



[2022] JMSC Civ. 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV01393

BETWEEN	BUSINESS VENTURES & SOLUTIONS INC.	CLAIMANT
AND	ANTHONY THARPE	DEFENDANT

IN CHAMBERS (VIA VIDEOCONFERENCE)

Mrs. Alexis Robinson and Mr. James Earle Kirkland instructed by Myers Fletcher & Gordon for the Claimant

Mr. Anthony Tharpe the Defendant in person

Heard: November 3, 2021 and February 1, 2022

Interim injunction - Factors to consider in granting an interim injunction -

Whether there is a serious issue to be tried - Whether damages are adequate -

Balance of convenience - Civil Procedure Rules - Section 49 (h) of the

Judicature (Supreme Court) Act

SONIA BERTRAM LINTON, J

BACKGROUND

[1] The Claimant, says that Business Ventures & Solutions, Inc (hereinafter “BVS”) is a company duly incorporated under the laws of New York, United States of

America. Its registered office is at Capitol Services, Inc., 1218 Central Ave. Suites 100, Albany, New York, 12205, USA and that the Defendant, Mr. Tharpe is the former sole owner of BVS.

[2] On March 25, 2021 the Claimant filed an action seeking an injunction to restrain Mr. Tharpe, whether by himself or his servants and or agents from entering and dealing with the parcels of land registered at Volume 665 Folio 10 and Volume 665 Folio 11 and Volume 650 Folio 65 in the Register Book of Titles in Palm Beach, Montego Bay in the parish of St. James. Together all properties were known as 15 Queens Drive, Montego Bay in the parish of St. James referred to as "the Property". The Claimant also sought damages for trespass and loss of use and profits and interest at 6% pursuant to the Law Reform (Miscellaneous Provisions) Act, costs, and any other relief the Court deems just.

[3] The Property was previously owned by Alexander Burnham and was governed by the Alexander Burnham Trust (the Burnham Trust) prior to it being transferred to the BVS on April 6, 2006. However, on February 2nd 2016 the Burnham Trust sought an injunction against BVS to restrain its agents and or servants from transferring, mortgaging, charging or encumbering or otherwise dealing with or disposing of the property. This injunction was granted for a period of twenty-eight days. The Defendant, Mr. Tharpe who was a former director and principal owner of 100% interest in BVS filed for bankruptcy on February 22, 2017. A trustee was appointed by the United States Bankruptcy Court (hereinafter "the US Court") for Mr. Tharpe's estate in bankruptcy. On September 26, 2017 the US Court approved the sale of 100% of the Defendant's Interest in BVS and on October 6, 2017 the bankruptcy trustee transferred the 100% ownership from BVS to the Burnham Trust who became the legal and beneficial owner.

[4] The US Court then ordered that the Defendant no longer had ownership, interest in or control over BVS. The US Court also sanctioned the Defendant for continuing to purport to act on behalf of BVS, including but not limited to pursuing any claims on behalf of BVS. As a result, on May 6, 2019 Mr. Tharpe was remove as the director and principal of BVS and Mr. Steve Rapier was appointed as the sole director and president of BVS.

[5] On December 3, 2020 the Burnham Trust wanted to sell the property to an interested purchaser and so they applied to have the injunction against BVS, which it now owned, discharged. However, they allege that it was brought to their attention, and subject to checks, it was confirmed that the Defendant, Mr. Tharpe was trespassing on the property. The Claimant informed the Police, and their Attorney wrote a letter requiring Mr. Tharpe to cease and desist from trespassing on the Property. However, he continued his actions.

[6] The Defendant continued to enter and erect numerous structures on the Property without the Claimant's permission. The Particulars of Claim also outlined that Mr. Tharpe removed the Claimant's servants and agents from the property resulting in them suffering loss and damage and incurring expenses.

[7] The claim also alleges that BVS has been and continue to be deprived of any use of the property since the injunction was discharged. They are having difficulty selling the property and they have had to contract private security services to secure the property.

