

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

DOMHCV2016/0126

BETWEEN:

MARIA JOSEPHINE ISMAEL-THOMAS
(As Personal Representative of the Estate of Wilson Ismael
Deceased)
Claimant/Applicant
and

OLIVER S JOSEPH
MARGARET L JOSEPH
FRANCEIS A LAWRENCE
OLIVER JOSEPH CONSTRUCTION LTD
Defendants/Respondents

Appearances:

Mr. Michael Bruney for the Claimant/Applicant
Mr. Lennox Lawrence for the Defendants/Respondents

2016: June 8; 17
September 1

RULING ON APPLICATION TO CONTINUE EX PARTE INJUNCTION GRANTED AND
ON APPLICATION TO DISCHARGE INJUNCTION ON WRITTEN SUBMISSIONS

Introduction

- [1] Stephenson J: On 28th April 2016, Mary Josephine Ismael Thomas as Personal Representative of the estate of Wilson Ismael ("the applicant") urgently sought and obtained an ex parte interim injunction against the respondents wherein they were restrained whether by themselves or by their servants or by their agents or otherwise howsoever from entering, reentering, crossing or engaging in activity on the land located at Warner and registered in Book M20 Folio 67m of the Register of Titles in the names of the 1st and 2nd named defendants and bounded on the North by a Public Road, South East by the land of Yvonne Alexander, West by

remaining lands of the Warner Estate and North West by the Public Road **(hereinafter referred to as “the Land subject of the application”)**.

- [2] The respondents were further restrained from selling or otherwise transferring ownership of the said land until the conclusion of the matter herein and the determination of High Court Case No. DOMHCV2012/0084 or further or other order of court.
- [3] On 9th May 2016, the applicant filed an application seeking the continuation of the interim injunction and also an application for the 1st and 2nd defendants to forthwith remove the container from the land subject to the application, subsequently, the respondents filed an application to set aside the interim injunction.

The Parties

- [4] Maria Joseph Ismael is the claimant/applicant and she is the sole executor named in the will of one Wilson Ismael deceased **(hereinafter referred to as “the applicant”)**. It is contended that the land subject of the application was owned by Wilson Ismael and bequeathed to applicant by the Wilson Ismael in his will.
- [5] Oliver and Margaret Joseph are the first and second named defendants purchased the land subject of the application from Francis Lawrence who is the administrator of the estate of Judith Lawrence and he is the third named defendant. The third named defendant took over the administration of the estate of Judith Lawrence deceased from the previous administrator Deveril Lawrence who died without fully completing the administration of the estate of Judith Lawrence deceased.
- [6] The fourth named defendant is a company associated with and owned by the first named defendant and that company has placed a caveat on the said land subject of the application on the grounds that it has an equitable interest.

[7] Judith Lawrence was the registered owner of the land subject of this application.

The Application for the Injunction and to Continue the Injunction

[8] **It is the applicant's contention** that Wilson Ismael purchased the property from Deveril Lawrence as personal representative of Judith Lawrence who was the previous owner and that this was prior to the land being sold to the first and second named defendants by the third named defendant who became Personal Representative of the estate of Judith Lawrence subsequent to Deveril Lawrence. The applicant exhibited the Memorandum of Transfer dated 12th May 2000 in support of her claim. It is noted that the Memorandum of Transfer has not been registered.

[9] The applicant also contended that Wilson Ismael occupied the portion of land some 39 years until his death, and whilst he was in occupation of the property he built his residence, a garage and a bar partially in concrete and in wood. The applicant further contended that after the death of Wilson Ismael, one Jones Warrington was permitted by her to enter and occupy the land as an agricultural tenant and also to secure the premises.

[10] The land subject of the application is the subject matter of a dispute between the third named defendant and Wilson Ismael¹ filed previously. In that case, the third named defendant brought an action of trespass against Wilson Ismael and Wilson Ismael counterclaimed seeking a declaration that he is entitled to the disputed land and for an order that the Registrar process and issue a Certificate of Title to him.

[11] The applicant further contended that the said matter remains unresolved and that the parties are awaiting a ruling from the High Court Judge on a preliminary point raised by the defendant in those proceedings.

¹ DOMHCV2012/0084

- [12] The applicant further contended that the third named defendant by Memorandum of Transfer sold the land subject of the application to the first and second named defendant. The fourth named defendant placed a caveat on the said land. The applicant exhibited the Memorandum of Transfer and the caveat.
- [13] The applicant stated that the first named defendant brought onto the land subject of the application a 40 foot container, that, he has also broken down the garage on the property and gave Mr. Warrington a notice to quit and deliver up the property.
- [14] The applicant also stated that there was an attempt by DOMLEC to disconnect the electricity to the property and that she fears unless he is restrained by an injunction the first name defendant will proceed to destroy the other buildings on the property and evict Mr. Warrington from same.
- [15] The claimant undertook to abide by any order as to damages caused by the granting of the injunction in the matter².
- [16] In her application for the continuation of the injunction the applicant contended that the 40 foot container on the property subject of the application is in the path of her tenant which he uses to access his cultivation thereby obstructing him and if the container is allowed to remain there, the first, second and fourth named defendants would try to access the container thereby trespassing on the land which has been in the possession of her and her predecessors in title for over three decades. Therefore she is seeking to have the container removed.

