



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2010 CD 00122
IN COMMERCIAL DIVISION

BETWEEN	CHISHOLM AND COMPANY DEVELOPMENTS LIMITED	1 ST CLAIMANT
AND	JAMES CHISHOLM	2 ND CLAIMANT
AND	KEMTEK DEVELOPMENT CONSTRUCTION COMPANY LIMITED	1 ST DEFENDANT
AND	SYLVESTER TULLOCH	2 ND DEFENDANT

Ms. Carol Davis for the claimant.

Dr. Lloyd Barnett instructed by Mr. Keith Bishop of Bishop and Partners, for the defendants.

Heard: 20th January 2011, 8th February 2011 and 5th March 2012

Interlocutory Injunction – Main Road Act – Abandoned Roadway – Statutory Requirement for Ownership – Arguable Case – Balance of Convenience

Campbell J.

[1] This application for an interlocutory injunction centres around the ownership of a stretch of roadway which is regulated by The Main Road Act (Old main road). It's a section along the Ocho Rios to Ocrabessa main road, from the Rio Nuevo Bridge to Huddersfield passing by the fishing beach.

[2] The 1st claimant and the 1st defendant are registered companies involved in real estate development. The 2nd claimant and the 2nd defendant are the principal officers of those organizations. Both companies are the registered proprietors of lands in the Huddersfield District area of St. Mary, these lands are separated by

this stretch of old main road. The 1st claimant is the registered proprietors of Rio Nuevo Resorts and the 1st defendant has an approved subdivision plan for development on its lands, adjoining the old main road

[3] On the 22nd December 2010, the claimants filed an action seeking reliefs for;

- (1) Damages for libel against the 1st and 2nd defendants.
- (2) Damages for trespass and/or malicious destruction of property and/or nuisance and/or negligence
- (3) Damages for breach of statutory duty
- (4) An injunction restraining the defendants, their servants, etc from entering or trespassing, doing and/or continuing any construction on the claimant's land being the old abandoned main road.
- (5) An injunction restraining the defendants, there servants, etc from discharging any water, debris or other substance and/or material from the 1st defendant's land on to the claimant's lands being the abandoned main road, adjacent to the claimant's property

[4] The particulars of claim state, inter alia:

Para (B) The 1st claimant contends that he is the beneficial owner of the segment of the old abandoned main road adjacent to the claimant's property . . . and leading down to the western boundary . . . which adjoins the fishing village (old abandoned main road). Further, that the 1st claimant acquired the old abandoned main road in 1994 by way of an exchange of lands with the Ministry of Construction and Works. The exchange is contained in a letter dated 15th March 1994 and accepted by the claimant by letter dated 21st March 1994. That the claimant gave the Ministry lands for road purposes from Lot 82A of the subdivision and was from that time put into and has retained possession of the old abandoned main road.

Paragraph g. 12.15

- (b) The claimants allege that on or about 8th July 2009, entered the claimant's land being the old abandoned main road and trespassed thereon, and used bulldozers and or other heavy equipment and tore down a section of embankment on the seaward side of the old abandoned main road

thereby destroying the claimant's property. He also destroyed vegetation, trees and fauna, and entered again and constructed manholes and drains on the claimant's said land. The defendants caused a large volume of water, debris and dead animals to come from the 1st defendant's land onto the claimant's land.

[5] The claimants complained that their title and ownership to their lands were defamed and disparaged in that the defendant published an application for subdivision to the St. Mary Parish Council which represented that there was a direct access to the Caribbean Sea from lots to be developed by the defendants which, in its natural and ordinary meaning, the plan meant that the claimant did not own any land between the Caribbean Sea and the defendants' lots, and by innuendo that they were squatters and had no rights to the land between the Caribbean Sea and the defendant's proposed development.

[6] On the 4th January 2010, the claimants filed a Notice of Application for Court Orders, applying the injunctive relief expressed in their particulars. On the 18th January 2011, the defendants filed a defence and counterclaim.

