[2023] JMSC Civ.136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. SU2022CV03148

BETWEEN	**NORMAN STEPHENSON**	**CLAIMANT/APPLICANT**
AND	**WOOF GROUP LIMITED**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Dr Marcus Goffe instructed by Goffe Law Attorneys-at-Law for the Claimant/Applicant

Ms Stephanie Ewbank and Mr Jacob Phillips, instructed by Myers, Fletcher & Gordon Attorneys-at-Law for the Defendant/Respondent

Equity – Injunction – Interlocutory Injunction – Serious issue to be tried – Adequacy of damages – Adverse possession

Heard on December 1, 2022, December 8, 2022, January 13, 2023, February 3, 2023, February 24, 2023 and March 22, 2023

M. JACKSON, J (AG)

Introduction

[1] This is an *inter partes* hearing on an application filed by Mr Norman Stephenson ("the Applicant") for an interim injunction to restrain Woof Group Limited ("the Respondent"), whether by itself or by its servants, agents or otherwise, from entering, remaining on or otherwise interfering with or trespassing on land comprising 2.7 acres, being part of the land registered at Volume 1037 Folio 141 of the Register Book of Titles ("the disputed area"), until the final determination of the Applicant's claim. The Applicant is claiming to be the legal owner of the disputed area by virtue of adverse possession and has filed a claim in the

Supreme Court seeking a declaration in this regard, among other things ("the Applicant's claim").

[2] This hearing stems from an *ex parte* application filed by the Applicant on October 13, 2022. On October 21, 2022, Lawrence-Grainger J heard the *ex parte* application and, on that date, granted an interim injunction against the Respondent until November 18, 2022, and ordered that an *inter partes* hearing be fixed for November 18, 2022. The Applicant was also ordered to serve the Claim Form, Particulars of Claim and Supporting Affidavits on the Respondent on or before October 24, 2022. It is the *inter partes* hearing that is now before me.

[3] The Applicant is seeking an interim injunction against the Respondent on the following grounds:

I. The matter is an emergency and is very urgent.

II. The Applicant has a real prospect of succeeding on the claim.

III. It is in the interest of justice and the overriding objective of the Civil Procedure Rules 2022 ("CPR").

IV. The Applicant undertakes to abide by an order as to damages caused by the granting or extension of the order.

[4] The substantive cause of action on which the Applicant's claim is premised was outlined in the Claim Form as follows:

> *"The Claimant, Norman Stephenson… claims declaration, an injunction and damages including aggravated and exemplary damages against the Defendant for adverse possession under the Limitation of Actions and the Registration of Titles Act, in respect of the 2.7 acres."*

[5] The declarations and orders sought in the Applicant's claim are set out in the Applicant's Particulars of Claim, which the court has conveniently summarised as follows:

(1) A declaration that the Applicant has been in open, quiet, undisturbed and undisputed possession of the disputed area in excess of 12 years and as such, the Respondent's title is extinguished.

(2) A declaration that the Applicant is the legal owner of the disputed area.

(3) An order that the Respondent deliver the Duplicate Certificate of Title to the Applicant.

(4) An order that the Certificate of Title be cancelled by the Registrar of Titles and a new Certificate of Title be issued by the Registrar of Title in the name of the Applicant, in respect of the disputed area occupied by the Applicant and his family.

(5) An injunction restraining the Respondent, whether by itself or by its servants, agents or otherwise howsoever, from entering, remaining on, or otherwise interfering with or trespassing on the disputed area.

(6) Interest pursuant to the Law Reform (Miscellaneous Provision) Act.

(7) Costs, including Attorney's costs.

(8) Damages, including aggravated and exemplary damages.

[6] Before discussing the substantive application, for which this court is asked to make a determination, a brief summary of the factual background which gave rise to the proceedings will be necessary. The pertinent facts are extracted from the parties' statement of case.

The Background

[7] The disputed area in contention between the parties, is 2.7 acres of beachfront property forming part of a larger parcel of land known as Sugar Loaf Mountain in the parish of St Thomas. The size of the larger parcel of land is approximately

200 acres, as described in the Certificate of Title registered at Volume 1037 Folio 141 of the Register Book of Titles.

[8] The parcel of land, inclusive of the disputed area, was sold to the Respondent by the registered owner, Leslie Wright, on November 11, 2019. Both the Respondent and the Applicant became aware of each other in or around 2020. As the new registered owner, the Respondent, acting on its intention to build a hotel on the land, sought to have persons occupying the land vacated. However, the Applicant has contended that he has been in open, quiet, and undisturbed possession of the disputed area for over 12 years, and, thus, on the basis of adverse possession, he is the owner of the disputed area.

[9] The foundation of the Applicant's claim to the disputed area is grounded in his family's long-standing connection to the disputed area. The Applicant has asserted that from the 1950s, his father, Gladstone Stephenson, an elder of the Nyahbinghi Rastafarian community, lived on the disputed area until his death in 2007. The Applicant deposed that his father built the first tabernacle and several other buildings within the disputed area, including a business place and a house, where the family continued to live even after his father's death.