The Application to Discharge the Injunction and Dismiss the Proceedings

- [17] The defendants all opposed the application for the injunction on the following grounds:

² Paragraph 21 of the affidavit in support of the application for the interim injunction filed on the 28 April 2016

- (1) That the application fails to set out or establish the fundamental principles for the grant of injunctive relief laid out in *American Cyanamid*³.
- (2) That the application fails under the settled principles that where damages are a sufficient remedy that an injunction will not be granted;
- (3) that the allegation of fraud is a non starter as the alleged conduct does not include any representation or other conduct in relation to the claimant and that the allegation of fraud is scandalous;
- (4) that the claimant relies on adverse possession and that a litigant cannot institute such an action on an adverse possession claim;
- (5) that the claimant should not be permitted to approbate adverse possession yet equally to approbate that ground and rely on an impugned Memorandum of Transfer;
- (6) that the claimant cannot seek to challenge the 4th **named defendant's title** on the basis of an impugned Memorandum of Transfer as the Memorandum of Transfer does not give any interest in title;
- (7) that the claim and application is frivolous and vulgar and does not establish any reasonable ground for bringing nor maintaining any action;
- (8) that there is no urgency sufficient or at all to grant injunctive relief; and
- (9) that the matter is statutory and the claimant has not sought the available statutory relief and the application for the injunctive relief is an abuse of process.

[18] The third named defendant stated that he does not know the claimant nor that she is the sister of Wilson Ismael deceased. He averred that he did know Wilson Ismael and that Wilson Ismael did have a claim based on adverse possession. He said that he challenged the purported Memorandum of Transfer which was the subject of litigation. Mr. Francis Lawrence stated that he placed a caveat on the property which property was properly and legally removed thereby allowing him to properly and legally transfer the title in the land subject of the application to the first and second named defendants.

³ [1975]AC 396;[1975] 2 WLR 316

- [19] The third named defendant also averred that he was the Personal Representative of Judith Lawrence deceased and was therefore authorized to sign the Memorandum of Transfer to the first and second defendant.
- [20] Mr. Francis Lawrence further averred that the claimant had no title to the land subject of the application and could not in the circumstances restrict the sale to the first and second defendants. He also contended that the claimant and Mr. Warrington are in fact trespassers on the property.
- [21] The third named defendant contended that he was informed by his Solicitor and verily believed that the claimant is unable to sustain any action relating to title to the land subject of the application as she is not the registered proprietor and is restricted to do so by virtue of the Title by Registration Act⁴. Further, that all matters relating to registered titles are all statutory and that the applicant in an appropriate case would have only statutory remedies and not by way of the action being pursued and therefore in the circumstances the claim is frivolous, vexatious and an abuse of the process of the court.
- [22] The first and second named defendants contended that they are bona fide purchasers for value without notice of any adverse claim. They say that they purchased the property for a price negotiated between themselves and the third named defendant and that they have been advised by their solicitor and verily believe that their title in the circumstances of the case indefeasible.
- [23] That as purchasers and owners of the property they placed the container on the land and issued a notice to quit to Mr. Jones Warrington. They say that the **claimant's** application for injunctive relief is without merit and should be dismissed with costs.

⁴ Chapter 56:50 of The Laws of Dominica

Status of the Matter

- [24] The application for continuation and discharge of the injunction came up a number of times and it was ordered that:
- (1) “The defendants were restrained whether by themselves, or by their servants or by their agents or otherwise howsoever from entering, reentering, crossing or engaging in any activity on the land which is **subject of this action ... save for the sole purpose of** accessing the container belonging to the 1st named and/or 4th named defendant which is located on the land.
 - (2) The 1st and 2nd defendants are hereby restrained from selling or otherwise transferring ownership of the said land until the conclusion of the matter herein and the determination of High Court Case No DOMHCV 2012/84 or **further order**”⁵
- [25] On 25th May 2016 the parties were ordered to file their submissions for the courts consideration and the matter was adjourned to 20th June 2016 for ruling. The injunction was continued to remain in effect until that day. Unfortunately the court as currently constituted was ill and unable to comply with its own order. The ruling is handed down now.