Defence and Counterclaim

[7] The defendants denied that the claimant is the beneficial owner of the old abandoned main road. The defendants assert that the road is vested in the Commissioner of Lands and that the letter of the 15th March 1994 provided that the offer was subject to two conditions.

[11] All necessary surveys and legal processes will be carried out at the claimant's expense.

[12] That there be no land which can only be accessed via this segment of roadway that will be rendered inaccessible from any road as a result of your acquisition of abandoned roadways.

[8] The defendants denied there was acceptance by the 1st claimant of the conditions because of the denial of access to the defendants, who can only

access their land through the segment of the old main road, would render the defendants' land inaccessible. Further, the Chief Technical Director, in a letter dated the 15th June 1998 advised the claimant that the old main road is still a public road and therefore free passage should be permitted to all members of the public who may wish to use the section of the road which is in question.

[9] That in a letter dated the 3rd February 2010, the claimants were advised that their offer to swap lands in exchange for the section of the old main road in question could not be entertained because;

(a) The old main road provides the only viable access to the Rio Nuevo Fishing Village and a section of a proposed subdivision done by the 1st defendant.

(b) A National Water Commission water main which supplies water to the area traverses the old main road and thus the NWC and/or its agents will need access to connect customers, maintain or upgrade this service.

[10] In a letter dated the 21st October 2010 NWA notified the claimants that they had installed blockages to the drainage systems, and that was a breach of the Main Road Act, and demanded that the blockages be immediately removed and reinstate the drainage infrastructure.

[11] The defendants say that the drainage system was carried with the approved plan, including the extension of the drains to the culverts across the old main road.

Defendant's Application for Court Orders

[12] On the 18th January 2011, the defendants filed a Notice of Application for Court Orders, seeking an injunction, preventing the claimant from blocking access to the old main road to the defendants, among the grounds alleged was that the claimant has continuously blocked the access to the old main road to the 1st

defendant. Placed a gate across the old main road, blocking access to the 1st defendant and its servants, etc.

- [13] Mrs. Davis submitted that the letter of the 15th March 1994, evidences' the crystallisation" of the exchange of the lots. She claims that the abandoned roadway had collapsed which necessitated the construction of the new road. The 2nd defendant's predecessor, in title, Mr. Beckford, was present when the land was being surveyed; and did not object. The claimants would have acquired the land by estoppel in any event. That the land would have been gated, and did not allow for motored movement. The letter of the 15th June expresses that up to the gate is a public road, which is consistent with the claimant's claim. In relation to the Charles Johnson, there is an alternate access, even if there is an additional cost it has to be absorbed.
- [14] The defendants have no claim to the old main road, if they are contending that it is a roadway then the Main Road Act is in force, based on communications, it is abandoned. Section 24 of the Act expresses how encroachments on main roads are to be dealt with. Nothing alleged conforms to that.
- [15] There is damage caused by the defendants to areas of the claimants' property where the ownership by the claimant is unchallenged. The action of the claimant in renting out a section of the old main road since 1999 is enough to ground a claim in trespass and nuisance. Mrs. Davis further submitted that the defendants lacked privity of contract. That they had no title or entitlement in the old abandoned main road. There was nothing in the approved plan of the defendant that allows it to put water from their land unto the claimant's property. Planning permission is not a license for nuisance, see Halsbury section 66. The Balance of convenience lies in favour of granting the claimant's application. It is implausible to allow the continued destruction of the property.