[10] The disputed area became popular among members of the Rastafarian community, particularly the late renowned legendary singer, Robert Nesta Marley, known worldwide by his stage name Bob Marley. The beach was subsequently named "Bob Marley Beach".

[11] The Applicant maintained that throughout his father's and his family's long-standing occupation of the disputed area and later, his own occupation and investments, he was at all material times entitled to the ownership of the land and was also at all times the beneficial owner. Therefore, he is entitled to the disputed area by reason of adverse possession under the **Limitation of Actions Act** and the **Registration of Titles Act**.

<u>The Applicant's case in support of the Application</u>

[12] In support of the Application, the Applicant relied on affidavits sworn to by himself, his father's sister, Gladys Stephenson, and Stephanie Marley, a daughter of the late Bob Marley. Both the Applicant and Gladys Stephenson filed three affidavits each.

[13] The Applicant's Particulars of Claim, for the most part, contains similar averments as the affidavits in support of his application. The evidence from these affidavits chronicled the Stephenson family's, particularly the Applicant's father, Gladstone Stephenson, connection to the disputed area.

[14] In summary, the Applicant relied on the following evidence in support of his application:

(i) He is a dual citizen of the United Kingdom and Jamaica, and he has a home in both places.

(ii) He is the owner and taxpayer of the disputed area and his connection to the disputed area dates from as far back as 1992, when he helped his father to build on the land.

(iii) Since 1992, whenever he visited Jamaica, he lived on the land with his father for up to 3 – 6 months at a time and assisted his father in maintaining the disputed area. He was very involved in the community and during those years, he undertook significant expenditures on the land and continued to undertake investments even after his father's death in 2007.

(iv) He had assisted his father with the construction of the property on the disputed area, purchased materials to rebuild the tabernacle that was destroyed by a hurricane and renovated his father's house.

(v) His father has always claimed to be the owner of the disputed area.

(vi) From 2007, after his father's death, he and his family searched for title owner Leslie Wright as it was their intention to apply for adverse possession. However, their search was unsuccessful.

(vii) After his father’s death, between the period 2007 and 2009, other family members lived on the property, including his uncle, a cousin and a family friend.

(viii) Gladys Stephenson, who visited and cared for his father until his death, moved on to the disputed area in 2012 and established a business of her own. She lived on the disputed area without the obligation to pay rent because it was considered family land.

(ix) In 2015, approximately eight years after his father’s death, he took the initiative to get a title to the property through the Government of Jamaica’s Land Administration and Management Programme (“LAMP”) with the intention to possess the disputed area. He was instructed to provide certain documents and, in compliance with those instructions, he provided receipts for the property taxes, survey diagram, statutory declaration, his father’s identification, and survey declaration, in addition to paying up all property taxes up to 2019. However, he was unable to obtain his father’s death certificate.

(x) In 2018, he permitted a neighbour to set up and maintain a business within the disputed area.

(xi) In 2019, he resurfaced the road for access to locals and tourists, extended a car park beside the family house, and in 2020 he began the process of using truck tyres to protect the beach from erosion from the sea water.

(xii) In 2020 he lived with Gladys Stephenson for a period of 6 months and bought water tanks for his family and residents in the community, laid pipes for the property, and built a standing shower.

[15] The Applicant also provided the court with several receipts for the period 2018 – 2020, which itemised expenditures undertaken by him on the land. He deposed that it was his intention to build other structures and provide electricity to the residents of the community, but the pandemic halted those plans.

[16] He added that his brother, Donald Stephenson, also built on the land and renovated buildings, creating rooms and bathrooms for visitors.

[17] The Applicant stated that he is claiming the disputed area on behalf of himself and his family as their inheritance from his father. He maintained that he and his family have occupied the disputed area for over 60 years and that their collective possession of the disputed area predates the acquisition of the land by the Respondent. Therefore, the Respondent acquired the land and title subject to the possessory title in the disputed area occupied by him and his family.

[18] Miss Stephanie Marley, in her affidavit, detailed Gladstone Stephenson's and Gladys Stephenson's connection to the disputed area. She, however, did not mention the Applicant or provide any details of association with the disputed area. She further deponed her that her parents were very close to Gladstone Stephenson, whom she refers to as "Bongo Gabby".

The Respondent's response in opposition to the Application

[19] The Respondent relied on affidavits filed on its behalf by Donovan Reid, Director of the Respondent's Company, Paul Cummings, Inspector of Police assigned to the Kingston Eastern Police Division, Judith Tingling, Compliance Manager at Tax Administration Jamaica, and Donald Stephenson, the brother of the Applicant.

[20] Of major note was the affidavit evidence of Donald Stephenson which sought to refute the facts presented by the Applicant. In stark contrast to the evidence of the Applicant, Donald Stephenson averred that the Applicant has never lived on the disputed area or had possession of any part of it. He averred that the Applicant has always lived in the United Kingdom and that he was very surprised to learn that the Applicant had filed a claim with respect to the disputed area on the basis of adverse possession.