The Defendants’ Submissions

- [26] The submissions were filed by the defendants as ordered on 31st May 2016. The defendants noted that it was instructive that the first and second defendants are not parties to DOMHCV2012/0084 and yet the claimant seeks to restrain them from enjoying their statutory rights as registered proprietors of the land subject of the application.

(1) Indefeasibility of the First and Second named **Defendant’s** Title

- [27] The defendants contended that the claimant claims an interest in the land subject

⁵ Order of Court dated 10th May 2016 and entered the 26th May 2016

of the application by virtue of undisturbed occupation and possession by herself and predecessors in title. Learned Counsel Mr. Lennox Lawrence submitted that matters relating to the subject property are governed by the Title by Registration Act⁶ and in these circumstances the claimant must ground her application within the provisions of this act.

[28] Learned counsel made reference to Section 33 of the Title By Registration Act⁷ which states that any person who has acquired or claims to have acquired ownership of land by virtue of the Real Property Limitation Act shall not be entitled to maintain any suit in regard to the land until they have obtained a Certificate of Title thereto. That in the circumstances of the case at bar the claimant has not obtained a Certificate of Title and therefore the application is without merit and the application should be dismissed accordingly.

[29] It was also submitted that an averment by the claimant of 40 years occupation is a claim to title under the Real Property Limitation Act⁸ and in the circumstances of this case the claimant is unable to maintain the substantive action and more particularly an application for injunctive relief.

[30] Learned counsel submitted that the first and second defendants are the registered owners of the land subject to the application and pursuant to section 8 and 10 of the Title by Registration Act ⁹their title is indefeasible and in the circumstances they are entitled to enjoy the fullest and most qualified right that can be held in land.

[31] Learned Counsel Mr. Lennox Lawrence submitted that the defendant's certificate of Title gave them indefeasible title to the land subject of the application therefore whatever inchoate right possibly possessed by the claimant or her predecessors were unenforceable as against the defendants who enjoy indefeasibility of title.

⁶ Op cit

⁷ Op cit

⁸Chapter 54:07 of the Laws of Dominica

⁹ Op cit

The case of George –v- Rosalie Estate Limited¹⁰ was relied on by the defendants in support of this proposition. In that case, it was held that Rosalie Estate Limited having obtained a Certificate of Registration; their title was indefeasible and the indefeasibility was in fact guaranteed by the Certificate of Title. The Appellant in that case sought to institute a claim for trespass against Rosalie Estates Limited before he obtained his certificate of title and was not allowed to do so. It was held **that the appellant “George” could not have a cause of** action for trespass prior to obtaining his Certificate of Title.

(2) The Unenforceability of the Unregistered Memorandum of Transfer

[32] Learned Counsel Lennox Lawrence submitted that even if the claimant sought to rely on the Memorandum of Transfer in her possession, the said memorandum was not enforceable as an interest in land if it remains unregistered as occurred in the case at bar. Learned counsel relied on the provision of Section 6 (2) of the Title by Registration Act¹¹. **Therefore the claimant’s contention that the third** named defendant fraudulently transferred the property to the first and second defendant cannot stand as the land had not been transferred to Wilson Ismael as contended. That the unregistered Memorandum of Transfer was at best a contract only and did not confer any rights on Mr. Ismael or to his estate.

[33] It was contended on behalf of the defendants that the filing of the previous action does not prevent the subject of the litigation from being sold. That the only restriction that can be placed on land to prevent dealing with same is a caveat placed on the title of the land by virtue of Section 114 of the Title by Registration Act.¹²

[34] It was further submitted on behalf of the defendants that in the circumstances of

¹⁰ [(1965) 13 WIR 401 @ 402 g and h

¹¹ Op cit

¹² ibid

this case the principles enunciated in the *George –v- Rosalie Estates Limited*¹³ that any inchoate rights which were possessed or alleged to have been possessed by the claimant are unenforceable against the third defendant or the first and second defendant at the date of filing this action.

[35] The defendants further contended that the rights conferred by the unregistered Memorandum of Transfer is only between the parties to that contract and in the circumstances of this case, the first, second and fourth defendants are not parties to that contract.

[36] Learned Counsel Lawrence on behalf of the defendants contended that there is no procedure in the Title by Registration Act¹⁴ to restrict the registered owner of land by injunction and that the statutory protection and guarantees enjoyed by the registered owners of land cannot be defeated by a common law remedy of injunction.

(3) The Principles Laid out in *American Cyanamid –v- Ethicon*

[37] Learned Counsel Mr. Lawrence contended that in order to obtain an interim injunction the applicant must satisfy the principles as laid out in *American Cyanamid –v- Ethicon*¹⁵. It was contended that the claimant has failed to raise or identify that there is a serious question to be tried. Learned Counsel Lawrence reiterated that the claimant does not have an enforceable claim and in the circumstances of this case, there can be no serious issue to be tried.