THE APPLICATION

[8] By way of Notice of Application for Court Orders file on March 25, 2021 the Claimant sought the following orders:

1. *The Defendant is restrained until the determination of this claim, whether by himself, his servants, agents, or any of them or otherwise howsoever from entering, altering or otherwise dealing with:*
 - a. *ALL THAT parcel of land part of Palm Beach situate in the Town of Montego Bay in the parish of Saint James containing by survey twenty- four thousand seven hundred and nine square feet and thirty-five hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof and being part of the land comprised in Certificate of Title Registered at **Volume 665 Folio 10** in the Register Book of Titles;*
 - b. *ALL THAT parcel of land part of Palm Beach situate in the Town of Montego Bay in the parish of Saint James containing by survey forty-four thousand one hundred and forty-eight square feet and seventy- seven hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof and being part of the land comprised in Certificate of Title Registered at **Volume 665 Folio 11** in the Register book of Titles;*
 - c. *ALL THAT parcel of land part of Palm Beach situate in the Town of Montego Bay in the parish of Saint James containing by survey fifty-nine thousand five hundred and ten square feet of the shape and dimensions and butting as appears by the plan thereof and being comprised in Certificate of Title Registered at **Volume 650 Folio 65** in the Register book of Titles;*

*together known as **15 Queens Drive, Montego Bay St. James.** (“the Property”)*

2. *The costs of this application are costs in the Claim.*
3. *Such other relief as this honourable Court deems fit.*

[9] What is now before this Court is the inter parties hearing of the interim injunction. Counsel for the claimant and the Defendant, who represented himself, both submitted written submissions. I will not address all the submissions and authorities but will refer to those that are applicable to the instant case.

SUBMISSIONS

The Claimant

[10] The Claimant submits that the main issue is whether it is just and convenient under the circumstances for the Defendant to be restrained from his trespass on their land. The application is made pursuant to **section 49 (h) of the Judicature (Supreme Court) Act** as a statutory basis for the grant of the interlocutory injunction. In addition, **Part 17 of the Civil Procedure Rules** (hereinafter CPR) provides the procedural context of the application for an interim injunction.

[11] The cases of ***American Cyanamid v Ethicon Limited* [1975] 1 ALL ER 504 at pp 510-11** and ***National Commercial Bank (NCB) v Olint Corporation* [2009] UKPC 16** outlined the guidelines the Court should consider when determining whether to grant an interlocutory injunction. These are:

- i. *The claim is not frivolous nor vexatious; that there is a serious issue to be tried*
- ii. *Damages are not an adequate remedy; and that*
- iii. *The balance of convenience generally lies in favour of granting the interim injunction.*

[12] In support of the point that there is a serious issue to be tried the Claimant says that the Certificates of Title exhibited in the Affidavit of Steve Rapier shows that

the property is owned by them. They also referred to documents before the Court which demonstrated that Mr. Tharpe's interest in BVS was assigned pursuant to the Florida Bankruptcy Court Order. Therefore, Mr. Tharpe has no legal or equitable right to the Property. Without BVS' authorization Mr. Tharpe is trespassing and defacing the property and prejudicing the Claimant's commercial interests. On the face of the pleadings there is evidence before the Court that there is a serious issue to be tried because the Defendant has no lawful excuse to interfere with the Claimant's right to exclusive possession and their right to dispose of their interest in the Property.

[13] In support of the point that damages are not an adequate remedy the Claimant referred to ***American Cyanamid (supra)*** to emphasize that the court, before granting an injunction should consider whether damages would be adequate as compensation for any the loss. The case emphasizes that where damages would be adequate, no injunction should be granted however, credible the Claimant's case is. The Claimant is concerned that Mr Tharpe would not be in a financial position to pay the damages as he has proven and documented financial challenges based on his declaration of bankruptcy and the ruling of the Southern District of Florida Court Order of September 26, 2017.

[14] On the issue of the balance of convenience, the Claimant referred to ***NCB v Olint Corporation (supra)*** to emphasize that in granting an injunction the Court should consider whether it is likely to cause "...irremediable prejudice to one party or the other." They say that they have and will continue to suffer harm by their inability to enjoy or sell the property because of the Defendant's actions. Moreover, they submit that Mr Tharpe would not suffer any irremediable harm if the injunction is granted. They referred to ***American Cyanamid (supra)*** to emphasize that the

injunction is necessary where the Defendant is not able to pay them for their loss and the damage caused. Therefore, the Claimant stated that there is no reason why the Court should refuse the interlocutory injunction.

[15] The Claimant highlighted the case of ***Azzuro Coat Limited v Dennis Atkinson et al*** [2016] JMMCC COMM 36 to state that by virtue of them being the registered owner of the property it is enough reason why the injunction is necessary and would not cause irreparable harm. They submitted that there is a strong prima facie case in their favour and it is just and convenient for the Court to grant the injunction they have sought as Mr. Tharpe is unlikely to be able to compensate them.

