



[2017] JMSC Civ. 202

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 02172

BETWEEN	OLD NATIONAL WEALTH MANAGEMENT (Personal Representative in the estate of RAYMOND JOHN RYAN)	CLAIMANT
AND	AL SOCRATES JOBSON	1ST DEFENDANT
AND	MICHAEL ANTHONY JOBSON	2ND DEFENDANT
AND	DEMETRI ANTHONY JOBSON	3RD DEFENDANT

IN CHAMBERS

Alexis Robinson instructed by Myers, Fletcher & Gordon for the Claimant

Lawrence Phillpotts-Brown instructed by Lawrence Phillpotts-Brown & Co for the 1st Defendant

Symone Mayhew for the 2nd Defendant

Carlene Larmond and Anna Gracie instructed by Rattray Patterson Rattray for the 3rd Defendant

Heard: May 15, 2017 Delivered: December 7, 2017

Injunctions – Application to discharge interim injunction - Considerations for discharge of injunctions-Inter-partes hearing of interim injunction-Considerations for the granting of an injunction-failure to reseal probate granted in foreign jurisdiction.

BERTRAM LINTON, J

Background

- [1] The genesis of this matter surrounds the title and ownership of lands known as Half Moon Bay in the parish of Trelawny registered at Volume 1490 Folio 564 of the Register Book of Titles (hereinafter referred to as Half Moon Bay). Half moon Bay was once owned by the late Raymond Ryan who died in the United States of America on 18th October 1977. The claimant, Old National Wealth Management, is the personal representative of Mr Ryan's estate. They have alleged fraud against the defendants, Al, Michael and Demetri Jobson who presently hold the legal interest in Half Moon Bay.
- [2] Old National has alleged that the defendants obtained interest in Half Moon Bay by submitting a lost title application as well as transfer documents, to the Registrar of Titles which were purported to be signed by Mr Ryan in 2014, even though he has been dead for some 37 years. As such, the claimant has asked the court for:
- a. damages for fraudulent deprivation of Mr Ryan's proprietary interest, misrepresentation and deceit;
 - b. a declaration that the defendants fraudulently deprived Mr Ryan's estate of Half Moon Bay;
 - c. a declaration that the defendants have no proprietary interest in Half Moon Bay;
 - d. a declaration that the estate of Raymond Ryan has the sole proprietary interest; and
 - e. an order that the present certificate of title be cancelled and the certificate of title at volume 783 folio 95 be re-issued.
- [3] On the other hand, the Jobsons have countered that Half Moon Bay was sold to their father Mr Gilbert Jobson on 11th September, 1972 but the official transfer of the legal interest was not completed. They say their father was merely given the title document, and on his passing on 23rd May, 1980, the transfer was still not effected. In 2014, the brothers commissioned the expertise of Attorney at Law

Drew St'Clair. They say that, Mr St'Clair, who was employed to the Caribbean Law Group, took steps to submit documents that none of them had knowledge of or signed to. Having made the connection to what appears to be some questionable dealings, an application was made by the 3rd defendant to add Drew St Clair and Caribbean Law Group as ancillary defendants. This application was granted.

[4] On the 14th July 2016, the claimant made an ex parte application to this court seeking an injunction to prevent the defendants from dealing with Half Moon Bay until the matter has concluded. This was considered and granted by my sister Justice Lindo. Consequently, the 1st defendant applied to the court to discharge the injunction and instead has offered to undertake not to divest of his interest in Half Moon Bay. This application is the subject matter of this judgment. Before me also is the inter-partes hearing for the interlocutory injunction by the claimant.

[5] In his Notice of Application for Court Orders dated 8th May, 2017, the Applicant/1st Defendant, Al Jobson, has sought the following orders:

- a. That the injunction granted by Justice Lindo be discharged;
- b. That the court accepts an undertaking from the defendants that they will not sell, transfer, diminish or dispose of their interest in Half Moon Bay;
- c. That the 1st defendant be permitted to file an ancillary claim against Drew St Clair and Caribbean Law Group;
- d. That the matter be transferred to the commercial list of the Court and the defendants pay all costs associated with this transfer; and
- e. That the claimant provides security for costs and that this be done before the matter proceed.

I am only concerned with the first two orders sought and oral submissions were made upon this basis.