[21] Donald Stephenson further asserted that the Applicant was not being truthful when he deposed in his affidavit that he had visited Jamaica and stayed with their father for 3 – 6 months at a time and that he had built a structure on the disputed area. He deposed that between 2007 and 2009, no one was living on the disputed area, and during that period, their father's house was occupied by goats. He further stated that no one occupied the house between 2015 and 2018, and he was the only one with access to it. With respect to his aunt, Gladys Stephenson, he stated that she did not move onto the land until 2018, and it was he who permitted her to occupy the same on the agreement that she would pay him rent, which she never did. He also averred that Gladys Stephenson did not construct any building on the disputed area.

The Applicable Law

[22] McDonald-Bishop JA opined in **Associated Gospel Assemblies v Jamaica Cooperative Credit Union League Limited and another** [2022] JMCA Civ 36 that:

> *"[42] The first point of departure in considering the appropriateness of granting injunctive relief is the Judicature (Supreme Court) Act, section [49(h)], which empowers the Supreme Court to grant an injunction by an interlocutory order 'in all cases in which it appears to the Court to be just or convenient that such order should be made'. The applicable law also includes the well-settled principles that govern the grant of an interlocutory injunction as laid down in the well-known cases of* ***American Cyanamid Co v Ethicon Ltd*** *[1975] 1 All ER 504 ('American Cyanamid') and* ***National Commercial Bank Jamaica Limited v Olint Corp. Limited*** *[2009] UKPC 16 ("NCB V Olint")."*

[23] The principles distilled from **American Cyanamid Co v Ethicon Ltd** [1975] 1 All ER 504 ("**American Cyanamid**")**,** as applied in **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 ("**NCB v Olint**")**,** are as follows:

> (a) The claim must not be frivolous or vexatious: in other words, there must be a serious question to be tried.
>
> (b) The court should not try to resolve conflicts of evidence or undertake a detailed consideration of the law. Rather, if there is a serious question to be tried, it should proceed to consider the balance of convenience.
>
> (c) As to the balance of convenience, the court should first consider whether, if the Claimant were to succeed at the trial in establishing his rights to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the trial.
>
> (d) If common law damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appeared.
>
> (e) If, however, damages would not be an adequate remedy for the claimant in the event of his succeeding at the trial, the court should then consider whether, if the defendant were to succeed at trial in establishing his right to do that which was sought to be restrained, the defendant would be adequately compensated by an award of damages under the claimant's undertaking in damages.
>
> (f) If damages in the measure, recoverable under that undertaking, would be an adequate remedy and the claimant would be in a financial position

to pay them, there would be no reason upon this ground to refuse the interim injunction.

(g) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, then the general balance of convenience arises.

(h) Where the factors relevant to the general balance of convenience are evenly balanced, the court will generally take such measures as may be necessary to preserve the status quo.

[24] In **NCB v Olint,** Lord Hoffmann, in delivering the decision, stated that:

> *"[16] …It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial… The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result…*
>
> *[17] …The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other…*
>
> *[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."*

[25] While the foregoing principles will help guide the court's deliberations, the decision whether to grant the interim injunction sought by the Applicant is also influenced by the law governing adverse possession. In **Allen v Matthews** [2007] EWCA Civ 216, the Court of Appeal of England and Wales outlined the requirements that must be established in a claim for adverse possession. At paragraph 85, Lawrence Collins LJ said, in part:

> *"[85] …A person seeking to establish title to land by adverse possession must show that for the requisite period of time (1) he had factual possession of the land; (2) he had the requisite intention to possess (animus possidendi); and (3) his possession of the land had been 'adverse' within the meaning of the Act. In relation to factual possession the test is whether the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so. As to intention, what is required is not an intention to own or even to acquire ownership, but an intention to possess to the exclusion of others, including the owner with the paper title. See* ***Powell v McFarlane*** *(1977) 38 P&CR 452, 471;* ***Buckingham County v Moran*** *[1990] Ch 623, 639-643, [1989] 2 All ER 225, 88 LGR 145;* ***JA Pye (Oxford) Ltd v Graham*** *[2002] 3 All ER 865. As in* ***Lambeth London Borough Council v Bidgen*** *[2002] EWCA Civ 302, (2001) 33 HLR 43, it is not necessary for the adverse possession to be by one person for the whole period. As long as the period of adverse possession is continuous, the adverse possession of successive squatters may be aggregated."*

[26] In the same way, in **JA Pye (Oxford) Ltd and another v Graham and another** [2002] 3 All ER 865 ("**JA Pye (Oxford) Ltd v Graham**"), Lord Browne-Wilkinson quoting from the dicta of Slade J in **Powell v McFarlane** (1977) 38 P&CR 452, agreed that:

(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.

(2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (*animus possidendi*).

(3) Factual possession signifies an appropriate degree of physical control. It must be a single and exclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus, an owner of land and a person intruding on that land without his

consent cannot both be in possession of the land at the same time. The question of what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so.