Defendants' Submission

[16] In opposition to the grant of the application, submits that by virtue of having been a main road property is vested by statute in the Commissioner of Lands. That the claimant sought to claim the property on the basis of contract, however, there is no factual or legal basis on which such a claim can be sustained from the correspondence and affidavit. They rely on the letter of the 15th March 1994. In the letter of the 15th March, there are references to previous correspondence and requires (a) that details designs to be agreed. The letter of the 15th March does not meet the previously stated requirements. Section 13 does not support the claimant's case, as the person who is to do the exchange must have land that is needed by Government of Jamaica for the construction of the new road. There is the requirement of the declaration of the Minister, and also for the Commissioner of Lands or the Accountant General to value the land in relation to the other land. Dr. Barnett submitted that nothing as required by section 13 has occurred.

[17] It was further submitted that a main road is a road to which the public has access, until a declaration has it removed from the Schedule or the Minister makes a declaration. There has been no such declaration. The claim of the defendants is not in private nuisance they have a statutory right to access the road. Act permits continuity of right of way. The parochial authorities can take over the road for parochial purposes, but must maintain a public right of way. The Director has special functions pursuant to the Act (see S. 25), can remove obstructions, and then charge the cost. The claimant has not shown an arguable case in favour of having any right to the roadway which constitutes the old main road. Public right of access can only be terminated by Ministerial declaration. There is no concluded contract which requires the agreement of the Commissioner of Lands. On the examination of the structural engineers no access possible other than by the main road.

Balance of Convenience

[18] The defendants' subdivision is to provide a residential development, the blocking of the road and the exclusion of access is causing damage to the scheme and great financial loss to the defendants and expresses them to litigation.

Analysis

[19] Is there material before this court to maintain the claimants'/applicants' submission that there are serious questions to be tried. Have the applicants a real prospect of being granted a permanent injunction for which they have prayed in their claim? The Privy Council in **ENG Mee YONG and Others v Letuchasan**, 1979 UKPC 13 (4th April 79), in a judgment delivered by Lord Diplock, stated that in the grant of an interlocutory junction;

“the guiding principle in granting an interlocutory injunction is the balance of convenience, there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a ‘probability,’ a ‘prima facie case’ or ‘a strong prima facie case’ that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, **American Cyanamid v Ethicon Ltd.** (1975) AC396.”

[20] The claimants have been in occupation of the disputed property since 1998. They evidence the letter of the 15th March as the crystallisation of the exchange of properties between themselves and road authorities. The property has been gated so as to deter motorized movement over its surface. The claimant has exhibited possession, by renting an area on the property. This is being done openly and on the basis that they had the property surveyed. Neither the chief technical director nor the predecessor in title to the defendants raised any objection when the property was being surveyed. Are these factors that could lead to a finding of a contract between the claimants and the named officials in the Ministry?

[21] The claimants and the defendants are strangers to the arrangements between the claimants and the officials in the then Ministry of Works, does this affect the defendant's ability to challenge the claimant's occupation of the old main road. The defendants' answer is that their claim is granted not in private nuisance but to a statutory right to access the road. Against whom should such a right lie? Is the failure of the officials to take actions to prevent encroachments as enumerated in the Act, a serious issue in determining whether there was in fact a legal basis for the claimants to contend a contract. To my mind, there is no support for a finding that the claimant's case is frivolous and vexatious or that their case is bound to fail.

Balance of Convenience

[22] I therefore turn my attention to the balance of convenience. The purpose of an interlocutory injunction is to improve the chance of the Court to do justice after a determination of the merits at trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding is more likely to produce a just result. The claimants have been in occupation of the old main road since 1998. It has not been traversed that they have taken important steps in preserving the coastline in that area and contend that if they had not done so there would be greater erosion in the area. Should the defendants, in their due diligence, have unearthed the fact that access was likely to be a contentious matter in respect of the development? No challenge has been raised as to the capability of the claimants to satisfy any loss that may accrue to the defendants, in the event the final determination goes against the claimants. On the other hand, the evidence before the court is the actions of the defendants have caused embankments to be removed and the claimant's land to be flooded. The claimants' tenants, who operate a restaurant, is likely to be severely affected, irreparably so. I think the balance lies in favour of granting the application.
Application granted.