[2017] JMSC Civ. 105

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2017HCV00630

BETWEEN	**JUNIOR WEST**	**CLAIMANT/APPLICANT**
AND	**GERALD MILLER**	**DEFENDANT/RESPONDENT**

IN CHAMBERS

Mr. Garnett Spencer for the Claimant/Applicant.

Ms. Ashtelle Steel for the Defendant/Respondent.

Interim Injunction- Factors to be considered in granting Interim Injunction – Guiding principles under American Cyanamid Case – Delay – Applicability of Human Rights Law

HEARD: 10th & 18th April & 6th July, 2017

CORAM: PALMER HAMILTON, J. (AG.)

Introduction

[1] The Applicant, Mr. Junior West, states that he was a promoter and co-owner with Olga Taylor, his mother, of a property at New Banks District in the parish of St. Ann. Mr. West also claims that he was given an "interest" in land at New Banks District by his mother, Olga Taylor, in 1998. He also claims that the Respondent, Mr. Gerald Miller, caused a chain link fence with razor wire to be erected which is attached to his house which impeded him, the reasonable user from access to his land. Of note, a survey was subsequently conducted, which disclosed that a part of his house was on land which was owned by the Respondent. Since 2015

there have been constant disputes between the Respondent and/or his agents and himself.

[2] The Respondent, Mr. Gerald Miller, on the other hand, stated that he has been in possession of his land, which annexes the Applicant's land, since 1984 and that Olga Taylor moved unto her property about the late 1990's, and further, that the Applicant, Mr. West, did not live on the property until around 2013. In essence, Mr. Miller has not contradicted Mr. West with respect to him erecting a fence that is attached to the house in which the Applicant lives. However, on all other aspects, the two sides are diametrically opposed.

[3] Hence, this inter-partes application was brought by Mr. West by way of a Notice of Application for Court Orders for (1) an interim injunction restraining the Defendant/Respondent and/or agents from interfering with the Claimant's use of premises at New Banks District in the parish of St. Ann within 15 feet of the Claimant's house, and (2) an order that the Defendant/Respondent removes a fence erected by his servants and/or agents which now interferes with the Claimant's use of premises at New Banks District in the parish of St. Ann within 15 feet of the Claimant's house. Both parties deposed with Mr. Miller being supported by Affidavits; one from his wife and one from his neighbour.

[4] The Claim Form will be dealt with at a trial on the merits, and I will not concern myself with the substantive matter pertaining to the Claim Form at this time.

Submissions

[5] In the Applicant's oral submissions, Counsel, Mr. Spencer, argued that the Applicant acquired an interest in the property based on his "open and undisturbed" possession of the property and relied on the case of **American Cyanamid Co. And Ethicon Ltd., [1975] AC 396**. He further submitted that one should examine the balance of convenience and look to its applicability in circumstances, such as what obtains in the current situation, which are untenable

for the Applicant who is practically fenced in. Counsel also relied on the Privy Council decision of **National Commercial Bank Jamaica Ltd., v Olint Corp. Ltd., [2009] 1 WLR 1405**. He submitted that the reason for pursuing this application two (2) years later, was that the Applicant experienced some financial challenges but that position has now been favourably altered. He further submitted that the Applicant's use of his property is significantly hampered and impeded by the fence and barbed wire whereas in contradistinction, the Respondent would not be adversely affected in any way were he to be ordered by the court to remove the fencing.

[6] The Respondent, through his Counsel, Ms. Steele, argued that the orders for injunction sought were both prohibitory and mandatory in nature and as such the Applicant must demonstrate that he has an "unusually strong case" and that there must be a high degree of assurance that the course undertaken will be "vindicated" when the issues come to be decided at trial. Counsel relied on the cases of **Erica Francis-Griffiths v Patricia Griffiths, [2016] JMSC Civ.68;** and **Info Channel Ltd. v Cable and Wireless Jamaica Ltd., (2000) 62 WIR 176.**

[7] Counsel for the Respondent further submitted that the Claimant/Applicant should not have brought this Claim without his mother being joined as a Claimant as well. It was further argued that the issue as to co-ownership was being dealt with in the Resident Magistrate's Court in which Olga Taylor is the Claimant against her son, Junior West (the Applicant herein). Counsel further submitted that there was no serious issue to be tried and the case for the Claimant/Applicant was not an unusually strong one. Additionally, the mere fact that the Applicant took two (2) years to bring this Claim indicated that there was no urgency and as such they could ask for an early trial date. It was Counsel's view that if the fence were to be removed as a result of the granting of this injunction, then the Respondent would stand to lose a very good tenant, whose child, prior to the fence being

erected, had a morbid fear of the dogs owned by the Applicant that would venture over to the Respondent's property.

