COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2002/0299

BETWEEN:

CATHERINE CUFFY

Claimant/Applicant

And

GENEVIEVE GUYE

Defendant/Respondent

Appearances:

Mrs. Singoalla Blomqvist-Williams for Claimant/Applicant
Mr. Michael E. Bruney for the Defendant/Respondent

2002: October 25;
December 12.

DECISION

[1] **RAWLINS, J:** The Parties are the fee simple owners of adjoining lots of land situated in the Canefield East Housing Scheme in the Parish of St. Paul, Commonwealth of Dominica. The Claimant/Applicant (hereinafter referred to as "the Claimant") is the owner of lot 240 which is registered in Register Book V13 folio 4 containing 4959 square feet. She instituted the claim herein against the Defendant/Respondent (hereinafter referred to as "the Defendant") on the 25th day of July 2002 by way of Claim Form and a Statement of Claim.

[2] The Claimant claims that the Defendant wrongfully entered her land in or about January 2002 constructing part of her dwelling house on the land. She claims that as a result of

this alleged wrongful entry, she (the Claimant) has been deprived of the use and enjoyment of her land and has thereby suffered damage. She prays for a declaration that the Defendant is not entitled to enter or to cross her land. She also prays for an injunction to restrain the Defendant, her agents or other persons in that behalf from entering or crossing her land. She further prays for mense profits until possession is delivered up, damages for trespass and costs.

[3] On the said 25th day of July 2002, the Claimant also filed a Notice of Application in which she repeated the prayers contained in the Claim and referred to in the foregoing paragraph. The Application is supported by an Affidavit of even date that was deposed by the Claimant.

[4] In the Affidavit, the Claimant deposed that she purchased her lot of land from the Government of Dominica by way of a loan from the Roseau Co-operative Credit Union Limited, which has a repayment period of 15 years. She stated that in late January 2002 she was made aware that the Defendant was trespassing on her (the Claimant's) land, lot 240. The Defendant had commenced the construction of a house on a part of lot 240. The Claimant deposed that she informed the builder and the contractor, one Mr. Ken Linton, of the encroachment. She stated that Mr. Linton confirmed that there was an encroachment and indicated that it was due to the fact that he was shown the wrong boundaries by the Housing Division of the Ministry of Communication, Works and Housing.

[5] The Claimant further deposed that on the 20th day of February 2002 she instructed her Solicitor to inform the Defendant in writing that approximately one half of her house was being constructed on her (the Claimant's) lot, and that she was prepared to have the problem resolved amicably. Her Solicitor wrote as instructed. She received communication in response from Solicitor for the Defendant dated the 1st day of March 2002. It informed her that there had been discussions with personnel of the Housing Division with a view to having the matter resolved amicably.

[6] The Claimant deposed that she subsequently received a letter from the Ministry dated the 11th day of Mach 2002. That communication advised that the Housing Division had allocated to her another lot of land in the said Canefield Housing Scheme. The letter, signed by the Honourable Minister, Reginald Austrie, informed the Claimant that she was allocated lot 315 which contained 6815 square feet in exchanged for lot 240 which contained 4959 square feet. It requested her to pay the difference in price, $913.50, to the Housing Division and to submit her Certificate of Title for lot 240 to the Division in order to facilitate the exchange. The letter also requested the Claimant to signify acceptance, payment or otherwise within three (3) months, by which date all sale transactions should have been completed.

[7] The Claimant deposed, in paragraph 9 of her Affidavit, that she did not accept the lot that was allocated. She was invited to attend a meeting at the Ministry of Legal Affairs by letter dated the 5th day of April 2002. She said that the meeting never took place. She deposed, in paragraph 10 that by letter dated the 16th day of May 2002, her Solicitor informed the Defendant through her Solicitor, that she was willing to sell her lot 240 to the Defendant for $49,590.00. This was the market value of the land given in a valuation report done by one Mr. Anthony Lebruin. In response, she said, Solicitor for the Defendant stated in a letter dated the 17th day of June 2002 that the Defendant was both unwilling and unable to pay that sum.

[8] When the application was heard, Mr. Bruney, learned Counsel for the Defendant, indicated that he took no objection to the short notice that he had for the hearing. He said that the result was that he was not able to file an Affidavit in Answer. He further indicated that his difficulty with the Application was that it was defective in some respects. First, he said, it was not couched in terms of an application for interim relief. Rather, he said, it sought the substantive reliefs prayed in the Claim. This, he said is not contemplated in **Part 17 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000**, (hereinafter referred to as "the Rules").

