

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: 602 of 2008

BETWEEN

ROSALIND MORRIS

Plaintiff

VS

ENA DURANT

Defendant

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court*

2008: April 29

May 5

Mr. Alwyn Archer for the Defendant/Applicant

**Mr. Clement Lashley, Q.C. in association with Miss Michelle Russell for
the Plaintiff/Respondent**

DECISION

[1] **Crane-Scott J:** This is an urgent application by the Defendant, Ena Durant brought by Summons filed on April 21, 2008 for the discharge of an *ex parte* injunction granted by *Alleyne J (ag)* on April 15, 2008 in which it was ordered and directed that:

- i) “the defendant do forthwith dismantle and remove a gate erected on the Plaintiff’s access to her house built by the Defendant’s servants or agents on the Plaintiff’s access at Lot 20 Parish Land, Phase 3A Christ Church;
- ii) an injunction is granted to restrain the Defendant whether by herself, her servants or agents from continuing to construct a gate blocking the Plaintiff’s access to her residence;
- iii) the Defendant be at liberty to apply to this Court to vary or set aside this Order or any part thereof on twenty-four hours notice to the Plaintiff.”

[2] The injunction was made *ex parte* under a certificate of urgency four days after the filing of the Writ of Summons on April 11, 2008. The Order contained the usual stipulation that the Defendant was at liberty to apply to the Court to vary or set aside the Order or any part thereof on twenty-four hours notice to the Plaintiff. The Defendant’s application seeking to set aside or discharge the injunction effectively places the issue of the necessity for the interlocutory injunction back before the High Court for an *inter partes* review.

[3] It is not in dispute that the Court has a discretion at any stage of the proceedings to grant an injunction where it appears just and convenient to do so. Sections 44 and 45 of the **Supreme Court of Judicature Act, Cap. 117A** provide as follows:

“44. The High Court may at any stage of the proceedings

(a).....;

(b) grant a mandatory or other injunction;

(c).....;

where it appears to the Court to be just or convenient to do so for the purposes of the proceedings before it; and, if the case is one of urgency, the Court may grant a mandatory or other injunction before the commencement of the proceedings.”

“45. (1) Any ...injunction under section 44 may be made either unconditionally or on such terms and conditions as the Court thinks just, including, if an injunction is granted before the commencement of the proceedings, a condition requiring proceedings to be commenced.”

- [4] Under the Diplock guidelines on the proper approach to the grant of interlocutory injunctions at an inter partes hearing laid down in *American Cyanamid Co v. Ethicon Ltd [1975] A.C. 396*, a party who is seeking to keep an interlocutory injunction in place must, *as a first step*, satisfy the Court that there is “a serious question to be tried.” Put differently, the interlocutory injunction should be discharged at this stage if the Plaintiff cannot show that she has “any real prospect of succeeding in her claim for a permanent injunction at the trial.”

Is there a serious question to be tried?

- [5] The Plaintiff's case: Perusal of the relief sought by the Plaintiff in the generally endorsed Writ of Summons filed herein on April 11, 2008

- suggests that the Plaintiff's cause of action against the Defendant is founded on an alleged trespass by the Defendant. Indeed, in addition to the injunctive relief sought at items (i) and (ii) of the Writ of Summons, the Plaintiff also seeks at item (iii), damages for trespass.
- [6] At the ex parte hearing of the application for an injunction, the Plaintiff placed reliance on the affidavit in support of Rosalind Morris filed on April 11, 2008. The Plaintiff's case appears to be based on her claim to a long standing right of access (or right of way) to the main road from her property situate at Lot 20, Parish Land, Stage 3A over and across adjoining lands situate at Lot 21 Parish Land, Stage 3A, Christ Church owned by the Defendant.
- [7] In support of her claim, the Plaintiff deposes at paragraph 2 of her affidavit, that Lots 20 and 21 were previously one area which was subdivided in and about the year 1996. Curiously however, no subdivision plan, planning permission or other supporting documentation was adduced in proof of this contention.
- [8] The Plaintiff also deposes that the access leading east to west from her house situated at Lot 20 to the main road over what is now Lot 21, was approved by a Winifred Morris for the benefit of the Plaintiff's former husband, Winston Morris while the couple lived together in