Issues

[27] The issues relevant to the final resolution of these proceedings fall to be determined on three key considerations as recognised in **American Cyanamid.** These are**:**

i. whether there is a serious question to be tried;

ii. if there is a serious issue to be tried, whether damages would be an adequate remedy; and

iii. if damages would not be an adequate remedy or there is doubt as to the adequacy of damages as a remedy, whether the balance of convenience favoured the grant or refusal of the interim injunction.

Issue 1: Whether there is a serious issue to be tried

[28] Dr Goffe submitted that there is a serious issue to be tried, and it is in the interest of the Applicant that the interim injunction be granted. In advancing this position on behalf of the Applicant, he submitted that the Applicant is entitled to the disputed area by virtue of the **Limitation of Actions Act** and relied on section 3 of the said Act. He also relied on the case of **Chisholm v Hall** (1959) 1 WLR 413, which was affirmed in **Recreational Holdings (Jamaica) Limited v Lazarus** [2016] UKPC 22.

[29] Dr Goffe contended that by the time the Respondent acquired the land, the time had already begun to run against the title of the Respondent's predecessor, Leslie Wright, and even those before Leslie Wright, owing to the Applicant's father's, long-standing occupation and possession of the disputed area which was well in excess of 50 years. Counsel argued that the Applicant's father had clearly established his intention to possess and utilise the disputed area exclusively with the several things he did on the land in the 1950s. In that regard, he submitted that by the time the Respondent purchased the land in 2019, their title to the disputed area had already been extinguished in favour of the Applicant's father. He relied on several cases, including **Brown and another v Faulkner** [2003] NICA 5 and **Treloar v Nute** [1976] 1 W.L.R 1295.

[30] After the Applicant's father died in 2007, the Applicant commenced the process to claim the disputed area and acted upon those land rights. This included obtaining a survey of the disputed area in 2008.

[31] Dr Goffe submitted that continuous possession had been maintained by the Applicant's father from the 1950s until 2007, when he died and that, thereafter, the Applicant and other members of the Stephenson family have maintained, repaired, developed and preserved the property and paid property taxes with respect to the disputed area. Counsel argued that on those bases, the Applicant had exercised possession and control of the disputed area over those years.

[32] Dr Goffe maintained that the Applicant, as the first child of the deceased Gladstone Stephenson, had exercised possession and ownership of the disputed area on behalf of himself and the Stephenson family. Accordingly, he has filed a claim as successor to his father and as an equitable owner/beneficiary of the disputed area that was occupied and owned by his father based on adverse possession.

[33] In response, Miss Ewbank, on behalf of the Respondent, argued that there is no serious issue to be tried as the pleadings and the affidavits relied on by the

Applicant failed to establish the requisite ingredients to ground a claim in adverse possession. She further argued that even though the court is not called to determine issues of fact at this stage, the affidavit evidence of the Applicant's brother, Donald Stephenson, confirmed that the Applicant has never lived on or possessed any portion of the disputed area.

[34] Miss Ewbank also submitted that the Applicant has failed to delineate the period within which he possessed the disputed area on his own to the exclusion of others, which is an important criterion in satisfying a claim of adverse possession. She noted that this must be viewed against the background that both the Applicant and his aunt, Gladys Stephenson, gave affidavit evidence that Donald Stephenson built on the disputed area without the Applicant's permission.

[35] Counsel argued that, even on the basis of group possession relevant to the law of tacking on, the Applicant has not shown that he had been in possession of the property at any time. She relied on **Ewers (Executrix of the Estate of Mavis Williams) v Barton–Thelwell** (2017) 91 WIR 441. She submitted that the Applicant, having failed to adduce evidence of his own occupation, has sought to rely on the occupation of others, which she argued is not sustainable in law. Counsel maintained that the Applicant cannot claim title through his father and must clearly delineate sole, open, quiet, undisturbed, undisputed and continuous possession of the disputed area in keeping with the established authority. In this regard, she relied on the cases of **Allen v Matthews** [2007] EWCA Civ 216 and **JA Pye (Oxford) Ltd and Another v Graham and another** [2002] 3 All ER 865.

[36] Counsel contended that these defects are fatal, and all point to the conclusion that there is no serious issue to be tried.

[37] The granting of an interim injunction is a discretionary relief by the court. Consequently, the court will always exercise great caution before granting an interim injunction. I rely on the guidance provided by Whitford J in **Landi Den**

Hartog B.V. v Sea Bird (Clean Air Fuel System) Ltd [1976] F.S.R. 489 at 504, that:

> *"… relief by way of injunction is relief which is never lightly granted and in interlocutory proceedings the court, in any event, must be satisfied that there is a real apprehension that if steps be not taken to preserve a party's interest in property, then irreparable damage may be done"*

[38] The Applicant must show that he would suffer substantial prejudice or hardship in a material respect if he were confined to the other remedies, such as damages. In the **Celanese Corporation v Akzo Chemie UK Ltd** [1976] F.S.R. 273 at 275, Whitford J, said,

> *"… the grant of an interlocutory relief has always been considered the grant of relief of a somewhat exceptional character, and it is inappropriate to grant relief of this nature unless it is absolutely vital in order to protect the legitimate interest of the plaintiff that such relief be granted".*

