



[2019] JMSC Civ. 42

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

**IN CIVIL DIVISION**

**CLAIM NO. 2018HCV04744**

<b>BETWEEN</b>	<b>ASSOCIATED GOSPEL ASSEMBLIES</b> <b>(By Power of Attorney from Jeremy Karram,</b> <b>Executor for Estate of Albert Teimer Karram,</b> <b>Dec'd)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JAMAICA CO-OPERATIVE CREDIT UNION</b> <b>LEAGUE LIMITED</b>	<b>DEFENDANT</b>
<b>AND</b>	<b>REGISTRAR OF TITLES</b>	<b>INTERESTED</b> <b>PARTY</b>

**IN CHAMBERS**

Tamiko Smith and Sheldon Robinson, instructed by Ramsay and Smith, for the claimant.

Daniella Gentles-Silvera and Monique Hunter, instructed by Livingston, Alexander and Levy, for the defendant.

Heard: December 12 & 13, 2018, and February 4, 7 & 22, & March 22, 2019

**Application for ex parte injunctive relief – Whether hearing held ex parte or inter partes – Property dispute – Registered title – Circumstances in which injunctive relief granted on inter partes hearing may be discharged – Effect of sections 68, 70, 71 and 162 of Registration of Titles Act – Indefeasibility of Title**

## **ANDERSON, K., J**

### **The Introduction**

[1] This written ruling, emanates from an application made by the defendant, to discharge an interim injunction granted against them on December 13, 2018, in favour of the claimant. The background to that application is set out next. That application was heard, in this court, by me.

### **The background**

[2] The claimant received a devise of unregistered land, 'the disputed land,' under the will of Albert Teimer Karram, and it is that particular devise that has become the subject of these proceedings. The defendant, on October 31, 1995, became the registered owner of lands registered at Volume 827 and Folio 74, which is located next to the disputed land. The boundaries of the defendant's registered land, was described in the title as follows: '...by estimation One Hundred and Twenty-Three Acres more or less ...' Subsequently, on July 1, 2011, the defendant entered into an agreement for sale with the Ministry of Housing, to sell to it, a portion of the defendant's said property, subject to subdivision approval being obtained.

[3] Upon this agreement, steps were then made by the defendant to obtain subdivision approval. During the process of obtaining the said approval, the defendant was notified that, in order to complete the said process, the property would have to be re-registered by plan, as the current title reflects the boundaries, by estimation. This meant, that the defendant's land would necessarily be surveyed and a surveyor's report prepared so as to determine what is the true boundary of that land which was registered with its boundaries by estimation.

[4] This the defendant did, when it contracted the services of a Commissioned Land Surveyor, Richard Haddad, in or around 2018, who surveyed the land and produced a report. Richard Haddad, in his affidavit at paragraph 7 stated the following:

*'Based on my survey plan, the property size, based on the boundaries on the ground and the adjoining neighbours, is one hundred and fifteen (115) hectares, which amounts to 284.171 acres. The title estimation of "one hundred and twenty-three (123) acres more or less" is therefore understated, which is understandable as that figure is but an estimate, which by nature is imprecise.'*

- [5] The claimant subsequently became aware of the defendant's attempts to re-register their land, by plan, and shortly thereafter, brought action against the defendant, claiming that, in seeking to re-register its land, the defendant will be including the disputed land in their title. Additionally, the claimants also sought an interim injunction to bar the defendants from re-registering its land, until the claimant's interest in the disputed land has been finally determined by the court.
- [6] On December 12, 2018, that application for interim injunction came before me as an *ex parte* application. At that time, I ordered that the defendant be served with the application and all relevant documents therein. Having served those documents on the defendants, on December 13, 2018, the matter, again, came up for hearing, in this court, before me, and the defendant, though at that time having already been served with the relevant documents, was not present at that time, either via a representative, or via counsel.
- [7] At that hearing, an order was made, *inter alia*, restraining the defendant, whether by itself, or through any of its servants and/or agents, from transferring or otherwise dealing with the disputed property, in any way prejudicial to the interests of the claimant. It is that injunctive relief that the defendant now seeks to have discharged, on the ground that, *inter alia*, there are no serious issues to be tried, to properly allow for an injunction to have been granted.