The Defendant

[16] The Defendant, Mr. Tharpe represented himself and referred to himself as the Claimant/Defendant in the some of the court documents filed. In his submissions, he stated that there are four issues for the court to determine. They are:

- i. Does Steven Rapier have standing to have filed this claim?*
- ii. Does Steven Rapier have any standing to Claim the Defendant is trespassing on property to which the Defendant has had in his possession for more than 12 years in keeping with the Charter of Fundamental Rights and Freedom of the Jamaican Constitution [the limitations Act]?*
- iii. Does Steven Rapier or any Party represented by Steven Rapier, including Capital One N.A. AND THE Alexander Burnham Trust have any legal interest in the subject 15 Queens drive property.*
- iv. Does Steven Rapier; the Alexander Burnham Trust, Capital One N.A. or Myers Fletcher & Gordon have any standing to have withdrawn Damages owed to the Defendant, Anthony Tharpe, other Damaged parties, or the Successors in interest of Business Ventures & Solutions Inc?*

[17] Mr Tharpe stated that this claim was an attempt by Capital One N.A to scam him and the successors in interest of Business Ventures & Solutions Inc. In his oral submissions, he stated that the US Court orders are not applicable and thus cannot be enforced in Jamaica. He stated that ownership can only be transferred by resolution from the Directors and Shareholders. Whereas trustees manage a trust and cannot be in charge of the properties they claim were attached to the Affidavit of Mr Rapier.

[18] On the point of the injunction Mr Tharpe said that he has been in possession of the property since September 2005 and received permits since 2008. He argued that the Constitution says not even an arm of government can dispossess a person who has been in possession since then. He also stated that BVS has not paid costs or damages and the Jamaican economy is suffering because of the fraud that has taken place.

ISSUE

[19] Whether it is just and convenient for the Court to grant an interim injunction restraining Mr Tharpe either by himself or through his agents and or servants from entering, altering, or otherwise interfering with the Property.

LAW AND ANALYSIS

Issue- Whether it is just and convenient for the Court to grant an interim injunction restraining Mr Tharpe either by himself or through his agents and or servants from entering, altering, or otherwise interfering with the Property.

[20] ***West Junior v Gerald Miller [2017] JMSC Civ. 105*** states that interlocutory injunctions prevent litigants from losing by a delay what would be the fruits of the

litigation. At paragraph 9 Palmer- Hamilton, J referred to ***National Commercial Bank Jamaica Ltd., v Olint Corporation Ltd (Jamaica)*** [2009] 1 WLR 1405 to outline the purpose of interlocutory injunctions. The view expressed by the Privy Council states its purpose is “*to improve the chance of the court being able to do justice after a determination of the merits at the trial*”. Therefore, this Court will consider whether the grant of an interlocutory injunction in the instant case is just and convenient.

Is there is a serious issue to be tried?

[21] ***American Cyanamid v Ethicon Limited*** [1975] 1 AC 396-410 is the widely accepted position of the law on the grant of interlocutory injunctions. It provides the framework for the considerations this Court must give in determining whether it is just and convenient to grant an interlocutory injunction in the instant case. ***American Cyanamid*** establishes that before an injunction is granted the court must consider whether:

- i. There is a serious issue to be tried and if the Claimant has a real prospect of succeeding in the claim for a permanent injunction at the trial.
- ii. Damages are not an adequate remedy; and
- iii. The balance of convenience lies in favour of granting or refusing the interim injunction.

[22] In determining whether there is a serious issue to be tried, Lord Diplock at paragraph 404 of *American Cyanamid* referred to a statement made by Russell L.J. in his concluding paragraph of the judgment. Russell L.J. said:

“...if there be no prima facie case on the point essential to entitle the plaintiffs to complain of the defendants’ proposed activities, that is the end of the claim to interlocutory relief.”

[23] In addition, the case states that if damages can be recovered at the common law and the defendant is financially able to pay them, there should be no need for the grant of an interlocutory injunction. However, the Court must consider the balance of convenience which is the extent of the disadvantage that may result to each party because of the grant of the injunction. To ensure that the grant of the injunction is fair to both parties, the extent of the “*uncompensatable disadvantage*” should not widely differ between the parties.

[24] As the sole director and president of BVS, Mr Rapier’s use and enjoyment of the Property has been significantly affected by the actions of Mr. Tharpe. He is unable to sell the Property because Mr. Tharpe himself or through his agents and or servants have been constructing buildings on the Claimant’s property without permission. This presents a significant challenge because the Claimant is the one who is the registered proprietor and not the Defendant and as such the Defendant has no legal right to act in this manner. This Court believes that the affidavit evidence of Mr Rapier makes a very strong prima facie case that there is a serious issue to be tried and that the Claimant has a real prospect of succeeding in the claim for a permanent injunction at the trial.