[39] It is accepted, and for obvious reasons, that the issue as to whether there is a serious issue to be tried, is a condition precedent. This means that the Applicant must first satisfy this court that there is a serious issue to be tried in the claim brought by him. Accordingly, if the court finds that there is no serious issue to be tried, then the application for the interim injunction fails *in limine.*

[40] In **Tetrosyl Ltd v Silver Paint and Lacquer Co. Ltd** [1980] FSR 68, Lawton L.J in providing context and an interpretation on the question of whether there is a serious issue to be tried, noted that "[a] serious question …can only arise if there is evidential backing for it". Accordingly, a determination by this court as to whether there is a serious issue to be tried will, of necessity, require the court to examine the substance of the claim being pursued by the Applicant against the Respondent. The pleadings indicate the issues to be determined at trial, and it is from them, in conjunction with the evidence relied on to support the application, that this court would be able to conclude at this *inter partes* hearing whether there are serious issues to be tried.

[41] At the same time, the law is clear that a degree of caution must be exercised to ensure that the court does not undertake an investigation tantamount to a mini-trial of the action upon evidential material, which is different from that in respect of which the actual trial will be conducted. I remind myself of the pronouncement of Lord Diplock in **American Cyanamid**, at page 510:

> *"…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**… 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 relief that is sought." (Emphasis added)*

[42] Therefore, at this stage of the litigation, it is not part of this court's function to try and resolve conflicts of evidence on affidavit as to facts on which the case of either party may ultimately depend or to decide difficult questions of law which call for detailed arguments and mature consideration.

[43] The rationale behind this caution is not only obvious but is necessary, as oftentimes counsel for an applicant, in an attempt to satisfy the court, adduces evidence and a bundle of documents indicating a serious issue to be tried, and the respondent rejoins with documents of equal weight. This may trigger the Applicant to adduce further evidence and documents. In **Alfred Dunhill Ltd v Sunoptic SA and another** [1979] FSR 337, a decision from the United Kingdom Court of Appeal, it was held that:

> *"The massiveness of evidence and the length of the argument on the issue as to the chances of the plaintiffs' success –the forbidden issue– have about come without any impropriety on the part of either party in their general approach to this application for an interlocutory injunction. They have come about because, first, as I suppose is only natural, the plaintiffs, in putting forward their claim, were concerned to omit nothing*

> *that might assist to show that they had at least a good arguable case. The defendant then sought to show that the plaintiffs did not have even an arguable case. Whether or not in the circumstances that was realistic, the defendants were entitled, under the American Cyanamid, doctrine, to seek to show, if they could, that there was no real cause to meet. So they, in their turn, deployed lengthy affidavits, with exhibits, in support of that contention. The plaintiffs, in turn, replied with much further material in answer."*

[44] This court, however, accepts that it is nonetheless open for a court to decide at the interim hearing that there is no serious issue to be tried if the material available fails to disclose that an applicant has any real prospect of succeeding in his action for a permanent injunction at the trial.

[45] It is convenient at this juncture to highlight that the court, in advance of the hearing of this application, heard a preliminary objection filed by the Respondent on whether the Applicant is entitled to rely on his father's long-standing connection to the disputed area to ground his possession in the disputed area, in the absence of a grant of letters of administration. The Respondent relied on the cases of **Evon CA Bennett v Raymond Ramdatt** [2022] JMCA Civ 16 and **Noranda Jamaica Bauxite Partners v Mannasseh Thomas and Gerald Thomas** [2020] JMCA Civ 1.

[46] Dr Goffe, on behalf of the Applicant, argued that the Applicant's claim was not based on his father's possessory title but on the Applicant's own possessory title. Counsel strongly argued that the Applicant merely relied on his father's long-standing connection because of the unique history of the disputed area, which he contends is not an ordinary piece of land, coupled with the Rastafarian community's own connection with the area.

[47] At the end of hearing submissions from both sides, the court ruled that the Applicant could not rely on his father's long-standing connection to the disputed area and must present evidence of his own entitlement.

[48] Subsequent to the hearing of the preliminary objection, both parties filed additional affidavits to further buttress their case. However, there were no amendments to the pleadings by the Applicant.

[49] For the court to conclude that there is a serious issue to be tried in keeping with the prevailing law, the evidential substratum as it relates to adverse possession must be clearly established. In other words, I must be satisfied at this stage that the applicant has advanced the preconditions to ground a claim in adverse possession. I must be satisfied that the matters raised in the Applicant's claim are not frivolous or vexatious and that his application for the interim injunction disclosed that he has a real prospect of succeeding in his claim for a permanent injunction at the trial. Dr Goffe argues that the Applicant does. Miss Ewbank contends he does not.