[9] Mr. Bruney submitted, in the second place, that the grounds for the application are stated in the affidavit deposed by the Claimant, rather than in the Application itself as required by **Part 11.7 (1) of the Rules**. Third, he submitted that the Notice of Application was not served or even filed with a draft order as required by **Part 11.11(4)(a) of the Rules**. He however waived his right to have those procedural defects cured. The Court has decided to proceed with the matter as if it is an application for interim relief pending the final determination of the case, by virtue of its powers under **Part 26.9 of the Rules**.

The Applicable Principles

[10] The power of our courts to grant interim injunctive relief is conferred by **Part 17.1(1)(a) of the Rules**. **Part 17.3(1) of the Rules** requires an application for interim remedy to be supported by evidence on Affidavit unless otherwise ordered by the Court. **Part 17.4(3) of the Rules** provides that an order may be made in the first instance on 3 days notice to the Respondent. **Part 17.8 of the Rules** empowers the Court to exercise its powers of Case Management under **Parts 26 and 27 of the Rules** to give directions for an early hearing of a claim on the leaving of an application for interim order.

[11] The substantive legal principles that are applicable on this Application have been the subject of such consistent litigation within the jurisdiction of the Eastern Caribbean Supreme Court that it is unnecessary to enter into a detailed analysis of them here. It suffices to state that our courts have accepted the guiding principles laid down in **American Cyanamid Co.v. Ethicon Ltd. [1975] 1 All E.R. 504**. For the purposes of this case, it is useful to restate these principles as they were stated by Lord Diplock at pages 510f – 511a, thus:

> "[T]he Court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally

> be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do what was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them there would be no reason [on] this ground to refuse an interlocutory injunction.
>
> 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 the balance of convenience arises."

[12] In brief, the issues for consideration in this case are:-

1) Whether there is a serious question to be tried;
2) Whether damages may be an adequate remedy to the applicant;
3) Whether an undertaking as to damages by the Applicant to compensate the Respondent in the event that the latter sustains loss as a result of the injunction might adequately protect the Respondent;
4) Whether the balance of convenience favours its grant in preserving the status quo.

Submissions by Counsel

[13] In his submissions, Mr. Bruney, learned Counsel for the Defendant admitted that there is a serious question to be tried - the question of trespass by the Defendant upon the land of the Claimant. He insisted, however, that this was not a case of an intentional trespass. The Defendant, he said, had encroached upon the land of the Claimant because the officers of the Housing Division which is concerned with the housing development identified erroneous lot boundaries. The Defendant and her builders were led by those boundaries. Mr. Bruney further submitted that the balance of convenience is in favour of the Defendant. In his regard he said that while he does not deny that the Claimant has a

right to a remedy, no benefit will accrue to her if the Defendant is restrained from continuing the construction of her house and/or from living therein. The Claimant, he said, cannot build her house because of the encroachment. There is no equity, he said, in an order that prevents the Defendant from continuing the construction of her house. This, he submitted, is an ideal case in which damages will adequately compensate the Claimant, who may also be given another lot of land by the Housing Division by way of compensation. In his view, the price that the Claimant asked the Defendant to pay for lot 240 was not fair in the circumstances of this case.

[14] For her part, Mrs. Blomqvist-Williams, learned Counsel for the Claimant, stated the view that the balance of convenience in the case is in favour of the Claimant. She requested the court to consider that the Claimant has purchased her lot from the government and has been granted title thereto that is indefeasible. The Defendant and her agents have encroached upon the land. The Claimant has been literally begging for an amicable settlement. The Defendant has refused to pay the price which the Claimant has asked for the land. The Claimant in the meantime has been deprived of the use of her land, while she must continue to pay the mortgage on the loan that she received for its payment. These are grounds, Mrs. Blomqvist-Williams submitted, on which the Court should seek to maintain the existing status quo by halting further construction pending the final determination of the claim.

Finding on the Principles

[15] The Court is in accord with the admission by Counsel for the Defendant that there is a serious issue relating to trespass to be decided on the claim in this case. I am further of the view that an undertaking as to damages by the Claimant can adequately protect the Defendant for any loss or damage that she might suffer as a result of the grant of injunctive relief to the Claimant. With regard to the balance of convenience, I have noted that both Parties have purchased their lots in the Canefield Housing Scheme. They both have been issued with Certificates of Title by the Government. All indications are that they are both recipients of loans for the purchase of their lots. In addition, the Defendant has also taken

a loan for the construction of her house. They are both in the process of repayment of those loans with interest. The Claimant and her builders were led into error by the Housing Division in the first place. The house was at a stage of near completion at the time of the hearing of the application.