## **Submissions**

### **The defendant's submission**

- [8] The defendant had submitted, through their counsel's written submissions that when the injunctive relief was granted on December 13, 2018, same was granted

'ex parte.' Mrs. Gentles-Silvera maintained that position during her oral submissions before me, at the hearing which was held on February 22, 2019, but in fairness to her, it must be stated that she did not then emphasize that particular point or even put it forward, as a point of significance. Instead, she chose then to state that the notice of the hearing was very short.

- [9] Further, counsel for the defendant contended, the title which was passed to them from the previous owner of the registered land, described the boundaries by estimation. Therefore, by this point, the defendant contended that it was a bona fide purchaser of lands without notice of any equitable interest of any portion of that property. Further, the defendant argued, that a registered owner has an indefeasible title which serves as an absolute bar to any action for recovery of land, unless the registration was tainted by fraud. The total size of their registered land, the defendant submitted, was 284 acres, as concluded by the Commissioned Land surveyor, Richard Haddad, and that this also included the disputed land. Counsel for the defendant concluded their submissions, by stating that the proper recourse for the claimant in this case, is an action for damages pursuant to section 162 of the **Registration of Titles Act**.

### **The claimant's submission**

- [10] Counsel for the claimant argued that the injunction should remain in place as all material documents were before the court at the time of its consideration to grant the said injunction. The claimant asserts that there is a serious issue to be tried in determining its interest in the disputed land. Also, the claimant posited that, should the injunction be discharged now, the defendants will continue its steps to re-register its land to have the title reflect the disputed land as part of their registered property. This would lead to irremediable prejudice to the claimant, as, once re-registered, and the disputed land becomes part of the defendant's registered property, then section 161 and 162 of the **Registration of Titles Act** would apply to protect the defendant under the principle of indefeasibility of title, and a claim by the claimant to recover land at that stage, would be unlikely to succeed. The point

of the claim and the injunction, the claimant submitted, is to declare that the claimant has an interest in the disputed land.

### **Issue to be determined**

[11] The primary issue for my consideration is, whether the injunction, granted on December 13, 2018, restraining the defendants in their dealing with land registered at Volume 827 and Folio 74, ought properly to be discharged.

### **The law and analysis**

[12] In order to resolve the issue at bar, it is necessary to firstly consider whether, the injunctive relief granted on December 13, 2018, was granted as an *ex parte* injunctive relief. The resolution of this sub-issue, will determine what principles ought to be applied when considering whether or not the injunctive relief, obtained by the claimant on the said date, is to be discharged.

[13] What then is meant in law, by the term *ex parte*? The Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp. Ltd** [2009] UKPC 16, at paragraph 13, their Lordships, expressed that the applicant in that case needed to have given notice of their application to the respondent. They equated an '*ex parte*' application to the fact that the application was made '*without some notice to the [respondent]*.'

[14] Similarly, in **Venus Investments Ltd v Wayne Ann Holdings Ltd** [2015] JMCA App 24, at paragraph 25, Morrison, JA (as he then was), after his thorough analysis of authorities expounding on the duty placed upon an applicant seeking *ex parte* injunctive relief, concluded that there is '*an unbroken line of authority in support of the proposition that, on a without notice application, the applicant is obliged to act in good faith by disclosing all material facts to the court ...*' Here, in like manner, the Court of Appeal views the *ex parte* application, as one that is made 'without notice,' to the intended respondent. It follows therefore, that an application, of which the respondent has even some notice, however short or limited in its scope, is not considered to be an *ex parte* application.

