

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2018/0020

BETWEEN:

SONIA DOPLHIN

Applicant

and

MARGARET DANIEL

Respondent

Appearances:

Ms. Natasha Grey for the Applicant

Mrs. Yvonne Bussue-Flemming holding papers for Ms. Marcella Liburd for the
Respondent

Ms. Nisharma Rattan Mack, *amicus curiae* for the Chambers of the Attorney
General

2018: October 11

(Written Submissions filed on 23 October 2018 and 1 November 2018)

November 8

JUDGMENT

- [1] **VENTOSE, J.:** The matter before the court concerns a food cart that is located on a spot at the Ferry Terminal in Bay Road, Basseterre, the capital of Saint Christopher and Nevis. The Claimant on 30 January 2018 filed an application with

sworn affidavit for an *ex parte* injunction seeking the following orders: (1) an order that the Respondent immediately remove the food cart located at the Ferry Terminal; (2) an injunction restraining the Respondent by herself, her servants, and/or agents or persons subject to her control, authority or direction or however from trespassing or entering on the Applicant's spot which the Applicant rents from the Ministry of Tourism; and (3) an order that the Respondent remove the items belonging to the Respondent which has been placed or caused to be placed on the Applicant's spot, which she rents from the Ministry of Tourism. A certificate of urgency was also filed on the same day as the application.

- [2] The Applicant avers that on or about 23 May 2010 she entered into an agreement with the Respondent to rent a food cart from the Respondent for a period of three (3) years. It was a term of that agreement that the Applicant would pay a weekly rent of \$250.00 to the Respondent. This amount was subsequently increased to \$350.00 and then to \$400.00 a week. The Applicant states that she became aware that the Respondent was not authorized to have her food cart in the location from which she (the Respondent) was operating. The Respondent, the Applicant continues, did not have any agreement with the Ministry of Tourism to rent the spot. The Applicant then entered into an agreement with the Ministry of Tourism in June 2010 to rent the spot for a monthly fee of \$50.00. The Applicant avers that since that date she has been a tenant of the Ministry of Tourism for the purposes of occupying the spot on which the food cart is placed.
- [3] The Applicant avers that the food cart has become infested with rats and has a leaking roof. The infestation, the Applicant also avers, is causing her loss of stock and the leaking roof is causing her great embarrassment, thereby negatively affecting her business. The Applicant claims to have written to the Ministry of Tourism about the situation. The Chambers of the Attorney General, on behalf of the Ministry of Tourism, International Trade, Industry and Commerce, by letter dated 21 June 2017 wrote the Respondent giving her notice to remove her food cart from the spot no later than 21 July 2017. The Respondent has to date failed to remove her food cart from the spot. The Chief Environmental Officer via letter

dated 27 March 2017 also wrote the Respondent informing her that she did not have permission to have her food cart on the spot and giving her 14 days to remove the food cart. The Respondent has to date not complied. The Applicant fears that if the injunction is not granted the food cart would remain on the spot; that she will lose her customers and her business due to the health concerns; that the Ministry of Health will shut down her business; and that these factors combined will result in the loss of her livelihood.

- [4] In a supplemental affidavit filed on 26 February 2018, the Applicant avers that she received a notice to quit and deliver up possession of the food cart from the Respondent's attorney-at-law. The Applicant continues that she has no difficulty in giving up the food cart and has informed the Respondent that since their 2010 agreement has ended the Respondent should remove her food cart from the spot.
- [5] On 30 January 2018 Counsel for the Applicant filed a certificate of urgency in which she states that "the application filed herein is one of extreme urgency as the existence of [the Applicant's] business and her livelihood is at stake". The application was served on the Respondent on 29 May 2018. On 1 June 2018, the Respondent filed an affidavit in opposition to the grant of the injunction in which she avers that she was given permission by the Ministry of Tourism in 2005 to operate her food cart on the spot and had done so without interruption until 2010. The Respondent further avers that she became ill in 2010 and leased her food cart to the Applicant and that the rental sum was \$450.00 rather than \$400.00 as stated by the Applicant. The Respondent states that the Applicant continued to pay her rent from 2010 onwards although during that time the Applicant paid the Ministry of Tourism \$50.00 for use of the spot on which the food cart is located.
- [6] The Respondent states that since she has not occupied the food cart since 2010 she could not be held responsible for its current state; and that the Applicant who has occupied the food cart since 2010 is the one responsible for keeping the food cart in a safe and healthy condition particularly since this was a food business. The Respondent further states that the letter from the Chief Environmental Officer should have been addressed to the Applicant as tenant and occupier of the food

cart and not her. She states that notwithstanding the statement in the letter from the Chief Environmental Officer that the food cart “has become a harbourage site for insects and rodents”, the Applicant continues to do business in the food cart. As a result, the Respondent opposes the grant by the court of the orders sought by the Applicant stating that the status quo should be maintained until the court determines the respective rights of the parties at trial.

