is not even large enough to accommodate a house or sizable structure. If as claimed the photographs depict the area, it appears that the land occupied by Ms. Hector's building is large enough to relocate the 'soak away' and septic tank, if it turns out that the disputed land belongs to Ms. Richards. If it belongs to Ms. Hector as claimed, (even without an estimation of the value of the wall, or the cost of relocation of the septic and 'soak away', or securing them; replacement of topsoil and related or similar materials) it seems to me that any loss to Ms. Hector can be quantified and made the subject of a reasonable damages award.
- [29] In this regard, I note that the value ascribed to the adjoining parcels of land at the respective dates of transfer¹⁸ to the present owners were \$155,000.00 and \$34,000.00 respectively. I reject the notion that damages would not be adequate. I am therefore fortified in my earlier assessment that this is an appropriate case in which to refuse interim injunctive relief. It is not necessary to consider the balance of convenience issue.
- [30] Incidentally, the Specific Power of Attorney by which Ms. Toby was constituted as Ms. Hector's Lawful Attorney was attached to the FDCF. It expressly empowered Ms. Toby to protect Ms. Hector's share and/or interest in realty described in Deed No. 3248 of 2000; to bring and defend actions in respect of that property; and to enter into agreement and perform any obligation regarding the said property. No survey plan of the property described in that Deed has been exhibited or presented to the court. No court order or other determinative finding as to the boundaries of that said property have been exhibited or presented. In the premises, Ms. Toby's

¹⁸ The year 2000 in the case of the conveyance to Ms. Hector; and 2017 in the case of Ms. Richards'.

remit with respect to the disputed property is nebulous. This is further reason to dismiss the application.

[31] Ms. Richards has prevailed at this stage of the proceedings. The general rule is that a successful party is entitled to her costs.

ORDER

[32] It is accordingly ordered:

1. Admenia Hector's application for interim injunctive relief to compel Ms. Richards to rebuild the referenced northern wall; replace soil and lawn; and to refrain from the alleged trespass is dismissed.
2. The claimant/applicant shall pay to the defendant/respondent, pursuant to CPR Part 65¹⁹ costs to be assessed, if not agreed, on application to be filed and served on or before April 30th 2020.²⁰

[33] Counsel Ms. Robertson and Ms. Forde provided helpful legal submissions and in the case of the former, list of authorities; while Ms. Richards graciously made her speaking notes available in electronic format. The court is grateful for their assistance.

Esco L. Henry
HIGH COURT JUDGE

By the Court

Registrar

¹⁹ Rule 65.12.

²⁰ Corrected pursuant to CPR 42.10 by deleting the first sentence of paragraph 32 (2).