1986. She alleges that since her separation from her husband, the Defendant, who is the daughter of Winifred Morris and also her former husband's aunt, has been persistently denying her the right to use the entrance to her house which she has enjoyed for over 20 years.
- [9] At paragraph 7 of her affidavit in support, the Plaintiff deposes that as a result of the action taken by the Defendant in constructing a wire fencing across the entrance to her house, she can only access her property on foot using the opening next to the gate. According to her, *“if this entrance is blocked [she has] no other existing means of entering her property”*.
- [10] At paragraphs 5 and 9, the Plaintiff contends that having regard to the fact that the entrance was in use by the occupiers of Lots 20 and 21 for over 20 years the Defendant has no credible defence to her action.
- [11] *The case for the Defendant:* The Defendant's Summons for discharge of the injunction is supported by an Affidavit in Answer (“the Defendant's first affidavit”) filed on April 21, 2008 and by a second affidavit (“the Defendant's Supplemental affidavit”) filed on April 29, 2008.
- [12] In the Defendant's first affidavit, the Defendant sets out the relevant facts which, in her view, support her contention that in constructing a

gate on the said property, she is acting completely within her legal rights as a joint fee simple owner of 344.9 square metres of land situate at Lot 21, Parish Land, Phase 3A, Christ Church.

[13] Exhibited to the Defendant's first affidavit and of particular relevance to the issues at stake in these proceedings is the Conveyance ("**Exhibit ED1**") dated the 31st August 2006 between the National Housing Corporation and the Defendant and her husband as joint tenants. Perusal of the Conveyance clearly supports the Defendant's contention that both herself and her husband have since 2006 been the joint estate owners of the fee simple absolute in possession free from encumbrances of 344.9 square metres of land situate at Parish Land in Christ Church.

[14] The land conveyed to the Defendant and her husband is Lot 21 shown on the a Subdivision plan certified on the 31st day of October, 1990 by Kenneth D. Ward, Land Surveyor prepared for purposes of an approved subdivision of a larger area of land owned by the National Housing Corporation permission for which was granted in 1992.

[15] The history of the ownership of the larger area of land by the National Housing Corporation is also set out in ("**Exhibit ED1**"). As clearly appears in Recital 1, the National Housing Corporation became the

estate owner of the fee simple absolute in possession free from encumbrances of a parcel of land containing by admeasurement 39.2206 hectares or 4,221,660 square feet or thereabouts which was vested in the Corporation by a Conveyance dated the 8th day of June 1982 between the Crown and the Corporation.

[16] According to Recitals 6 and 7 of the said Conveyance, the land situate at Parish Land in the parish of Christ Church was sold in lots as a building estate and was subject to the due observance and performance by the Purchaser or Purchasers of each lot of the conditions and stipulations contained and/or attached to the said permission of the Chief Town Planner...and also to the covenants contained in the said Conveyance but was otherwise free from encumbrances.

[17] Significantly also it is observed that nowhere in the said Conveyance of Lot 21 to the Defendant is any express mention made concerning the existence of an encumbrance in the form of a right of access or right of way over Lot 21 in favour of Lot 20.

[18] The Subdivision Plan of the Parish Land development (**“Exhibit ED7”**) certified by Kenneth D. Ward, Land Surveyor on 31st October 1990 which was referred to in the Recital 3 of the Conveyance was

put into evidence by way of the Defendant's Supplemental affidavit filed on April 29, 2008.

[19] The said plan clearly shows the subdivision of the larger area of land owned by the National Housing Corporation into 72 lots which includes Lot 21 consisting of 344.9 square metres and the adjoining Lot 20 consisting of 469 square metres. The plan also clearly shows a reserved road 6.00 metres wide which is the approved access road for Lot 20, Lot 23, Lot 19 and Lot 24. Furthermore, neither the Subdivision Plan (**"Exhibit "ED7"**) nor the individual parcel plan for Lot 21 (**"Exhibit "ED2"**) shows or refers to the existence of any right of way to the main road for Lot 20 over Lot 21.