- [7] The matter came up for hearing on 4 June 2018 before another trial judge where a view was formed that the Attorney General should be joined as a party to the proceedings to facilitate a just disposal of the application and leave was granted to the Applicant to join the Attorney General as an applicant. The matter then came up for further hearing before me on 11 October 2018 when counsel for the Attorney General appearing as amicus informed the court that the Chambers of the Attorney General was not served with a formal order of the court and were not interested in joining the application. At that hearing, the parties were heard on the application and were asked to file and serve closing submissions and authorities in respect of the application for the interim injunction.

Interim Injunction: Applicable Principles

- [8] The *locus classicus* on the test to be applied by the court in deciding whether to grant an interim injunction is the decision of the House of Lords in **American Cyanamid Co. v. Ethicon Ltd** [1975] A.C. 396. The court must be satisfied that: (1) there is a serious issue to be tried; (2) damages are not an adequate remedy; and (3) the balance of convenience lies in favour of granting or refusing the application. Since an injunction is an equitable remedy, the court has a wide discretion in determining whether or not to grant the injunction. The Court of Appeal of Barbados in **Toojays Limited v. Westhaven Limited** [2012] 2 LRC 65 has recast the test in **American Cyanamid**. It held that that the test is a two-pronged one. The first involves an enquiry as to whether the party seeking an interlocutory injunction has shown that there is a serious issue, in the sense of not being frivolous or vexatious, to be tried. Once this is established – that the party has crossed this threshold – the court can then address the second, which

involves a question of whether the balance of justice lies in favour of granting or refusing the interlocutory relief sought.

Should the Court Grant the Interim Injunction?

- [9] The Applicant submits that she is entitled to seek injunctive relief against the Respondent pursuant to section 26 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act, which provides as follows:

26. Granting of mandamus, etc.

(1) A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.

(2) If an injunction is prayed for, either before or at, or after the hearing of a cause or matter to prevent a threatened or apprehended waste or trespass the injunction may be granted if the High Court or a Judge of the High Court thinks fit

(a) whether the person against whom the injunction is sought

(i) is or is not in possession under a claim or title or otherwise; or

(ii) if out of possession, does or does not claim under any colour of title a right to do the act sought to be restrained; and

(b) whether the estates claimed by both or by either parties are legal or equitable.

- [10] The Applicant submits that since she is a tenant of the Ministry of Tourism she has the relevant standing and is as such entitled to seek injunctive relief against the Respondent. The Respondent counters that the Applicant is a mere licensee without possession of the spot and therefore cannot bring an action in trespass against the Respondent. The Respondent submits that both the Applicant and Respondent are licensees and as such have no interest in any land; and that the Applicant is estopped from denying that the Respondent is an occupier in light of the rental agreement entered into between the Applicant and the Respondent. At this stage, the court is not concerned with determining or resolving issues of fact

between the parties. I will therefore resist the recommendation of the Respondent to do so, because Lord Diplock in **American Cyanamid** (at p. 407) stated:

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.

- [11] The Respondent also submits that the Applicant, being a licensee, has no cause of action and therefore has no *locus standi* to make the application for the interim injunction, citing the decision of the House of Lords in **Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.** [1979] A.C. 210 where Lord Diplock (at p. 256) stated as follows:

A right to obtain an [interim] injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a preexisting 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 [interim] injunction is merely ancillary or incidental to the preexisting cause of action.

- [12] The Applicant has not filed a claim form in this matter although the application for the interim injunction was filed 8 months ago. That however does not answer the issue raised by the Respondent. Without expressing any definitive view either way on the nature of the cause of action, I am not convinced that the Applicant has no preexisting cause of action against the Respondent arising out of an invasion, actual or threatened by the Respondent, of a legal or equitable right of the Applicant for the enforcement of which the Respondent is amenable to the jurisdiction of the court.
- [13] In applying the requirements of **American Cyanamid**, the first question is whether there is a serious issue to be tried. The Applicant submits there is because the matter before the court is not a frivolous or vexatious matter and that the Respondent has failed to remove her food cart despite being asked to do so by the Applicant and the Ministry of Tourism. The Applicant submits that she is entitled to the use of the spot based on her 2010 agreement with the Ministry of Tourism. The Respondent claims that she has a right to have her food cart remain

on the spot but has not articulated the basis of that right. Having read the affidavits filed in this matter, having heard counsel for the parties and having read the submissions filed, I find that there is a serious issue to be tried in respect of who is entitled to be in occupation of the spot.

- [14] Secondly, in respect of whether damages is an adequate remedy to compensate the Applicant, the Applicant submits that damages is not an appropriate remedy because of the amount of goodwill generated by the business carried on by the Applicant on the spot. The condition of the food cart, the Applicant further submits, is having a negative impact on the goodwill of her business. In **Pete Waterman Ltd v CBS (UK) Ltd** [1993] EMLR 107, Sir Nicolas Browne-Wilkinson V-C said:

The essence of the goodwill is the ability to attract customers and potential customers to do business with the owner of the goodwill.