The Law

[8] I will deal briefly with the line of cases relied on as I see them, in determining the issue to be addressed, that is, whether an interim or interlocutory injunction should be granted at this stage in these particular circumstances as outlined.

[9] The purpose of an interlocutory injunction is to prevent a litigant/party from losing by a delay, the fruit of his litigation. As was expressed by the Privy Council in **National Commercial Bank Jamaica Ltd., v Olint Corporation Ltd. (Jamaica), [2009] 1 WLR 1405**, its purpose is "to improve the chance of the court being able to do justice after a determination of the merits at the trial." Over the years we have come to understand that interlocutory injunctions may be prohibitory, mandatory or *quia timet*.

[10] Normally, such types of injunctions remain in force until the trial of the action, but may be granted for some shorter specified period. This is evident in Rule 17.4 (4) and (5) the **Civil Procedure Rules** – 2002 which states:

> (4) *"The Court may grant an interim order for a period of not more than 28 days (unless the Rules permits (sic) a longer period) under this Rule on an application made without notice if it is satisfied that:-*
>
> *(a) in a case of urgency, no notice is possible; or*
>
> *(b) that to give notice would defeat the purpose of the application*
>
> *(5) On granting an order under paragraph (4) the court must –*

(a) fix a date for further consideration of the application; and

(b) fix a date (which maybe later than the date under paragraph (a) on which the injunction or order will terminate unless a further order is made on the further consideration of the application."

[11] Although rule 17.4(4) speaks to an ex-parte (without Notice) application, a specified time limit is equally applicable to an inter-partes application for an interlocutory injunction. An interlocutory injunction is discretionary and is never granted as of right or course.

The Guiding Principles under American Cyanamid Co. And Ethicon Ltd;

[12] **The American Cyanamid case**, the *locus classicus*, highlights firstly that the court must be satisfied that the Claimant's case is not frivolous or vexatious, for such claims will fail at the threshold. Simply put, the Claimant must show that there is a serious question to be tried, in other words, the Applicant must have a real prospect of success at the trial.

[13] Secondly, the balance of convenience was seen as the governing consideration. The inadequacy of damages is a significant factor in determining the balance of convenience, and the Court should consider the adequacy of damages to each party, namely whether damages would adequately compensate the Claimant for any loss caused by the acts of the Defendant prior to the trial. If the Claimant fails at the trial, the Court should consider whether any loss caused to the Defendant by the granting of the injunction could be adequately compensated by the Claimant's undertaking in damages. This undertaking in damages is given to the court, so that non-performance is a contempt of Court and not a breach of contract, it therefore follows that enforcement with respect to a breach of this undertaking is at the Court's discretion.

[14] I took no issue with the application nor the affidavits in support with respect to an undertaking as to damages because one was in fact given and supported by an affidavit from the Claimant's wife. My role in considering this application is not to embark on anything resembling a trial of the action. Generally, at the interlocutory stage it is not part of a judge's function to resolve conflicts of evidence on affidavit or to resolve difficult questions of law. These are matters for the trial. At the interlocutory stage certain facts were disputed such as when the fence was erected, among other things, and there was no cross-examination, as is the norm, at this stage. It is merely an interlocutory application, and the courts discretion would be stultified if, on untested and incomplete evidence, it could only grant the injunction if the Claimant had shown that he was more than 50% likely to succeed at trial. (See **Hanbury & Martin on Modern Equity,** 19th ed., chap.25)**.**

[15] Although the balance of convenience is the governing consideration in applications for interlocutory injunctions, if the balance of convenience does not clearly favour either party, then the preservation of the status quo will be decisive. "**Only as a last resort is it proper** (my emphasis) to consider the relative strength of the case of both parties, and only then if it appears from the facts set out in the affidavit, as to which there is no credible dispute, that the strength of one party's case is disproportionate to that of the other" (see **Cambridge Nutrition Ltd., v British Broadcasting Corp. [1990] 3 ALL E R 523** as per Ralph Gibson, L.J.)

[16] In the case of **Infochannel Ltd., v Cable and Wireless Jamaica Ltd., (2000) 62 WIR 176 at 225;** Downer J.A. opined:

> "In considering an application for the grant of a mandatory injunction at the interlocutory stage, a judge in the proper exercise of his discretion, must consider both whether or not there is a serious question to be tried and also whether or not it is an 'unusually, strong and clear case' on the evidence

> before him to give him a 'high degree of assurance' that at the trial it would be evident that the mandatory injunction was rightly granted."