- [15] Further, Chapter 92, of the **White Book, 2000**, entitled, '*Changes in Terminology Made by the CPR,*' lists, in tabular format, the terms that have been changed following the reforms in civil procedure which began in 1998, and among that list was the change of the term '*ex parte*' to the modern terminology of '*without notice (to other parties).*'
- [16] In the case at bar, as stated at paragraph [6] above, the matter came up before me on December 12, 2018, at which time, the then applicant, the claimant, was ordered to serve the defendants with the application along with all the accompanying documents. The defendants do not contend that they had no notice of the application, but however contended that said notice was short. In my view, in light of the authorities, the fact that the defendants received notice of the application, made the December 13, 2018 hearing an *inter partes* hearing, and consequently, the injunctive relief obtained by the claimant then, was not granted *ex parte*.
- [17] When however, the application for interim injunction came on for hearing, on December 12, 2018, and subsequently, on December 13, 2018, as a result of the defendant's absence from those hearing dates, certain documents, material to the consideration of the granting of the said injunction, were not placed before the court, as such documents were not within the possession of the claimant, who was then, the applicant. Upon this present application, by the defendant, to discharge the injunctive relief, documentation material to the present issue was provided to the court upon the defendant's evidence supporting the application. One such piece of documentary evidence, which in the view of this court, would have been material to the consideration of whether or not the injunctive relief which had been sought, ought or ought not to have been granted, was the surveyor's report of Commissioned Land Surveyor, Richard Haddad.
- [18] The thrust of the defendant's submission is that, the injunctive relief obtained by the claimant, ought not to have been granted as there was no serious issue to be tried, as the defendant possesses an indefeasible title to their property which also

includes the disputed land. The considerations to be borne in mind, upon an application to discharge an interim injunction heard *inter partes*, may be gleaned from the case **Bardi Limited v McDonald Millingen [2018] JMCA Civ 33**, where at paragraph 47, F. Williams, JA stated:

*I too take the view that on a proper reading of the dictum of Dingemans J in Richard Parr v Tiuta International Limited [2016] EWHC 2 (QB), the categories of circumstances in which a judge may review an order of another judge of co-ordinate jurisdiction, are not closed. This, to my mind, is indicated in the said dictum as follows:*

*“[T]he circumstances in which the jurisdiction to set aside or vary might be exercised include situations where there was a material change of circumstances, where a judge was misled, or where there was fraud.”*

[19] Additionally, the following observation by the Privy Council, in **National Commercial Bank Jamaica Ltd v Olint Corp. Ltd Op. Cit.**, at paragraph 16, is also to guide this court’s consideration, which states as follows:

*‘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** (Highlighted for emphasis). As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd [1975] AC 396*, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.’*

[20] Upon the guidance of the above statements, in this court’s determination of whether the injunctive relief granted on December 13, 2018 herein, ought properly to be discharged, this court is obliged to consider whether there was any material change in circumstances that would cause the re-consideration of the said injunctive relief that was granted. In so considering, this court, by the end result of whether or not to discharge the injunction, must produce a just result.

[21] This court is therefore constrained to revisit its granting of the injunctive relief, in this present claim, on December 13, 2018, as now, documents material to the claim have been placed before this court, and of considerable significance is the surveyor's report of Richard Haddad. This report is of considerable significance, in that, not only has it revealed the true size of the defendant's registered land, but that the defendant's registered land also includes the disputed land.

[22] The claimant has submitted through its counsel, that, currently, indefeasibility of title does not apply to the disputed land as that land was not registered as part of the defendant's title. I, however, do not agree with that contention. The appropriate light in which the surveyor's report is to be viewed, in the context of the defendant's registered land, is that it serves only to make certain, the extent of the land belonging to the defendant, which is already registered to the defendant and therefore carries with it all the attendant benefits a registered owner of land is entitled to, pursuant to the **Registration of Titles Act**, including, indefeasibility of title pursuant to sections 68, 70 and 71. These sections read as follows:

*'68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.*

...