A. *The Claimant's Arguments*

- [6] Counsel for the claimant referred to her skeleton submissions filed on March 31, 2017. She contended that the transfer took place more than 31 years after Mr Ryan's death. The ex parte injunction was granted as a result of this apparent fraud that the claimant became aware of. She submitted that the fact that Mr Ryan's signature was affixed to the transfer documents after his death raises a serious issue to be tried.
- [7] She further argued that there would be no foreseeable loss to the defendants should the injunction continue to be in force.
- [8] Counsel has asked the court to consider that the claimant has given an undertaking as to damages. She has also expressed a willingness to undertake to re-seal the documents from Indiana.

B. *The 1st Defendant's Arguments*

- [9] Counsel for the 1st Defendant argued that the injunction was wrongfully granted based on documentation presented from the United States. He said that since probate was issued outside of the jurisdiction, the grant needed to have been resealed in the Supreme Court of Jamaica before the document could be relied upon. He noted that nothing in the claimant's affidavit suggest that resealing was done and as such the claimant has not complied with the ***Real Property Representative Act*** or the ***Probate (Re-Sealing) Act***.
- [10] He further contended that the claimant has not disclosed all the facts material to the case at hand. As such, the lack of re-sealing reflects a material non-disclosure which ought to prevent them from seeking an equitable remedy.
- [11] It was submitted that the claimant did not expressly state that it would undertake to pay damages as stipulated in the Civil Procedure Rules 17.4(2). Furthermore, the fact that the claimant is an entity which resides outside the court's jurisdiction, the court ought rightly to order security for costs in these proceedings.

[12] Lastly, counsel asked the court to have regard to the case of ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] UKPC 16*** as it outlines the principle that ex parte rulings should be extremely rare. The point was made that when the usual guidelines are applied, damages would be an adequate remedy for the Claimant and as such an injunction was not to be granted.

C. *2nd Defendant's Arguments*

[13] Counsel Mrs. Mayhew contended that the wide nature of the injunction granted is to be reconsidered particularly the aspect of the order which restricts the defendants from "*altering [the land] in any way.*" This she says affects her client as he has been in possession since 1973. Further, her client fears that he will not be able to properly secure the property in any way, especially since he now plants crops on it which require maintenance that he is not allowed to undertake.

[14] Counsel submitted that even if Mr Ryan has a right, the Limitation of Actions Act has extinguished his right and as such, there is no prejudice to his estate at this point.

The Issue

[15] The issues for consideration are two-fold:

a. As it relates to the inter-partes hearing I must consider:

- i. Whether there is a serious matter to be tried;
- ii. Whether damages is an adequate remedy; and
- iii. Who does the balance of convenience favour.

b. As it relates to the 1st defendant's application I must contemplate:

- i. Whether there has been any material change in the circumstances of the case for the court to re-consider the injunction order granted by Lindo J on 14th July 2016;
- ii. If there is a change, is it significant enough to warrant a discharge of the injunction; and
- iii. Should the court accept the undertaking made by the 1st defendant/applicant.

Law and Analysis

(1) The Inter-partes Injunction

[16] The law relating to the court's consideration for the granting of an injunction is clearly stated in ***American Cyanamid v Ethicon*** [1975] AC 396. The court must consider:

- a. Whether there is a serious matter to be tried;
- b. The adequacy of damages in lieu of an injunction; and
- c. In whose favour the balance of convenience lies.

(a) *Whether there is a serious matter to be tried*

[17] In ***Cyanamid*** the court made it clear that issue for trial must not be fanciful but a case of substance. In the matter at bar, there is no doubt there is a serious matter to be tried. The allegation put forward is that the defendant's obtained their legal interest in Half Moon by way of fraud. I have considered that the law does not lightly alter the legal interest in property as it is right in rem and is valid against the world. However, I have also contemplated that where fraud is proven at the route of a legal interest then that interest cannot be valid.

[18] As such, the allegations of fraud are not taken lightly by the court and based on the information presented to the court in the form of documentation showing that an application was indeed sent to the registrar of titles with the deceased signature attached at a time when he was already dead is enough for me to say that there is a very serious issue to be tried.

(b) *Whether Damages is an Adequate Remedy*

[19] This case involves land that is both extensive and expensive. Though Mr Ryan has died, the detriment to his estate cannot be quantified merely in the present market value of the property. Land is unique and though there is the potential to compensate his estate for its present value, this money cannot really procure the benefit of lands exactly like this one.

