

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2020/CLE/gen/00722

BETWEEN

LONG ISLAND DEVELOPMENT LIMITED

Plaintiff

AND

- 1) DYLLIS SMITH**
- 2) WESLEY B. SMITH**
- 3) ROBERT SMITH**
- 4) ILENE SMITH**
- 5) ORAMAE PINCER**
- 6) HELEN DARVILLE**

Defendants

Before: The Honourable Madam Justice Tara Cooper Burnside (Ag)

Appearances: Adrian M. Hunt and Christina D. Justin for the Plaintiff

Mark Flowers for the Defendants

Hearing Date: 15 January 2021

RULING

- [1]** This is a trespass action, which was commenced by the Plaintiff by a specially indorsed Writ of Summons filed on 24 August 2020. The application before me is a Summons issued by the Plaintiff for an interlocutory injunction to restrain the Defendants and their

servants and agents from “entering upon, crossing, or conducting any acts whatsoever” on the property (the “**Property**”) which is the subject of the action.

- [2] The application is supported by an affidavit sworn by Gregory P. Graham, a director of the Plaintiff. A summary of that affidavit is set forth below.
- [3] The Plaintiff is the owner in fee simple in possession of the Property by virtue of a certificate of title granted by this Court on 1 March 1974 (the “**Certificate of Title**”) in a quieting titles action, namely, Equity Action No. 120 of 1967 (the “**Quieting action**”). The Property comprises 136.09 acres and is located in North End, Long Island.
- [4] In or about November 2019, the Plaintiff discovered that 4 acres of the Property (the “**4 acre parcel**”) had been cleared by the first named Defendant, whereupon the Plaintiff issued a written demand to the first named Defendant to cease and desist all activities on the Property. The Plaintiff asserts that until this time “there were no signs whatsoever of any trespassers or activity on the Property”.
- [5] An exchange of correspondence ensued between the parties during which the Defendants claimed to be descendants of Thomas Smith and Alfred Duncombe Smith and demanded the Plaintiff “to provide LEGAL documentary evidence of [its] CLAIM as the legal owner” of the Property. It is to be noted that in the Quieting action, the Plaintiff traced its title to the Property though the said Thomas Smith, the son of Alfred Duncombe Smith.
- [6] In response to the Defendants’ demand, the Plaintiff provided the Defendants with a copy of the Certificate of Title and other documents filed in the Quieting action, and repeated its request that the Defendants cease all further acts of trespass on the Property.
- [7] The Defendants have refused to cease their activities and continue to carry out the same without the Plaintiff’s permission. The Plaintiff commenced this action in the circumstances.
- [8] Wesley B. Smith (“**Mr Smith**”), the second named Defendant, filed an affidavit in response on behalf of the Defendants. In summary, the Defendants say that their ancestors occupied and farmed the Property for many years and the 4 acre parcel was the original farm of their father, Leonard R. Smith. They also say they continued the cultivation of the 4 acre parcel and currently sell fruit harvested from the Property in the local market.
- [9] The evidence of the Defendants also indicates that the first and fifth named Defendants produce straw work for sale locally and internationally from the palm trees growing throughout the Property, including the 4 acre parcel. Such straw work includes handmade hats, bags, purses, dolls and placemats which are apparently traded by first and fifth named Defendants under the name Starfish Traders, which appears from the evidence to be an established business.

[10] In addition to the foregoing, the Defendants say that, after reviewing the documents provided by the Plaintiff, they verily believe that the Plaintiff misrepresented and concealed material facts in the Quieting action such that the Certificate of Title was procured by fraud. They do not consider that they are trespassers on the Property and assert that the 4 acre parcel was cleared prior to 2019. They also say that the rights which they currently exercise over the Property and their use of the Property for profits, have been exercised for generations. Accordingly, by their Defence and Counterclaim filed on 12 January 2021, the Defendants seek, *inter alia*, to have the Plaintiff's Certificate of Title set aside on the basis that it was procured by fraud and claim that they have a possessory and equitable title over the Property or alternatively, they have acquired prescriptive rights in respect of it. They also claim that this action is statute-barred under the Limitation Act, 1995.

Relevant legal principles

[11] This Court has power pursuant to section 21 of the Supreme Court Act to grant an injunction whenever it is just and convenient to do so.

[12] When dealing with an application for an interim injunction the courts will usually apply the tests established by the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396, namely:

- (i) Is there a serious issue to be tried?
- (ii) Would damages be an adequate remedy for either side?
- (iii) Where does the balance of convenience lie?