[17] This approach, as mentioned above in the **Cambridge National Ltd. Case** should be taken as a last resort. The basic principle was outlined in **National Commercial Bank Jamaica Ltd., v Olint Corporation Ltd. (Practice Note) [2009] 1 WLR 1405 at 1409**: "the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other." This position is not a significant departure from the 'rules' laid down in the **American Cyanamid Case**; instead what it demonstrates is that each application must be considered on its own merits and some amount of flexibility must be applied to suit the particular circumstances. As Browne L.J. stated in **Fellowes & Sons v Fisher**, **[1976] Q.B. 122** at 139, the remedy is discretionary and the principles enunciated by Lord Diplock contain some elements of flexibility. The House of Lords cannot have intended to lay down rigid rules. They are best described as guidelines which "must never be used as a rule of thumb, let alone as a strait-jacket."

Present criteria to be used in considering whether or not to grant an Interlocutory Injunction

[18] I am therefore required to examine what, on the particular facts of this case, the consequences of granting or withholding of the injunction are likely to be on the Applicant, on one hand, and the Respondent on the other. As Lord Hoffman so aptly stated in **National Commercial Bank Jamaica Ltd., v Olint Corp. Ltd., (Jamaica):**

> "If it appears that the injunction is likely to cause irremediable prejudice to the Defendant a court may be reluctant to grant it unless satisfied that the chance that it will turn out to have been wrongly granted are low; that is to say, that the court will feel as Megharry J., said in **Shepherd**

> **Homes Ltd., v Sandham [1971] Ch 340, 351**, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted."

[19] It has been emphasized in **Films Rover International Ltd., v Cannon Film Sales Ltd., [1987] 1 WLR 670,** that arguments whether an injunction should be classified as prohibitive or mandatory, are barren and what matters is what the practical consequences of the actual injunction are likely to be. Their Lordships in the **National Commercial Bank case** referred to this exercise as a type of box-ticking approach which "does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction."

[20] I readily adopt the sage words of Mangatal, J. in the case of **Cable and Wireless v Digicel (Jamaica) Limited, 2009 HCV 05568,** and followed by Bertram-Linton, J. in **Erica Francis-Griffiths v Patricia Griffiths, [2016] JMSC Civ. 68**, where it is stated:

> "(a) whether an interlocutory injunction is prohibitory or mandatory, the same fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should turn out that the court turns out (sic) to be wrong or which seems likely to cause the least irremediable prejudice to one party or to the other.
>
> (b) whether an interlocutory injunction is prohibitive or mandatory, the Claimant must demonstrate that there is a serious issue to be tried before any injunction will be granted.
>
> (c) There is no usefulness to be derived from arguments based on semantics as to whether an injunction is prohibiting or mandatory. What is required in each case is to examine the particular facts of the case and the consequences of granting or withholding of the injunction is likely to be."

[21] It is for these reasons why I do not agree with counsel for the Respondent that because the orders sought were both mandatory and prohibitory in nature, then there should be a higher standard applicable and the Claimant must demonstrate that he has an unusually strong case, at this critical juncture, and as such I would need to examine the affidavits. A grave injustice would occur were I to apply that proposed standard at this stage.

The issue of Delay

[22] The Claimant made this application two (2) years after the alleged breach in which he asserts in his application that his right of access to his home was being infringed by the Respondent. I have given careful thought to this delay and to how it would impact any decision to grant an interlocutory injunction. I find that it certainly would, though not favourably to the Claimant. From what is gleaned in the various authorities, it is apparent that if such an infringement of rights is being claimed, then urgency compels the aggrieved party to bring an action in a timely manner. Where the Claimant has delayed his application for an interlocutory injunction, he is unlikely to establish that it would be unreasonable to make him wait until trial, (see **Hanbury & Martin on Modern Equity**). In **Shepherd Homes Ltd. v Sandham**, an unexplained delay of five (5) months prevented the grant of an interlocutory injunction. Megharry, J., stated that "if the injunction is also mandatory, any delay by the Claimant will mean that the injunction if granted, would disturb rather than preserve the status quo."

Applicability of the Law on Fundamental Human Rights

[23] With the global recognition of human rights law especially within the Commonwealth, it behoves the judiciary, where it is relevant, to find ways and means of demonstrating the applicability of human rights law to everyday decisions and reasoning in our judgments. Within the International context, Jamaica ratified the **International Covenant on Economic, Social and Cultural Rights (ICESCR**) on the 3rd October 1975. According to the principles of

international human rights law, all rights are interdependent, indivisible and interrelated and as such, must be justiciable. Neither the nature of economic, social and cultural rights as such, nor the terms of the **ICESCR** or its travaux preparatoires, may be invoked to deny the justiciability of such rights. On the contrary, many aspects of the rights concerned lend themselves to judicial determination. States Parties to the Covenant, by way of ratifying this instrument, commit to act in conformity with their legal obligations under the Covenant such as the obligations to respect, protect and fulfil the rights in the Covenant. States Parties must provide judicial remedies for alleged violations of economic, social and cultural rights whenever such measures are necessary for their effective enforcement. Such remedies must exist alongside adequate administrative remedies, (see **Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers**).