[20] There is no question as to damages being an inadequate remedy in the circumstances. Therefore, I find that damages is not an adequate remedy.

(c) *The Balance of Convenience*

[21] I have considered how the outcome will affect the parties.

(i) Claimant

[22] Mr Ryan's estate stands to lose its legal interest in Half Moon Bay. I have already found that the uniqueness of the land confers that no amount of damages would suffice as remuneration for its loss. With that said, there is no difficulty in understanding what his estate stands to lose.

[23] There is also the matter of the potential fraud being the reason for the loss of this legal interest and I find that this weighs significantly in my mind. If anything, the court ought to preserve the status quo so as to determine whether there is any legitimacy to the allegations being proposed.

[24] The risk to the claimant is therefore significant.

(ii) The Defendants

[25] The defendants are the present owners of the property. Preservation of the status quo therefore does not necessarily operate to their disadvantage. I have considered that 2nd defendant is not able to tend to the land in the manner in which is use to and I have weighed this against what the claimant stands to lose. In the circumstances, I feel that the 2nd defendant has the opportunity to ask for a modification of the terms of the injunction which would better suit all parties in the matter. In all, I do not find that the inconvenience the defendants now face is a risk that is more significant than that to the claimant.

[26] Having assessed the applicability of the **Cyanamid** principles to the matter, I will now consider the 1st defendant's application to discharge the injunction and substitute it with an undertaking.

(2) The 1st Defendant's Application

[27] In ***Tropicrop Mushrooms Limited v Saint Thomas Parish Council and Others*** Claim number 2008HCV0663 delivered on 12th August 2008 Brooks J (as he then was) outlined what the court should consider when dealing with an application to discharge an injunction. He said:

"The questions which the court must answer in resolving this issue are, firstly, what is the court order which is currently in place. Secondly, if there is an injunction in place, whether there has been any material change of circumstances which would cause the court to re-consider the order for the injunction. If any such change exists for reconsideration, whether that change is sufficient to warrant the discharge or modification...."

I will use my brothers outline in ***Tropicrop*** to navigate the outcome of this case.

(a) *The Current Order*

[28] The order as granted by my sister Lindo J is:

The Defendants, jointly and severally, are restrained until August 15, 2016 whether by themselves, their servants, agents or otherwise, from altering in any way, disposing, transferring and/or dealing with ALL THAT parcel of land part of HALF MOON BAY in or near the Town of FALMOUTH in the parish of TRELAWNY

containing by estimation Three Hundred Acres more or less and butting North and North-East on the Sea and on land of the Colonial Secretary of Jamaica South on land of Maxfield Pen East on the Main Road leading from Falmouth to Montego Bay and West on the sea shore and being all the land now comprised in Certificate of Title registered at Volume 1490 Folio 564 of the Register Book of Titles (formerly comprised in Certificate of Title registered at Volume 783 Folio 95 of the Register Book of Titles).

(b) *Whether there has been any change in the circumstances*

[29] There is no doubt that there are serious issues to be tried. However, the considerations raised by counsel for the 1st Defendant are indeed factors to be acknowledged:

- a. **Failure to re-seal documents** – Counsel’s contention is that the documents grounding the claimant as the personal representative is not valid in our jurisdiction unless they are re-sealed. Though I agree that this is a serious matter, it is such that it can be rectified by the court with an order compelling the claimant to have the documents re-sealed. In fact, in her oral submissions, counsel Ms Robinson expressed that she would undertake to have the re-sealing done. As such, I cannot agree that this is sufficient to discharge the injunction currently in place.
- b. **Non-Disclosure of all material facts**- The gravamen of Counsel’s arguments is that the court granted an injunction based on circumstances which were incomplete as it was not informed that the Indiana documents were not re-sealed before the claim was brought. I agree with the applicant that this is a very serious matter for consideration. On the other hand, it should be noted that the claimant would be constrained in its activities with the property should the court ultimately declare the validity of its interest in Half Moon Bay. However, I must determine whether this non-disclosure changes the colour of the circumstances before the court as it relates particularly to the injunction granted by Lindo J.

Though the court frowns upon non-disclosure in general, I have weighed the non-disclosure as against what is at stake. Should this injunction be

discharged, Mr Ryan's estate could be permanently deprived of its legitimate legal interest in a property of considerable value. On the other hand, the non-disclosure at the heart of counsel's arguments would not prejudice his case if the documents are re-sealed at the court's request. Though he may be prejudiced by the fact that an overseas corporation has conduct of proceedings, it is to be remembered that without re-sealing Old National cannot legally deal with the land. In other words, re-sealing must be done in order for Old National to proceed.

