



[2021] JMSC Civ 66.

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2020CV04310**

**BETWEEN                                      BENBECULA LIMITED                                      APPLICANT**

**AND                                      PALM BEACH RUNAWAY BAY LIMITED                                      RESPONDENT**

In Chambers

**Mr. Demetrie Adams instructed by Tavares-Finson Adams for the Applicant**

**Mr. Michael Hylton Q.C. and Ms. Shanique Scott instructed by Hylton Powell and Associates for the Respondent**

**HEARD: January 21, 2021 and February 5, 2021.**

**CARR. J**

**ORAL JUDGMENT**

The Notice of Application for an interim injunction was refused. Upon the delivery of an oral judgment counsel on behalf of the Applicant and the Respondent requested that the reasons be reduced to writing.

**Background**

[1] This matter arises out of a dispute between the Applicant and the Respondent as to the ownership of a parcel of land part of Palm Beach part of Beverley Pen in the parish

of St. Ann and being part of the land comprised in Certificate of Title registered at Volume 1267 Folio 64 of the Register Book of Titles known as Lot no. 8, Silver Spray Road, Salem in the parish of St. Ann.

**[2]** The Applicant by way of fixed date claim form has sought declarations that they are the equitable owners of the property and that the Respondent holds the property on trust for them. They also seek the determination of the court as to the true boundary between the two properties owned by the parties.

### **The Application**

**[3]** A notice of application for court orders was filed on the 10<sup>th</sup> of November 2020 seeking the following orders:

- a) An interim injunction restraining the Respondent, its servants and/or agents or otherwise from: -
  - i) Entering upon the Applicant's property being that parcel of land part of Palm Beach part of Beverley Pen in the parish of St. Ann and being part of the land comprised in Certificate of Title registered at Volume 1267 Folio 64 of the Register Book of Titles known as Lot no. 8, Silver Spray Road, Salem in the parish of St. Ann to carry out any construction work in re-erecting, relocating or interfering in any manner with the boundary wall which the Respondent through its servants and/or agents demolished and;
  - ii) Removing the solar array, two (2) jet skis and sailboat from that parcel of land part of Palm Beach comprising of Lots 2, 3, 4, 5, 6, 7, 13 and 14 in the Parish of St. Ann and being part of the land comprised in Certificate of Title registered at Volume 1505 Folio 947 of the Register Book of Titles being the 668.910 square meters more or less of the canal reserve.

## **The Law**

**[4]** The court, in determining whether to grant an interim injunction, is guided by the principles set down in the case of **American Cyanamid Co. v. Ethicon Ltd. [1975] All ER 504**. In summary:

- a) Is there a serious question or issue to be tried?
- b) Whether damages is an adequate remedy?
- c) Where does the balance of convenience lie?

It is only where there is uncertainty as to the first two limbs that the court should seek to determine the balance of convenience. The overarching principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

## **Submissions on behalf of the Applicant and the Respondent**

### **Applicant**

**[5]** Mr. Demetrie Adams submitted that the Applicant was entitled to an equitable interest in the disputed property. This was based on two factors. Firstly that there was an agreement for sale which had been entered into by the Applicant and the previous owners of the property (Querida Ltd.). The terms of the agreement for sale included the transfer of the disputed property to the Applicant. The Applicant in reliance on that agreement expended money to construct a wall on the premises. That wall has since been demolished. The Respondent it was argued purchased the property knowing of the original agreement and as such is deemed to be holding the property on trust for the Applicant.

**[6]** Secondly the wall which was constructed was in existence for some seven years and in accordance with Section 45 of the Limitations of Actions Act was now the true boundary for the property. It was submitted that the Respondent had acquiesced to the construction and continued existence of the wall and as a result was estopped from claiming any interest in the disputed property as the statute of limitations had expired.

The matter therefore was not frivolous or vexatious, there was a serious issue to be tried and damages was not an adequate remedy.

## **Respondent**

[7] Mr. Michael Hylton QC submitted that the issues before the court were questions of law. The claim of an equitable interest was based on the principle of proprietary estoppel. In this case the land was transferred to the Respondents who acquired good legal title. The original agreement for sale between the Applicant and Querida Ltd. was never completed. The Applicant therefore cannot rely on it. In any event, it was argued that the principle of proprietary estoppel does not arise in respect of a bona fide purchaser for value.

[8] In reference to Section 45 of the Limitations of Actions Act it was submitted that the section does not confer on the Applicant a possessory right to the disputed property. The section applies where the boundary is erected in the wrong place. In the instant case there is no dispute as to the boundary as it is the evidence of the Applicant that he erected the wall to enclose his section of the property. The issues are therefore questions of law on undisputed facts and as such there is no serious issue to be tried. It was also submitted that damages was an adequate remedy and that the balance of convenience rested in favour of the Respondent.

## **Analysis and Discussion**

Is there a serious question or issue to be tried?

