

DRAFT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO: 2010 HCV 04115

BETWEEN NADIA NADIAK-PARCHMENT 1ST CLAIMANT

AND ANGELA CLARKE-MORALES 2ND CLAIMANT

AND SUNSWEPT JAMAICA COMPANY LTD. DEFENDANT

Ms. Martina Edwards and Mr. Shaun Shelton instructed by Shelards, Attorneys-at-Law, for the Claimants/Applicants.

Mrs. Georgia Gibson-Henlin and Ms Carissa DeLisser instructed by Henlin Gibson Henlin for the Defendant/Respondent.

Heard: November 3rd and 10th, 2010

f **Whether interim injunction granted ex parte should be ~~granted or~~ extended; whether material non-disclosure, whether serious issue to be tried; discretion of court to grant new injunction or vary one previously given.**

CORAM: ANDERSON J.

1. The proceedings before me relate to an attempt by the claimants ("Applicants" herein) to prevent the Registrar of Titles from registering a mortgage on or effecting a transfer of or other dealing with certain property registered at Volume 695 Folio 84 of the register book of titles. An *ex parte* injunction was obtained on an application before Sinclair-Haynes J. a judge of this court, on August 24, 2010. The injunction was subsequently extended on September 1 and October 5, 2010 but, until today, there has not been an *inter partes* hearing in relation to its grant, as counsel for the defendant, (the "Respondent" herein) sought instructions from the Respondent.

2. Today's hearing also encompasses an application by the Respondent to discharge the injunction previously granted to the Applicant/Claimant.
3. On October 27, 2010 counsel for the Respondent filed an application to discharge the interim injunction. I do not propose here to rehearse the principles informing the grant of injunctions as exemplified by the well-known American Cyanamid case, as those principles have been later refined. Rather, I will start with the submissions made by the Respondent for discharging the injunction.
4. The grounds put forward for discharging the injunction were set out as follows:
 - i. There is no serious issue to be tried.
 - ii. The statements of case disclose no reasonable grounds for bringing the claim in accordance with (CPR) 26.3 (1) (c).
 - iii. The statements of case (are) an abuse of process pursuant to 26.1 (3) (b).
 - iv. The application failed to disclose to the court that the Respondent by Suit No: C.L.S. 317 of 1992 had filed a claim for recovery of possession against her in relation to the subject matter of the application and intended claim.
 - v. The Applicant misrepresented to this court in this application that she has a potential claim on the basis of adverse possession as a basis for getting the urgent injunction and for her potential claim. The Applicant failed to disclose to this court that contrary to her assertion that she had been in adverse possession since 1985, she in fact entered the property with permission to rehabilitate the property that is the subject matter of this claim by agreement or Letter of Introduction dated the 2nd day of November 1987.
 - vi. The Applicant also filed a claim as evidenced by Suit No: C.L. N. 225 of 1992 for possession of the property from the Respondent on the basis of proprietary estoppel.

5. By the time this matter came before me on November 3, 2010, the Applicant, by then joined in the claim by the 2nd claimant, had filed a Further Amended Notice of Application for Court Orders as well as a Fixed Date Claim Form in which the primary relief sought was in the following terms:

An Order that the registrar of Titles be restrained from registering mortgage number 1651448 to Derrick Hanlan on Certificate of Title Volume 695 Folio 84 and/or from transferring, charging or in any way dealing whatsoever with respect to the said property until the determination of the Fixed Date Claim Form filed herein or for such other period as determined by the Honourable Court.

6. It should be noted that the relief sought in this Further Amended Notice dated August 23, 2010 and filed and served on November 2, 2010, was in essentially the same terms as the Notice previously filed except, importantly, that the original notice sought the restraint "until determination of the adverse possession application lodged by the Applicant/Claimant at the National Land Agency on the 14th December 1998 or for such other period as determined by this Honourable Court". In addition, the Further Amended Notice now filed, was supported by an affidavit filed on November 2, 2010
7. I note the above because, in fact, the notice being submitted upon by the Applicants' attorney is materially different from the notice in respect of which the original order had been made. Counsel for the Respondent did not take the point of the amended notice not being in the same terms as the original one, as a preliminary point *in limine*. Nor did she raise the issue of

the affidavit by the 2nd Applicant which had only been filed and served the previous day. She did, however, in her opening submissions, make the point that she was being asked to meet a different case to that in respect of which the original order had been issued. Further, in her written submissions she adverted to the fact that “the application was short-served on Sunswept’s attorneys, and although the hearing was *inter partes*, the attorneys never had the opportunity to obtain instructions from their client”. (I must say it is not immediately clear whether the reference is to today’s hearing or a previous hearing).