This is the starting point for interim injunction applications but the principles are not set in stone and there may be special factors that apply.

[13] There is no dispute between Counsel for the parties in this regard and they agree that the first test is satisfied, i.e., there is a serious issue to be tried between the parties. Such consensus does not excuse the Court from examining the position for itself and having considered the affidavits and pleadings, I agree with Counsel that the claims raised in this action are not frivolous or vexatious. There are, indeed, serious issues to be tried, which include (i) whether the Certificate of Title was procured by fraud, (ii) whether the Plaintiff's claim against the Defendants in trespass is statute-barred under the provisions of the Limitation Act, 1995 and (iii) whether the Defendants have acquired certain prescriptive rights against the Plaintiff.

[14] The next question which the Court must determine is whether an award of damages would be an adequate remedy for the Plaintiff in the event it were successful at trial in establishing its right to a permanent injunction. As a general principle, if damages would

be an adequate remedy and the Defendants would be in a financial position to pay them, an injunction would be unwarranted.

- [15] In answering this question, I note that it is a well-established principle of law that a landowner who has lost the use of his property to a trespasser is entitled to recover a reasonable sum in recompense for such loss of use, namely mesne rents or profits, regardless of whether he has suffered any actual loss: *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841, *Delta Properties Limited v. Bahamas Electricity Corporation* [2014] 1 BHS J. No. 101. It follows that, as a general proposition, an award of damages *should* adequately compensate the Plaintiff if it is successful at trial. On behalf of the Plaintiff, however, Mr Hunt correctly states that there is no evidence before the Court regarding the Defendants' willingness to provide a cross-undertaking as to damages in the event an injunction is granted and it is subsequently determined that such injunction was unjustified, or their means to pay such damages. The result is that there is no evidence which satisfies me that an award of damages would be an adequate remedy for the Plaintiff.
- [16] I must therefore consider a further question: Assuming the Defendants are ultimately successful at trial, would they be adequately compensated under the Plaintiff's undertaking as to damages for the loss they would sustain if they are prevented from continuing their activities on the Property and the 4 acre parcel in particular until trial? If an award of damages would be an adequate remedy and the Plaintiff would be in a financial position to pay them, there is no reason to deny the injunction.
- [17] In answering this second question, I am concerned that the Defendants would no longer be able to harvest and sell the produce cultivated by them on the Property and the first and fifth Defendants would lose their supply of raw material for the purpose of their straw work business. The livelihoods of the Defendants, the first and fifth in particular, would be at stake if an injunction is granted. The loss likely to be suffered by them would be considerable and also difficult to quantify. And although the Plaintiff has provided an undertaking as to damages, there is no evidence before the Court as to its means. In the circumstances, it is unclear whether an award of damages would adequately compensate the Defendants in the event an injunction is granted and the Defendants are successful at trial.
- [18] Given my doubt as to the adequacy of damages vis-à-vis both parties, the question of "balance of convenience" arises.
- [19] In *American Cyanamid v Ethicon Ltd* [1975] AC 396 Lord Diplock stated (at page 511):
- “...It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the

balance lies, let alone to suggest the relative weight to attach to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at trial.

- [20] In *National Commercial Bank Jamaica Ltd. V Olint Corpn Ltd* [2009] UKPC 16, the Privy Council explained the principles established in *American Cyanamid*. In delivering the judgment of that court, Lord Hoffman stated (at paragraphs 16 - 17) that:

“The purpose of such an [interlocutory] 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. 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.

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

- [21] There is no established list of all the various matters to which a court must have regard when deciding where the balance lies or the weight to be attached to such matters. However, one thing is certain, *viz.*, at this preliminary stage, the Court should not try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, nor to decide difficult questions of law which require mature

consideration. These matters should be left to be addressed by the judge who will hear the trial.