- [15] The ability of the Applicant to keep existing customers and continue to attract new customers will most likely be affected by the presence of the Respondent's food cart in its current condition on the spot. This is not something that can be quantified in money terms. In all the circumstances, I am of the view that damages would not be an adequate remedy for any loss suffered by the Applicant in this case.

- [16] Thirdly, where does the balance of convenience lie? In **Cayne and another v Global Natural Resources plc** [1984] 1 All ER 225, May LJ stated that the court must "the balance of the risk of doing an injustice..." Similarly in **Lansing Linde Ltd v Kerr** [1991] 1 WLR 251, Staughton LJ opined that:

The main question is then one of lesser evil: will it do less harm to grant an injunction which subsequently turns out to be unjustified, or to refuse one if it subsequently turns out that an injunction should have been granted? In either case the adequacy of a remedy in damages, and the likelihood of its being enforceable, is very important.

- [17] The court is therefore asked to determine which party would suffer less harm if the injunction were granted or refused and if it turns out that it should have been refused or granted respectively. The Applicant submits that if the injunction is not granted the food cart would remain on the spot and the Applicant's business will

suffer; and that the goodwill she has built in her business will continue to disappear. The Applicant further submits that if the injunction is granted the Respondent will not suffer any prejudice since she is not entitled to have her food cart on the spot. Consequently, the Applicant contends that the balance of convenience lies in her favour since she would suffer severe prejudice and irreparable harm if the Respondent were not restrained.

- [18] I am of the view that based on all the evidence before the court the Respondent would suffer less harm if the court grants the injunction, which might subsequently turn out to be unjustified. The balance of convenience therefore lies in favour of granting the interim injunction. The same result obtains if I apply the two-pronged approach adopted in **Toojays Limited**. First, there is a serious issue to be tried; and, secondly the balance of justice lies in favour of granting the interlocutory relief sought.

The Woods Exception

- [19] The grant of an injunction is not available to any person as of right. It is granted after the exercise by the court of its broad discretionary powers. In exercising that discretion, the court may take into account various factors including delay by the applicant; whether the injunction can properly be policed; or whether the applicant has engaged in any conduct or illegality relevant to the relief sought. In addition, the court will not usually grant an interim injunction in circumstances where the effect of granting relief is finally to decide the dispute between the parties, at least, unless it is satisfied that the claimant is almost certain to succeed at trial. This is the effect of the decision of the House of Lords in **N W L Ltd v Woods** [1979] 1 WLR 1294 where Lord Diplock stated (at p. 1306) that:

My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co. v. Ethicon Ltd.*, which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a

serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

[20] He continued (at p. 1307) that:

Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

[21] The Applicant seeks in the application for interim relief, *inter alia*, for an order that the Respondent immediately remove the food cart on the spot located at the Ferry Terminal. It is arguable that the effect of granting the injunction would be to put an end to the dispute between the parties. Once the Respondent complies with any such order if granted, there would be no incentive for the Applicant to file a claim form eventually to establish at trial that she is entitled to the relief that she seeks in the application for interim relief. In addition, the court takes notice that the Applicant filed a certificate of urgency on 30 January 2018, the same day the *ex parte* application for interim relief was filed but has to date not filed any claim form in this matter. Surely, the applicant does not need the grant of the orders that she seeks in order to file such a claim seeking relief against the Respondent.

[22] Since the grant of an interim injunction is based on the discretion of the court, the **Woods** exception requires the court to refuse the interim injunction sought by the Applicant since the effect of such an order is finally to decide the dispute between the parties. However, this is subject to the caveat that the court should not refuse to grant the injunction unless it is satisfied that the claimant is almost certain to succeed at trial. Based on all the evidence before the court and presented in this case, to use the words of Lord Diplock in **Woods**, there is a high degree of likelihood that the Applicant would have succeeded in establishing her right to an

interim injunction if the action had gone to trial. The Applicant therefore succeeds in her application for the interim injunction.

Disposition

[23] For the reasons explained above, I make the following orders:

- (1) The Respondent shall remove the food cart placed on the spot that the Applicant rents from the Ministry of Tourism and which is located at the Ferry Terminal, Bay Road, Basseterre, Saint Christopher on or before 12:00 noon on 12 November 2018.
- (2) The Respondent shall remove all other items belonging to the Respondent that have been placed or have caused to be placed on the spot that the Applicant rents from the Ministry of Tourism and which is located at the Ferry Terminal, Bay Road, Basseterre, Saint Christopher on or before 12:00 noon on 12 November 2018.
- (3) That if you, the within named Margaret Daniel, do not comply with this order (at paragraph 1 and 2) you may be held to be in contempt of Court and imprisoned and/or fined.
- (4) This order shall take effect from today's date and shall continue until the trial in this matter.
- (5) The Applicant shall file the claim form within 14 day's of today's date.
- (6) Costs shall be costs in the cause.

Eddy D. Ventose

High Court Judge

By the Court

Registrar