[50] The Applicant's pleadings, in its current form, lend itself to significant doubt as to whether there is a serious issue to be tried. In his affidavit sworn to on November 22, 2022, the Applicant affirms his position in the following terms:

> *"3. As explained in the previous affidavit filed on the 13th of October 2022, I claim this property on behalf of myself and my family as our inheritance from my dearly beloved father.*
>
> *4. I have always considered it my duty as the first child of my father and as a Rastaman to help him to secure his home and his legacy and that of the Rastafari community on the beach at Bull Bay. On that basis, over the years I have spent millions of Jamaican dollars on developing, repairing, maintaining and preserving our Stephenson family property and the surrounding community, in terms of infrastructure, amenities and resources.*
>
> *…*
>
> *21. My family and I have occupied the land of Sugar Loaf Mountain for over sixty (60) years. Our collective possession of the land predates the acquisition of the land by the [Respondent]. The [Resondent] therefore acquired the land and title subject to the possessory title in the 2.7 acres of land occupied by my family and me.*
>
> *22. My family and I are therefore entitled to title by limitation (adverse possession) in the 2.7 acres which my family and I have occupied for over sixty years. By the time the [Respondent] acquired title for the*

132 acres, my family and I had already been in undisturbed possession of our 2.7 acres for a period well in excess of 12 years and therefore the [Respondent's] title to the disputed 2.7 acres of the property within its 210 acre property title, had already been extinguished.

23. I therefore humbly request that this Honourable Court grant the Orders in terms of the Notice of Application for Court Orders filed in this claim and stop the [Respondent] company from depriving my family and me of our rightful, lawful property rights in our land."

[51] The court makes several observations. The first observation is that although the Applicant at paragraph 3 of his affidavit sworn to on November 22, 2022, stated that he "claim this property on behalf of [himself] and [his] family", the declarations and orders sought by the Applicant in his claim are with respect to himself, solely. Nonetheless, he has relied heavily on his father's occupation of the disputed area, and the occupation of other members of the Stephenson family to buttress his claim. Additionally, even though the Applicant said he commenced the process to obtain a title for the disputed area through LAMP, the requirement of the death certificate of his father, Gladstone Stephenson, also suggests that the Applicant had intended to rely on his father's long-standing possession to obtain a title for the disputed area.

[52] Secondly, although the Applicant in his claim is seeking, among other things, a declaration that he has been in open, quiet, undisturbed and undisputed possession of the disputed area in excess of 12 years, the Applicant's own evidence is that his brother, Donald Stephenson, has renovated the building on the disputed area without his permission, which later led to a dispute. Gladys Stephenson, in her affidavit filed on November 23, 2022, in support of the Applicant's application, also stated as follows:

"11. Behind the [Applicant's] back, Donald renovated the building, creating rooms and bathrooms for guests. Shortly after there were disputes, one regarded another business venture Donald started which involved the removal of sand from the beach. This too went against Rastafarian respect for nature. These disagreements caused Donald Stephenson to vacate the beach by 2012. Donald stated he wanted nothing more to do with the beach, giving the responsibility of

> *the building to me. I did not build anything on the land, but I have spent monies maintaining, repairing and developing the property."*

[53] Thirdly, the Applicant has not delineated a clear period where he was in sole, open, quiet, undisturbed, undisputed, and continuous possession of the disputed area for a period of 12 years or more. The court notes that with respect to the many receipts provided by the Applicant as proof of expenditure made by him in connection to the disputed area, the dates of the receipts were between the period 2018 and 2020. The receipts provided, therefore, is insufficient to show the Applicant's purported expense on, and occupation of, the disputed area outside of the period 2018 to 2020, or that such expense was incurred on his own and to the exclusion of others.

[54] It is settled law that a claim for adverse possession must comprise two essential elements: (i) a sufficient degree of physical custody and control (factual possession); and (ii) intention to exercise such custody and control on one's own behalf and for one's own benefit (the intention to possess) as set out in **JA Pye (Oxford) Ltd v Graham**.

[55] Accordingly, the Applicant would have to satisfy the court at trial that he not only had continuous factual possession of the disputed area for 12 years or more years, but that he also had the requisite intention to possess the same to the exclusion of all others, including the predecessors in title. On the Applicant's own case, there is significant doubt as to whether he had exercised sole, open, quiet, undisturbed, undisputed, and continuous possession over the disputed area in order to convince the court, at this stage, that he has a real prospect of succeeding in his claim at trial and, thus, there is a serious issue to be tried. This court is of the view that from the evidence adduced, the Applicant faces considerable challenges in making good on his claim.

[56] I agree with Miss Ewbank, that the Applicant's pleadings and the lack of evidence provided in support of the application for an interim injunction raise serious doubts as to acts of factual possession on his own behalf and for his own benefit.

[57] Equally, even if the Applicant's aunt, Gladys Stephenson, were to be considered an agent of the Claimant, based on the Applicant's own case, she has only been on the property for ten years.

[58] The Court is of the view, based on the lack of evidence before it, that the Applicant faces a huge hurdle in establishing the right to the relief sought on his claim.