[24] The right that would be relevant to these proceedings would be captured in **Article 11 (1)** of the **ICESCR** which reads:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate, standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right recognizing to this effect the essential importance of international cooperation based on free consent."

The Committee on Economic, Social and Cultural Rights in General Comment Number 4 rejected a "narrow or restrictive" interpretation of the right to adequate housing, which would imply, for instance, the mere provision of a shelter in the sense of having a roof over one's head or which could regard shelter exclusively "as a commodity." It should be seen as "the right to live somewhere in security, peace and dignity." The Committee opined that this interpretation consisted of at least two (2) components being, (a) the fact that the right to housing is integrally

linked to other human rights and to the fundamental principles upon which the Covenant is premised, and (b) the concept of adequacy.

[25] The right to adequate housing cannot be considered in isolation but requires for its full enjoyment, the protection of other rights as well, such as the concept of human dignity and the principle of non-discrimination, the right to freedom of residence and the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondences. All of these second generational rights constitute a very important dimension in defining the right to adequate housing. The right to adequate housing entails the principle that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, **harassment and other threats** (my emphasis).

[26] On the question of domestic local remedies, the Committee viewed many component elements of the right to adequate housing as being at least consistent with the provision of such remedies which included legal appeals aimed at preventing planned evictions, harassment and other threats, "through the issuance of court-ordered injunctions."

[27] Within our domestic/local context, this equivalent human right is implicit in the right of everyone to respect for and protection of private and family Life, and **Privacy of the Home** (my emphasis). In **The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, chapter III, section 13 (3) (j) (ii)** It states:

> *"The rights and freedoms referred to in subsection (2) are as follows:-*
> *the right of everyone to respect for and protection of private and family life and privacy of the home."*

[28] In this matter, I have taken into consideration the fact that the right to respect for and protection of privacy of the home is equivalent to the right to adequate

housing found within the **ICESCR**, [**article 11(1)**]**,** and the substratum of the Claimant's application is that there was a violation or infringement of this right. However, I have also determined that this right can also be said to be violated or infringed with respect to the Respondent's property and privacy of his home. In the true spirit of the States Parties obligation to incorporate into domestic law, minimum core obligations of the **ICESCR**, the avenue sought by the Claimant for domestic redress, is the most suitable one. **Section 19 (1)** of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011** states:

> "If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him....that person may apply to the Supreme Court for redress..."

Section 19 (3) also states:

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any provisions of this Chapter to the protection of which the person concerned is entitled."

a) An interlocutory injunction is an equitable remedy and a form of redress. In **section 49 (h)** of the **Judicature (Supreme Court) Act**, a judge of the Supreme Court is empowered

> *" 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 be made; and any such order may be made either*

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

Conclusion

[29] The Applicant, Junior West, sought this Court's redress through an application for an interlocutory injunction. He relied on the balance of convenience as the main factor that should be considered in the Court deciding whether or not this remedy should be granted for what I would classify, as a violation of his human right to the protection of his privacy of his home. Where the balance of convenience does not clearly favour the Claimant nor the Respondent, Mr. Gerald Miller, as in this case, then the preservation of the status quo is the decisive factor.

[30] Urgency is the catalyst for such applications and the Applicant's delay of two (2) years rendered his application incapable of succeeding. Therefore, the Applicant's best option is to seek an early trial date.

[31] I adopt the approach of examining the practical consequences were I to grant this interim injunction. The Applicant having extended the original dwelling structure caused this extension to encroach on the Respondent's property. The Respondent having erected a boundary fence at his expense did not impede free access of the Applicant in or out of his home. If I were to order that this boundary fencing be removed at the Respondent's expense there would then be a great

risk of the Applicant's dogs trespassing on the Respondent's property and causing great discomfort to his tenants.

[32] Additionally, I find it curious that the Claimant's mother, Olga Taylor, was not added by him as a second Claimant in this application and bearing in mind that there may be some contention existing between the Claimant and his mother with respect to possession of the house, a fact which was not raised by the Claimant but instead by the Respondent, - he who comes to equity must come with clean hands. In light of the foregoing, I find that the least irremediable prejudice would be to the Respondent, Mr. Gerald Miller.

Order

[33] 1. The application is therefore refused and dismissed.

2. Costs of this application awarded to the Respondent to be taxed, if not agreed, and

3. Liberty to apply.