*70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate*



*or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser:*

...

*71. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.'*

- [23] The law on those sections is settled. In **James Wylie, et al v David West, et al** [2013] JMCA App 37, at paragraph 27, Harris JA, in dealing with the effect of these provisions, stated the following:

*Section 68 of the Act grants to a registered proprietor an absolute title. Sections 70 and 71 of the Act also accord to a registered proprietor an unimpeachable certificate of title but impose fraud as the only factor which would affect the title's validity. The latter sections clearly demonstrate that the registration of a certificate of title, unless fraudulently obtained, stands impervious.*

- [24] The claimant also submitted that should the injunction be discharged now, and the defendant successfully completes the re-registration process, then it would suffer irremediable loss and its claim at trial would less likely to succeed. As it relates to the claimant's likelihood of success at trial, or it being put in a less favourable position if the defendant's re-registration is completed, I do not accept that submission. To my mind, the position of the claimant presently, will be no different from their position if the process of re-registration is completed. That is because, the true size of the defendant's registered land is already illustrated by the surveyor's report of Mr. Haddad, which means that, currently, the defendant's title already extends to include the disputed land, and therefore the weight of evidence

required of the claimant to prove its right to ownership of the disputed land, will be the same as that required of it, after the re-registration is completed.

[25] As it relates to the claimant's submission of its occasioning irremediable loss upon the completion of the re-registration, there are however, statutory provisions available under section 162 of the **Registration of Titles Act** for persons so aggrieved. Section 162 reads as follows:

*'Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land, estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorandum in the Register Book, may bring and prosecute an action for the recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud; error or misdescription:*

*Provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription, in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall upon a transfer of such land bona fide for valuable consideration, cease to be liable for the payment of any damage beyond the value of the consideration actually received, which damage but for such transfer might have been recovered from him under the provisions herein contained; and in such last mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case, such damages, with costs of action, may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant:*

*Provided that in estimating such damages, the value of all buildings and other improvements erected or made subsequent to the making of a contract of sale binding on the parties thereto, or subsequent to the deprivation shall be excluded.'*

Accordingly, it seems likely that the claimant's proper recourse in an action such as this, would be an action to recover damages pursuant to section 162 of the **Registration of Titles Act** set out above. I wish however, to make it clear, that at

this stage, I am making no final or conclusive pronouncement in that respect, since the claim, as filed, still subsists.

## **Conclusion**

**[26]** In concluding, I find that there is sufficient material which justifies the discharge of the injunction granted on December 13, 2018, restraining the defendant in its dealing with its property. There is no reasonable justification for the continuation of the injunction, and, the interests of justice would be best served in the discharge of the said injunction obtained by the claimant, in circumstances where documentation material to the present claim were not before this court.

## **Orders:**

1. The Interim Injunction granted herein by the Honourable Mr. Justice K. Anderson on the 13<sup>th</sup> December, 2018 restraining the Defendant, its servant and/or agents from registering lands contained in pre-checked Plan Numbered 400 909 comprising 169 acres and identified by land valuation number 18706009002 with lands comprised in Certificate of Title registered at Volume 827 Folio 74 and from transferring or otherwise dealing with the property in any way prejudicial to the interest of the Claimant until final judgment, is discharged.
2. If the defendant wishes to do so, arising from the claimant's undertaking as to damages, then a hearing is to be scheduled by the registrar and the defendant shall be entitled to adduce affidavit evidence for the purposes of that hearing, as to whether the defendant has suffered any loss arising from the injunctive relief which was earlier granted, in which event, the defendant is to be indemnified by the claimant arising from said loss.
3. Costs of the application are awarded to the defendant, with such costs, to be taxed if not sooner agreed.
4. The defendant shall file and serve this order.

.....  
**Hon. K. Anderson, J.**