[20] At paragraph 14 of the Defendant's first affidavit, the Defendant denies that her land served as an entrance to the Plaintiff's land for over 20 years. The Defendant also exhibited a copy of a letter dated July 7, 2006 (**"Exhibit "ED6"**) addressed to the Plaintiff by the National Housing Corporation which explained to the Plaintiff that the access to her land at Lot 20 Parish Land, Phase 3A was from the west through the Parish Land Development where an alternate road had been provided and not over Lot 21. The letter also advised the

Plaintiff that the Corporation was currently the legal owner of Lot 21 and requested her to desist from trespassing onto Lot 21.

[21] The Court has examined the relief claimed in the Writ of Summons filed by the Plaintiff on April 11, 2008 and read the affidavit in support filed by the Plaintiff on the one hand, together with the Defendant's two affidavits in answer on the other. The Court has also had regard to the legal submissions of Counsel for both parties for and against the discharge of the injunction. In exercising its discretion, the Court is satisfied that the Plaintiff has not established that there is any serious question of trespass by the Defendant to be tried nor that the Plaintiff has any real prospect of succeeding in her claim for a permanent injunction at the trial. The Court therefore holds that the ex parte injunction granted by the Court on April 15, 2008 should be discharged for the following reasons:

- (i) the Plaintiff's action against the Defendant for trespass is at this stage completely without legal foundation since the Plaintiff has not established (a) that she is the owner of Lot 20; nor (b) that the Defendant has unlawfully encroached on any right, interest or property to which the Plaintiff is legally entitled;
- (ii) furthermore, the evidence has established that construction by the Defendant of the wire fence or gate which is the subject of these proceedings is taking place entirely within the area of 344.9 square metres comprising Lot 21 Parish Land owned by the Defendant

and her husband and accordingly no trespass can be established;

- (iii) that the Plaintiff's claim to long user of a right of way to the main road from Lot 20 over Lot 21 for over 20 years, is clearly at variance with the evidence adduced by the Defendant which establishes as a fact that the Parish Land, Christ Church development was initially Crown land which in 1982 was subsequently vested in the National Housing Corporation;
- (iv) any arrangement between the tenants or other occupiers of Crown lands to allow adjoining tenants or occupiers access over lands occupied by them would have been in the nature of a mere licence or permission and would not have operated to create an encumbrance or right of way over Lot 21 which was capable of running with the land;
- (v) the Subdivision Plan ("**Exhibit ED7**") clearly shows that the National Housing Corporation as the former owner of the Parish Land subdivision had provided an alternate access to Lot 20 Parish Land, Phase 3A from the west through the Parish Land Development. In view of this, it is inaccurate and grossly misleading for the Plaintiff to assert as she has done at paragraph 7 of her affidavit, that her only access to her property is on foot by the opening next to the Defendant's gate and that if her entrance is blocked she has no means of entering her property;
- (vi) additionally, nowhere in the Conveyance between the National Housing Corporation and the Defendant and her husband of Lot 21 has any express mention been made either recognizing or creating an encumbrance in the form of a right of access or right of way over Lot 21 in favour of Lot 20;
- (vii) finally, the evidence currently before the Court clearly establishes that it is the Plaintiff who is committing a trespass on the Defendant's land by continuing to access the main road to the east over and through Lot 21 despite having been advised by the National Housing

Corporation and by the Defendant to desist from so doing.

Disposal

- [22] As the Court is satisfied (a) that the Plaintiff has failed to establish that the Writ of Summons filed herein on April 11, 2008 raises any serious question of trespass by the Defendant to be tried and, in particular, has failed to show that she has any real prospect of succeeding in her claim for a permanent injunction at the trial; and (b) that material facts which were, or ought to have been within the knowledge of the Plaintiff were not disclosed to the Court on April 15, 2008 when the ex parte injunction was granted, it is ordered that the injunction be hereby discharged.
- [23] The Defendant shall have her costs of the application certified fit for one attorney-at-law to be agreed or taxed.

**Maureen Crane-Scott,
Judge of the High Court**