[59] In this regard, the court does not find that there is a serious issue to be tried in the substantive action. The Applicant has failed, at this stage of the proceedings, to provide satisfactory evidence to support the likelihood of success of his Claim. For the avoidance of doubt, the court has come to this finding not by preferring one side's account over the other but having recognised that on the Applicant's own account, he has failed to surpass the first limb of the test set out in **American Cyanamid** and as applied in **NCB v Olint**, that there is a serious issue to be tried.

Would damages be an adequate remedy?

[60] Though I have already found that there is no serious issue to be tried, in the event I am wrong on that finding, I have also considered the second limb of the test as to whether the application for an interim injunction ought to be granted. Even if it were otherwise proven that there is a serious issue to be tried, that does not mean that the court ought to grant the application. There must be further consideration within the **American Cyanamid** guidelines to determine whether, if an interim injunction is granted, the Applicant is able to give an undertaking to adequately compensate the Respondent for any loss if, at the trial of the substantive claim, the court finds that the Applicant was not entitled to the injunction.

[61] In his third Affidavit filed on January 20, 2023, several months after the Application was filed, the Applicant gave an undertaking to abide by any order as to damages. However, the Applicant has failed to provide evidence of his

financial standing in support of that undertaking. Miss Ewbank argued that the authorities are clear that an Applicant is to provide evidence of his/her financial means. She further argued that in the context of these proceedings, the Applicant was put on notice of the Respondent's high-value development. In these circumstances, she strongly contended that the Applicant must show that he can satisfy an undertaking as to damages in light of the million-dollar contracts already undertaken by the Respondent.

[62] In this regard, Miss Ewbank relied on **TPL Limited v Thermo-Plastic (Jamaica) Ltd** [2014] JMCA Civ 50, where at paragraph 67 Mangatal JA (Ag), as she then was, stated as follows:

> *"[67] …The proper and usual practice and law is, and has been, to require **evidence both of a willingness and an ability to provide a proper undertaking as to damages.** It would be quite impossible to carry out the balancing exercise required by the court as referred to in **American Cyanamid** and more recently **NCB v Olint** and to arrive at a proper assessment of which course is likely to cause the least irremediable prejudice without requiring some substantiation of an applicant's posture and capacity to pay damages in the event that they are required to do so. Indeed, the practice has been particularly so in relation to companies, and commercial matters. Some authorities even go as far as to suggest that where a company is concerned, financial statements, records or accounts should be placed before the court in order that the court can properly assess the adequacy of the remedy of damages to the defendant and the claimant's financial ability to pay them. It is trite that the courts act on evidence and not bare assertions. Of course, in this case, the respondent did not even express a willingness to give an undertaking as to damages, much less assert or elucidate upon its financial ability to fulfil such a commitment." (Emphasis added)*

[63] The evidence of the Applicant's financial position regarding his ability to pay came directly from the Respondent's own investigations. Mr Donovan Reid, in an affidavit filed on February 17, 2023, deposed that:

> *"15. The Claimant's adverse possession claim lacks merits as he has lived in the U.K since the age of 16. He also is not in a position to honour any undertaking as to damages that may be suffered by The Woof Group Limited as a result of the injunction(s) granted in this matter. The Claimant started a GoFundMe campaign on November 22 to raise money to pay his legal bills, which campaign had raised some 565 U.K. Pounds*

the last time I checked in January 2023. A copy of the GoFundMe page is exhibited hereto and marked DR-2 for identification."

[64] Dr Goffe submits that a "GoFundMe campaign" is not determinative of one's financial status, a position with which this court is entirely in agreement and for which Miss Ewbank also takes no issue.

[65] Dr Goffe further argued that because the subject of the dispute is land and the historical connection to the land, the long history of association with the land by the Stephenson family, damages would not be an adequate remedy. In this regard, he relied on the decision of Mangatal J, **in Ralph Williams and Others v The Commissioner of Lands and another** [2012] JMSC Civ 118.

[66] Miss Ewbank, however, asked the court to have due regard to the case of **Silver Sands Estate Limited v Lorenz Redlefsen** [2022] JMCA Civ 28, where at paragraph [65] P Williams JA stated that "[a]n undertaking as to damages is usually required on an application for an injunction". She argued that the Applicant's inability to give an undertaking as to damages is a factor that should be contemplated in the court's consideration of where the balance of convenience lies and which, she submitted, would ordinarily favour the refusal of the injunction. She went on to submit that the Applicant did not give an undertaking in his first Affidavit nor has he up to now put forward any evidence of his financial ability to satisfy an undertaking as to damages. She maintained that evidence of his financial ability is necessary at this stage, as at the conclusion of the trial, if it were to be found out that the Applicant is unable to abide by an undertaking as to damages, the Respondent will be exposed to irremediable prejudice.

[67] Miss Ewbank contended that given that the Respondent has contracted with multiple third parties for a development valued at US$200 million dollars on the land, it is more likely than not, in the absence of evidence of the Applicant's financial resources, that the Applicant would be unable to provide or satisfy a proper undertaking as to damages, the course most likely to cause the least

irremediable prejudice is for the injunction to be refused. At the end of the day, at this interlocutory stage, the court must adopt a course which seems likely to cause the least irremediable harm or prejudice.