8. Although Respondent counsel’s grounds for discharge were as set out above, the main submission was that there has been material non-disclosure and/or misrepresentation of certain facts which should have been placed before the court at the time of the grant of the injunction.
9. In this regard, in the instant case, counsel for the Respondent says that the Applicant did not reveal to the court granting the ex parte injunction the fact that there had been filed by the Applicant, an application to the Registrar of Titles to secure a title in her name on the basis of adverse possession prior to the filing of the application for the injunction. Further, the fact that the 1st Claimant herself had filed a suit seeking a declaration that she had a proprietary interest in the property on the basis of “proprietary estoppel”, had not been disclosed.
10. There is a clear duty to disclose. (See **Reg v Kensington Income Tax Commissioners** [1917] KB 486). There is

undoubted authority for the proposition that where an application for an injunction is made ex parte, there is an even greater burden on the applicant to make the court aware of all material facts which may effect its decision. Failure to disclose and, a fortiori, misrepresentation, are proper bases upon which a court may exercise its discretion to discharge an injunction

11. In her submissions, counsel for the Applicants, Ms. Edwards submitted that there was indeed a serious issue to be tried. Further, given that the property at issue had been the home of the Applicant for many years during which time extensive refurbishing and renovations costing in excess of twelve million dollars (\$12,000,000.00) had been effected and the issue of right to land was a live one, damages may not be an adequate remedy should the injunction be denied but the claimant win in the substantive action. She cited the Limitations of Actions Act as well as two other authorities, **Goomti Ramnarace v Harrypersad Lutchmansingh** [2001] UKPC 25, a decision of the Judicial Committee of the Privy Council on an appeal from the Republic of Trinidad and Tobago, and **Secretary of State for the Environment, Food and Rural Affairs v Meier and Others** [2009] UKSC 11, as providing justification for a submission that there was a serious issue to be tried. While I am of the view that the latter case does not provide any assistance, I believe that issues raised in the former do raise issues which arise in the case before me.
12. I have in coming to a decision for the purposes of a ruling herein, proceeded on the basis that what I am considering is an

application extend the interim injunction (using as a basis, the further amended notice of application) and that the Respondent is opposing that extension and in fact seeking its discharge and is opposed to the grant of any new interim injunction.

13. Having heard submissions from both sides, including their summary of the evidence which is to be led in the substantive action, while it is not the role of this court to embark on a mini trial, I have formed the view that there was certainly some material non-disclosure by the Applicants in relation to the application as originally presented. That, of itself, would normally be sufficient to give the court discretion to discharge. However, it would seem to be a relevant fact, that the Respondent's application for recovery was dismissed, apparently on the basis of want of prosecution, according to the as yet unfiled affidavit of Mr. Clayton Morgan.
14. On the other hand, I would hold that there are serious issues to be tried as they relate to the true proprietary interest and whether proprietary estoppel would arise so as to create an equity in the Applicants. I also take the view that in the event that the Applicants were to be successful, given the averments of the use of the property as the ordinary residence of the Applicant, or at least one of them, damages may not be an adequate remedy while if they failed, it may be an adequate remedy for the Respondent.
15. Finally, it seems to me that on a balance of convenience it would be more desirable to let the status quo remain until the matter is

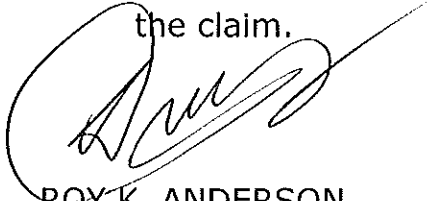
finally resolved at a full trial. In a recent case between Cable & Wireless Jamaica Ltd (Trading as LIME) and Claro v Mossell Jamaica Ltd (t/a Digicel) HCV 00036 of 2009, I reviewed a series of authorities and concluded that in exercising its discretion as to whether to grant the equitable remedy of an injunction, the court ought to bear in mind trying to ensure that it acts so as to enhance the interests of justice in the long run.

16. I am constrained to reiterate that the Further Amended Notice of Application with substantive new grounds for the injunction was filed on November 2, 2010 and the application to discharge brought by the Respondent was premised upon a different set of grounds as set out in the earlier Notice of Application for Court Orders. Further, the affidavit of the now 2nd claimant was only filed on the same day. This meant that the Respondent would not have had a chance to respond to that affidavit. Although that point was not taken, I believe that a court of Equity must bear those factors in mind in determining the appropriate outcome of these proceedings.

17. I have come to the view that I should discharge the injunction previously granted but exercise my discretion to grant a new interim injunction based upon the Further Amended Notice of Application for Court Orders, for a further period of twenty eight (28) days. The matter is to be set down for further consideration at that time. The Respondent is allowed to file and serve one affidavit within ten (10) days this order. The Claimant/Applicants may file and serve one further affidavit not later than seven (7) days after the receipt of an affidavit sworn

on behalf of the Respondent. No further affidavits may be served thereafter without leave of the Court. Each party is to file and exchange full submissions with authorities on or before Friday December 3, 2010.

18. As far as costs are concerned, I order that costs shall be costs in the claim.

A handwritten signature in black ink, appearing to read "Roy K. Anderson", is written over the text of the order. The signature is fluid and cursive, with a large loop at the beginning.

ROY K. ANDERSON

PUISNE JUDGE

NOVEMBER 10, 2010