[16] The letter which Mr. Linton, the builder for the Defendant, wrote to the Manager of the Housing Division on the 18th day of February 2002 is quite an indictment on that Division. It shows that notwithstanding that the Defendant had been in occupation of lot 241 for some years, she still requested that Division to show the boundaries to the builders prior to the commencement of construction. It is instructive that the letter states in paragraph 2:-

> "The construction of the dwelling house is now well advanced and is being constructed within the four boundaries that you showed us. Completion is expected within 6 weeks. However, despite our precaution to ensure that we build on the correct lot, there seems to be an error in the identification of the lot. Also, considering the fact that lot 241 was purchased six (6) years before lot 240 it's (sic) quite strange that this discrepancy did not come up when the owner of lot 240 was shown her boundaries."

[17] The process also discloses that the Housing Division in the end tried to remedy the situation by offering a larger lot in the same building scheme to the Claimant. The Claimant has refused to accept this for reasons that have not been made clear. At the hearing of the Application, Counsel for the Claimant indicated that the Claimant is no longer interested in having any land in the housing scheme. She simply wishes to sell her lot. The Defendant has refused to purchase it at current market price. In my view, this appears it be acceptance on the part of the Claimant that damages or a sum in money will be adequate compensation for the alleged trespass to her land. The question is how much will constitute adequate compensation or damages. I doubt that the Claimant can insist that this will be the market price for the lot. The measure of damages will be damages incidental to the tort of trespass.

[18] I am of the view that on the evidence, damages will be an adequate remedy for the Claimant. Additionally, the balance of convenience is in favour of the Defendant. She appears to have participated in the process of settlement in good faith. The Claimant has

indicated that she is not now interested in having lot 240 or any other lot in the scheme at this juncture. She has indicated an interest in monetary compensation by the proposal that she made to sell lot 240 to the Defendant. If the court were to restrain the Defendant from entering upon lot 240 and, in effect, from completing the construction of her house, this will, in all of the circumstances, work to her greater inconvenience ultimately than that of the Claimant.

[19] In summary, therefore, damages will be an adequate remedy for the Claimant. The Defendant should be in a position to make this good, notwithstanding the statement that was made in the letter of the 17th day of June 2002 by Solicitors on her behalf in response to the offer by the Claimant to sell at market price. Even if I am in error on this, the foregoing indicates that I still hold the view that the balance of convenience is in favour of the Defendant. I shall accordingly dismiss the Application for injunctive relief herein, but will make no order as to costs in the circumstances of the case. It is my view, however, that this case must have the benefit of an early trial. I shall therefore give directions for this pursuant to **Part 17.8 of the Rules**.

Order

[20] Premised on the foregoing, it is hereby ordered that:-

1) The Application herein for injunctive relief is dismissed, with no order as to costs.
2) The Defendant to file acknowledgement of service within 7 days of the date of this decision.
3) The Defendant to file and serve Defence within 21 days of the date of this Decision.
4) Reply, if necessary on or before Friday the 31st day of January 2003.
5) The Parties to file and serve a list of documents and Affidavits verifying list on or before Friday the 7th day of February 2003.
6) The Parties to agree on the documents that will be admitted at the trial with consent on or before Friday the 14th day of February 2003.

7) The Parties to file and serve witness statements of the witnesses who will be called to give evidence at the trial on or before Friday the 28th day of February 2003.

8) Witness statements to contain the evidence that will be given by the witnesses in chief, the Parties reserving the right to cross-examine thereon.

9) On or before Friday the 14th day of March 2003, the Claimant to file and serve in one (1) trial bundle the documents required to be filed in Part 39.1 of the Rules in the following order:-

    a. Documents required by Part 39.1(5)(a),
    b. Copies of documents required by Part 39.1(5)(b),
    c. Copies of documents required by Part 39.1(5)(c).

10) The Listing Questionnaire requirements under Part 27.9 in the Rules are hereby dispensed with.

11) The Parties to file and serve an estimate of the costs on or before Monday the 17th day of March 2003.

12) This case is to be fixed by the Registrar for trial on a date during the latter half of the month of March 2003, or as soon thereafter as may be convenient.

Hugh A. Rawlins
High Court Judge

Civil cause – interim injunction – procedural defects in application - Parts 11, 17 and 26.9 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 - whether damages an adequate remedy for the Claimant – the balance of convenience