[9] Lord Diplock in **American Cyanamid** at page 510 of the judgment stated:

**“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 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.”**

[10] The Court can only examine the evidence contained in the affidavits filed in support of the Application. The burden is on the Applicant to satisfy the court that there is in fact a serious question to be tried. In other words can the Applicant through affidavit evidence establish that he is likely to obtain a permanent injunction at trial? If the answer to that question is no, then an interim injunction ought not to be granted.

[11] In applying this principle to the present case I find and accept that the Respondent is the legal owner of the disputed property. They are the registered proprietors of the lands which include the canal reserve. There is no allegation contained in the affidavits filed on behalf of the Applicant to suggest that they obtained this title by fraud. There is also no claim of a possessory right based on the principle of adverse possession. In the circumstances therefore the Respondent has the protection afforded by the Registration of Titles Act and their title cannot be challenged.

[12] Has the Applicant satisfied this court that there is a serious question to be tried that would defeat the title of the Respondent? Have they shown that they have obtained an equitable interest in the property? Could the court find that the doctrine of proprietary estoppel arises in these proceedings? In support of their application Mr. Malcolm McDonald filed an Affidavit of Urgency to which was exhibited a letter (MM-3) dated October 7, 2011. The letter made reference to an agreement between the previous owners Querida Limited and Benbecula Ltd for the sale of the property. The agreement was contingent upon several factors including but not limited to final planning approval being obtained by Querida Ltd. and the application for individual titles. It was only when those matters were completed that title to the disputed property would be transferred to the Applicants.

[13] The affidavit evidence also showed that the consideration for the transfer of the disputed property to Benbecula Ltd. hinged on the transfer of another parcel of land registered at Volume 1267 Folio 64 of the Register Book of Titles from Benbecula Ltd. to

Querida Ltd. The court takes note of the fact that the actual “agreement for sale” was never exhibited to any of the affidavits filed on behalf of the Applicant.

**[14]** In response to the affidavits filed, Mr. Frederick Moe, on behalf of the Respondent, filed an affidavit to which was exhibited a letter dated March 8, 2012 outlining other conditions which were also part of the agreement. Querida Ltd. was to purchase the interest of another party in the property and they were also to undertake the development of the said property.

**[15]** Sometime In 2018 a letter was sent to the Applicant’s attorney-at-law indicating inter alia that after careful perusal of the agreement as well as the titles, the agreement had not been consummated. The reason for this was that the Applicant had not transferred the lands comprised in certificate of title registered at Volume 1267 Folio 64 of the Register Book of Titles to Querida Ltd.

**[16]** It is clear from the letters presented that the previous owners did not accept that the terms of the agreement were met. In fact they were at pains to point out to the Applicant that the agreement could not have been completed as set out due to the nature of the canal reserve and the rights associated with the use of the canal reserve that was noted on the title. There was no evidence presented to this court to support the contention that the Applicant was given the impression that he was entitled to an interest in the canal reserve based on the exchange of letters exhibited by both parties.

**[17]** Even if the court was to find that the Respondent was aware of the agreement, the doctrine of proprietary estoppel cannot stand against a bona fide purchaser for value. The Respondent in this case has acquired good title, if the Applicant has a remedy in law it would be against the previous owners for breach of contract.

**[18]** Turning to section 45 of the Limitation of Actions Act. The side notes of section 45 refers to reputed boundaries acquiesced in for seven years. There is no definition of reputed boundary in the interpretation section of the act. By its ordinary meaning reputed is defined as something which is thought to be but is not definitely so. In other words the

boundary is not certain. It is in the context of this uncertainty that section 45 becomes applicable. In this case the applicant in his affidavit made it clear that the boundary wall which was erected was done to enclose the part of the property which he had acquired as a result of the agreement. It cannot therefore be said that the Applicant was mistaken as to where the true boundary to the property was. The intention was to secure the property which they felt they were entitled to as a result of the agreement.

**[19]** It is also important to note that Section 45 of the Limitation of Actions Act does not confer upon the Applicant any possessory right in the property. It therefore cannot be prayed in aid to support the contention of the Applicant that there is a serious issue to be tried as it relates to ownership of the property.

**[20]** In the circumstances the Applicant has not established on the evidence presented, in support of this application, that there is a serious question to be tried.

### **Damages**

**[21]** Although that would ordinarily be the end of the matter. I went further to look at the issue of damages. It is well established that where damages are an adequate remedy and the Respondent is in a position to pay that no interim injunction ought to be granted. In this case the wall has already been demolished and a fence has been put in its place. The solar panels were removed and are being kept in storage, according to the evidence contained in the affidavit of Frederick Moe. There is presently no construction taking place in the canal reserve and there was no evidence before this court to suggest that the disputed property was being used for any other purpose apart from the storage of the said items. Whatever expenses the Applicant has been put to as a result of the destruction of the wall or the removal of the solar panels can be adequately compensated in damages, and the Respondent is in a position to pay.

## **Conclusion**

**[22]** Having regard to the reasoning above I find that there is no serious issue to be tried and damages are an adequate remedy. In the circumstances therefore the application for an interim injunction is refused.

## **Order**

1. The application for interim injunction is refused.
2. Costs to the respondent to be agreed or taxed.