- [22] On behalf of the Defendants, Mr Flowers asserted that the balance weighs against granting the injunction because it would likely cause irreparable prejudice to the Defendants and the same cannot be said of the Plaintiff.
- [23] First, I agree with Mr Flowers that the livelihoods of the Defendants and the first and fifth named Defendants in particular, will likely be prejudiced if an injunction in the terms sought is granted. As indicated previously, they would no longer earn money from selling produce harvested from the 4 acre tract. Moreover, the first and fifth Defendants would no longer have available to them the raw material produced on the Property which they currently use for their straw work and would have to look elsewhere for such material. And there is a real risk that their goodwill will be impaired if their business is suspended until a determination of the issues at the trial of this action. In comparison, the Plaintiff will have to suffer the activities currently carried on by the Defendants until the issues in this matter are finally determined at trial. And there is no evidence before the Court that any actual loss will be suffered.
- [24] I am acutely aware that it is possible that an award of damages in favour of the Plaintiff may not be satisfied by the Defendants. The same may hold true for an award of damages in favour of the Defendants, as there is no evidence of the means of the Plaintiff to pay, although probably to a lesser extent given the undertaking that it has provided. In any event, however, based on the evidence before me, the prejudice to be suffered by the parties should an injunction be granted or denied until the trial of this action is likely to be greater for the Defendants for the reasons stated.
- [25] I turn to the context in which the injunction is being sought to consider the relative strength of each party's case. As indicated above, the Plaintiff holds a certificate of title in respect of the Property. Pursuant to section 19 of the Quieting Titles Act, such certificate is conclusive as to the accuracy of its contents and is binding on all persons, including the Crown. It also constitutes conclusive evidence that every application, notice, publication, proceeding, consent and act which ought to have been made, given, taken or done before the granting of the certificate of title, have been properly, duly and sufficiently, made, given, taken and done.
- [26] Mr Hunt correctly pointed out that a landowner is prima facie entitled to an injunction to restrain a trespass whether or not the trespass causes him harm. However, that principle is subject to the proviso that the landowner's title is not in dispute: *Patel v W H Smith (Eziot) Ltd* [1987] 2 All ER 569. In the case at hand, the Certificate of Title is disputed by the Defendants on several fronts. First, the Defendants say that the Certificate of Title was procured by fraud. Pursuant to section 27 of the Quieting Titles Act, if a person fraudulently, knowingly and with intent to deceive makes any material false statement or representation, or suppresses, withholds or conceals, from the Court any material

document, fact or matter of information in a quieting titles proceeding, the certificate of title obtained by that person by means of such fraud shall be null and void except as against a bona fide purchaser for valuable consideration without notice.

- [27] In their Defence and Counterclaim the Defendants allege that the Plaintiff knowingly made misrepresentations to the Court in its Abstract of Title filed in the Quieting action. They say such misrepresentations related to the legal description of the Huntington Tract, from which the Property is derived and the interpretation and effect of the Last Will and Testament of Alfred Duncombe Smith. They also say that the Plaintiff's claim that it acquired a $\frac{3}{4}$ interest in the Property was predicated on such representations and that the Plaintiff failed to notify their father of the Quieting action even though he was in active possession of the 4 acre parcel when the action was commenced.
- [28] A plaintiff who wishes to challenge a certificate of title issued to another person after an investigation of title by the court under the Quieting Titles Act (to which the plaintiff was not a party) must show a prima facie title to the land which would have been likely to defeat the title presented to the court. The plaintiff must also establish that his failure to file an adverse claim or otherwise bring his claim to the attention of the Court was due to the fraudulent act or omission of that other person within the meaning of section 27 of the Quieting Titles Act. It seems to me that the Defendants have met the prerequisites for a challenge. However, fraud, is a serious allegation which must be proved by cogent evidence; for the rule is, the more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. There is limited evidence before the Court and I am unable to ascertain at this stage the strength of the Defendants' claim of fraud in the circumstances.
- [29] As regards the Defendants' plea of limitation and/or acquisition of prescriptive rights, the strength of their case will depend on the evidence adduced to the Court respecting the duration and quality of the acts of the Defendants and their father vis-à-vis the 4 acre parcel. The evidence of the Defendants in this regard is diametrically opposed to the evidence of the Plaintiff, which is that "there were no signs whatsoever of any trespassers or activity on the Property" until November 2019. And it is not the function of the Court at this stage to resolve such conflicts.
- [30] In all the circumstances, although I am prepared to say that the Defence and Counterclaim is not doomed to failure, it is difficult to assess at this stage the merits of the Defendants' case. If an injunction is granted, the Defendants will suffer prejudice; likewise, the Plaintiff will suffer prejudice if the injunction is denied. In my view, however, for the reasons discussed above, the denial of the injunction is the course which seems likely to cause the least irreparable prejudice to one party or the other in the time intervening before trial.
- [31] The Plaintiff's application for interlocutory injunctive relief is denied in all the circumstances.

[32] I will hear the parties on the issue of costs.

DATED this 25th day of March, 2020

A handwritten signature in black ink, appearing to read 'Tara Cooper Burnside', written in a cursive style.

TARA COOPER BURNSIDE
JUSTICE (AG)