- c. **Undertaking as to damages** – The formal order of Justice Lindo clearly states that *“the claimant gives the usual undertaking as to damages.”* As such, the point presented by counsel is not a valid one as this order was made.
- d. **Whether damages is an adequate remedy** - The issue of the adequacy of damages would have been a material consideration when my sister Lindo J granted the injunction in question and as seen above was a material consideration in my application of the **Cyanamid** principles above. As such, it is for me to determine, based on the submissions presented before me, whether there has been any change in circumstances which would now render damages as an adequate remedy. I have looked at the new information presented before me by the 1st Defendant and I do not find that any of the arguments presented would alter the position as to damages.
- e. **2nd Defendant's Concerns** – The concerns expressed by the 2nd defendant as it relates to his ability, or lack thereof, to secure Half Moon Bay and the crops he presently farms on the land are material to the considerations at hand. There is, however, one conflicting issue which I must also bear in mind. While I note the hardship suffered by Mr. Michael Jobson, I have also noted the clear prejudice to Mr Ryan's estate of which potential fraud is at the heart. I find that the 2nd defendants inconvenience pales in comparison to losses Mr Ryan's estate stands to suffer.

[30] I have considered the non-disclosure of the matter of re-sealing and I admit that this is the most aggravating feature expressed by counsel. While the court will not disregard this occurrence, or overlook the gravity of non-disclosure in general, I have weighed this against the fact that the claimant stands to lose interest in property that was, on the face of the documents, transferred to the defendants by fraud. I feel this is far more serious than the fact the claimant did not re-seal the probate documents from Indiana.

[31] In all the circumstances, I do not consider any of the factors discussed sufficiently material to discharge the injunction that is currently in place.

(c) *The Undertaking*

[32] Even though my finding above would make the matter of the undertaking moot, I will still discuss its implications. The court has been asked to consider discharging the injunction and replacing it with an undertaking not to deal with the land. I have to say the main consideration under this head is the effect that the injunction currently has on the 2nd Defendant who in effect has had some difficulty in reaping crops on the land. Though this may be so, the application being made is not that of the 2nd defendant. Indeed, the difficulty with accepting the position of the 1st defendant is that there is no indication that his view is one and the same as the views of the remaining defendants. Therefore, it would be a significant injustice for the court to discharge the present injunction so as to replace it with an undertaking from one defendant and not all three. An undertaking is such that the court cannot and will not impose it upon a party without his clear consent and understanding. As such, the fact of the 1st defendant's acceptance of an undertaking cannot be substituted for all the defendants' willingness. There is no evidence to suggest this.

[33] In any event, even if I am minded to discharge the injunction and replace it with the proposed undertaking, I am of the view that there are other measures which can be taken in order to offer the defendant what he seeks and which do not significantly prejudice the claimant in the manner being proposed.

[34] It is no surprise therefore that I find that there is no significant prejudice to the applicant which would move the court to discharge the injunction. Also, I do not find that replacing the injunction with an undertaking is appropriate in the circumstances.

Conclusion

[35] In all the circumstances, I find that the injunction is to be extended for the duration of the trial of this matter. That way, the court will be in a better position to assess what would be a fair outcome in the circumstances. With this in mind, the court makes the following orders:

- I. In relation to the Inter-partes hearing, the court orders that:
 - i. The claimant's relisted application dated and filed on the 10th June, 2016 is granted in terms of paragraph 1.
 - ii. Costs of the claimant's relisted application to be costs in the claim
- II. In relation to the 1st Defendant's application filed on 8th May, 2017, the court hereby orders that:
 - i. Application to discharge the interim injunction granted on the 14th July, 2016 and extended on various dates thereafter is refused;
 - ii. Application to accept the undertaking of the defendants in lieu of the injunction herein is refused;
 - iii. Applications numbered 3 – 8 of the 1st Defendant's Notice of Application dated and filed on the 8th May, 2017 is hereby adjourned for hearing on the 14th December, 2017 at 10am for two hours; and
 - iv. Cost on the 1st Defendant's application to the claimant to be paid by the 1st Defendant to be taxed if not agreed.