Are damages an adequate remedy in the circumstances?

[25] ***American Cyanamid (supra)*** states that an interim injunction should not be granted if damages are recoverable at the common law, would be adequate and the Defendant can afford to pay them. This case makes it clear that an injunction should only be granted where damages are inadequate. In the instant case, the evidence indicates that Mr. Tharpe, filed for bankruptcy on February 22, 2017. It is arguable that because he filed for bankruptcy that he would not be able to compensate the Claimant for the extent of loss and damage caused by his actions. Therefore, the

only appropriate remedy in the circumstances would be for the court to grant the interlocutory injunction.

Where does the balance of convenience lie?

[26] Section 49 (h) of the Judicature (Supreme Court) Act provides:

A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[27] Based on Section 49 (h) of the Act this Court has the authority to grant the injunction sought by the Claimant if the evidence indicates that it would be just or convenient to grant it. In the instant case the evidence is that the Defendant, Mr. Tharpe does not have any claim of title or otherwise of the Property. However, he has trespassed and altered the Property without BVS' permission.

[28] *Junior West v Gerald Miller* [2017] JMSC Civ. 105 states that the Court should consider the adequacy of damages to each party in the balance of convenience. If the Claimant fails at trial, the Court should consider whether their undertaking would adequately compensate the Defendant for any loss caused to them by the grant of the injunction and vice versa if the injunction was not granted. In the case at bar, the evidence is that Mr. Tharpe, who filed for bankruptcy in 2017 did not give an undertaking that if he fails at the trial he could compensate the Claimant for their loss if the injunction sought is not granted.

[29] *Berton J in Goyal v Chandra* 68 NSWLR 313 emphasized that the onus is on the Applicant to show that if the injunction is not granted, they will suffer injury that cannot be compensated for afterwards with damages. The evidence before this Court is that BVS is likely to suffer injury and Mr. Tharpe based on his declaration of bankruptcy and the ruling of the Southern District of Florida Court may not be able to compensate them.

[30] Based on *NCB v Olint Corporation (supra)* and *American Cyanamid (supra)* this Court has considered the extent of the disadvantage the grant of this injunction would cause to both parties whether it is likely to cause "...irremediable prejudice to one party or the other." Mr. Tharpe's action of trespassing and altering the Property is a hindrance to BVS. Without this injunction, Mr. Tharpe is very likely to continue trespassing and the altering the Property. This has and is still causing irremediable prejudice to BVS, the registered proprietor who is now unable to exercise their legal right to enjoy and sell the Property.

[31] Having considered the evidence, this Court finds that the balance of convenience lies in the favour of BVS. The grant of the interim injunction is not likely to cause a significant disadvantage to the Defendant. In fact, if Mr. Tharpe were to continue with his actions it would result in a significant disadvantage to the Claimant. Therefore, this Court believes that the balance of convenience lies in favour of granting the interim injunction.

CONCLUSION

[32] Accordingly, the Court makes the following Orders:

1. The Defendant is restrained until the determination of this claim, whether by himself, his servants, agents, or any of them or otherwise howsoever from entering, altering or otherwise dealing with:
 - a. ALL THAT parcel of land part of Palm Beach situated in the Town of Montego Bay in the parish of Saint James containing by survey twenty- four thousand seven hundred and nine square feet and thirty -five hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof and being part of the land comprised in Certificate of Title Registered at **Volume 665 Folio 10** in the Register Book of Titles;
 - b. ALL THAT parcel of land part of Palm Beach situated in the Town of Montego Bay in the parish of Saint James containing by survey forty-four thousand one hundred and forty-eight square feet and seventy- seven hundredths of a square foot of the shape and dimensions and butting as appears by the plan thereof and being part of the land comprised in Certificate of Title Registered at **Volume 665 Folio 11** in the Register book of Titles;
 - c. ALL THAT parcel of land part of Palm Beach situated in the Town of Montego Bay in the parish of Saint James containing by survey fifty-nine thousand five hundred and ten square feet of the shape and dimensions and butting as appears by the plan thereof and being comprised in Certificate of Title Registered at **Volume 650 Folio 65** in the Register book of Titles;

together known as **15 Queens Drive, Montego Bay St. James.** (“the Property”)