[68] I am in agreement with Miss Ewbank. This Court holds the view that, in light of the prevailing circumstances, a mere bare assertion by the Applicant cannot be a proper response. The Applicant had clear notice from November 2022 as to the nature of the undertaking for damages that he would be required to give and provide evidence of his ability to give such an undertaking. Mr Donovan Reid, in his Affidavit filed on November 17, 2022, stated as follows:

> *"9. The ex parte injunction granted by this Honourable Court on October 21, 2022, is causing severe prejudice to the Defendant and any extension of this injunction will cause the Defendant irreparable harm which cannot be adequately remedied by way of damages.*
>
> *10. The Defendant has entered into an agreement with a third party for the development of a US$200 million resort on the land. The Defendant has also established and entered into agreements and or understandings with extensive global development teams of architects, interior designers, landscape architects, construction contractors, civil and structural engineers and project managers, among other services providers. In addition, the Defendant is in the process of preparing technical works and applications for various local planning, building, environmental and other required permits for the development.*
>
> *11. Further, the Defendant has a contractual obligation which must discharge within certain strict timelines, including completing certain aspects of the construction within the next few months. Time is of the essence and any extension of the injunction will impede the Defendant's ability to honour its contractual obligations within the stipulated timeframes, thereby exposing the Defendant to liability and massive financial loss"*

[69] While this court is in no way advocating that an interim injunction can never be granted in the case of an applicant being unable to provide proof that he can provide full payment for potential losses to be suffered by a company, I believe some evidence must be provided of both of "a willingness and an ability to provide a proper undertaking as to damages". The Applicant has provided no

evidence as to his ability to pay damages in the event that he is required to do so.

[70] I, accordingly, hold that in light of the prevailing circumstances of this case, the Court must have clear evidence from the Applicant that he has sufficient assets and financial means to enable him to comply with any undertaking as to damages. This is a relevant consideration for the court and cannot be too strongly emphasised. This Court is concerned that the only evidence of the Applicant's finances had to come from the Respondent's research.

[71] Similar concerns were raised in **Brigid Foley Ltd v Elliot**, [1982] R.P.C 433, Robert Megarry V.C, brought out this point when he opined that:

> *"One must add to that that although in this case the first Defendant raised in her affidavit of August 18, the question of the financial position of the plaintiff and gave some evidence as to her own financial position, the plaintiff, in its affidavit in reply, sworn on August 22, gave no information as to its financial position, save a statement to its turnover. I have allowed Mr Delacey to mention some figures in an unaudited balance sheet to December 31 last for the plaintiff, from which it appears that the plaintiff is a substantial company with a substantial sum of current assets. I should have been reluctant to dismiss the motion simply on the grounds of a failure to put in evidence that balance sheet; but I would emphasise that in applications for injunctions, especially since Cyanamid, one of the important matters always to be dealt with is the ability of a plaintiff to meet an undertaking in damages."*

[72] I am, therefore, in complete agreement with Miss Ewbank's submission that even if this court were to find that there is a serious issue to be tried, the absence of any evidence as to the Applicant's financial resources to satisfy an undertaking as to damages, in a matter involving land for commercial use and purposes, renders the Applicant's undertaking as to damages baseless. The absence of sufficient evidence in this regard is fatal to the application.

[73] In these circumstances, I find that the balance of convenience lies in favour of refusing the interim injunction and that there is no basis at this stage of the proceedings to maintain the interim injunction previously ordered. Accordingly, the application to extend the interim injunction is refused.

Costs

[74] On January 13, 2023, an order was made by this Court granting the parties liberty to file further affidavits where necessary, which were to be filed and exchanged on or before January 20, 2023. No further affidavits were to be filed thereafter.

[75] The Applicant served his further affidavit out of time and sought to make an oral application for relief from sanction, which this court was minded to hear. Miss Ewbank objected to the oral application and stated that she would require further instructions from the Respondent to be able to respond to the Applicant's application, and, as such, the application ought to be reduced to writing and heard. In the interests of justice, the court obliged the Respondent's request.

[76] The application was heard, and Miss Ewbank indicated that she had no response and requested to be heard on the issue of cost only. The court heard her, granted the application and reserved its ruling in relation to the costs of that application. I now rule that the costs of that application is to the Respondent to be taxed if not agreed.

[77] In relation to the costs for the application for an interim injunction, I would apply the general rule that costs follow the event and award costs of the application for the interim injunction to the Respondent.

ORDER

[78] In light of the foregoing, my orders in relation to the final disposition of the matter are as follows:

1. The application to extend the interim injunction is refused.

2. Costs of the application for the interim injunction to the Respondent to be taxed if not agreed.

3. Costs of the application for relief from sanctions made on 24th of February 2023 to the Respondent to be taxed if not agreed.

4. Application for leave to appeal and stay of proceedings pending the Summary Judgment Application is denied.

5. The Respondent's Attorneys-at-Law to prepare, file and serve the orders made herein.

…………………..

Maxine Jackson

Puisne Judge Ag.