[38] The defendants also contend that the court is required to consider whether if the claimant were to succeed at the trial in establishing her right for a permanent injunction whether she could be adequately compensated by an award of damages. It is contended on behalf of the defendants that there is no suggestion

¹³ Op cit

¹⁴ Op cit

¹⁵ Op cit especially at 505(e) and 510(d) to 511(3)

in the affidavit that damages would not be an adequate remedy or that any presumed loss would not be adequately compensated in damages.

Claim for Fraud

[39] The defendant contends that the applicant's claim for fraud cannot be sustained as fraud is not made out in the affidavit in support of the application. Learned Counsel Mr. Lennox Lawrence also submitted that there is no statutory mechanism whereby a third party can raise an allegation of fraud in relation to a title which was issued to another. He further submitted that any question in relation to the grant of title can only be raised by the Registrar of Titles and not by the claimant.¹⁶

[40] Learned counsel placed reliance on Section 142 of the Title By Registration Act¹⁷ to say **"that in a case that it appears to the Registrar of Titles** that any title has been obtained by fraud then the Registrar is provided with a statutory power to call in or question that title. This is a statutory remedy only available to the **Registrar and not the claimant.**"¹⁸

[41] **Learned Counsel went on to submit** ¹⁹that the only statutory authority or mechanism for bringing an action based on fraud is the Registrar of Titles. That there is no statutory mechanism for the claimant not being the Registrar of titles to bring an ordinary claim to set aside a title based on common law fraud to a **transaction to which she is a stranger"**

The Claimant's Submissions

[42] The claimant contended that the claimant is in possession of the property subject

¹⁶ See Paragraph 42 and 43 of the Defendants' submissions.

¹⁷ Op cit

¹⁸ See Paragraph of 43 of the Defendants' submissions

¹⁹ See Paragraph 44 ibid

of the application. That the said property was purchased by Wilson Ismael and that the land was transferred to him. The claimant contended that the same piece of property which was sold to Wilson Ismael was sold by the third named defendant in circumstances which were suspicious.

- [43] The claimant contended that the land was sold knowing that Wilson Ismael had purchased the land and had been in occupation of the said land with structures there on. The claimant contended that the existing Certificate of Title held by first and second named defendants could only have been issued by the Registrar of Titles as a result of fraud by the third named defendant and/or the first and second named defendants.

Serious Issue to be Tried

- [44] Learned counsel for the claimant Mr. Michael Bruney submitted that there is a serious issue to be tried. Learned counsel submitted that the first schedule of the Title By Registration Act²⁰ says that a Certificate of Titles issued by the Registrar is indefeasible except on the ground of fraud connected with the issue of the Certificate of Title, or that the title of the registered proprietor has been superseded by a title acquired under the Real Property Limitation Act²¹ by the person making the challenge.

- [45] Learned Counsel Bruney submitted that if the Certificate of Title to the land which is in dispute was obtained by the fraud on the part of the third named defendant and in the circumstances would be capable of being cancelled. Mr. Michael Bruney further submitted that the act of selling the land subject of the application to the first and second defendant knowing that the land had been sold to Wilson Ismael can only be an act of fraud which would inevitably result in the cancellation of the existing Certificate of Title.

²⁰ Op cit

²¹ Chapter 54:07 of the Laws of Commonwealth of Dominica

[46] Mr. Bruney further submitted that in the circumstances of the case there is a serious issue to be tried. Learned counsel made reference to the dicta of Lord Diplock when he said

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend not to decide difficult questions of law which call for detailed argument and matured considerations. These are matters to be dealt with at the trial”

[47] Learned Counsel Bruney made reference to the dicta of Ramdani J in the case of Lemon Grove Company &Anr –v- First Caribbean Bank &Ord²² where he suggested that an amendment would be in order where he noted that the claimant had not properly pleaded any particulars of fraud.

[48] Learned Counsel Michael Bruney urged the court to allow the matters raised by the claimant to go trial in order for the issues to be determined. It was submitted that the claimant intends to amend the particulars of trial detailed in the statement of claim but argues that the statement of claim as pleaded contains sufficient circumstantial allegations against all the defendants to prove at the trial of the actions on a balance of probabilities that the Certificate of Title which they seek to impugn was obtained by fraud.

Balance of Convenience and Adequacy of Damages

[49] It is the claimant’s contention that damages would not be an adequate remedy. Learned Counsel Mr. **Bruney made reference to the claimant’s averments that** if the injunction is not granted, the defendants would destroy the buildings on the and thereby change the character and use of the land. The claimant also contends that the use of the land could possibly prejudice the eventual outcome of the matter which is previously before the court concerning the land subject of the application and which is still pending.

²² SKBHCV2013/0213

[50] Reliance was made to the Privy Council decision of *National Commercial Bank of Jamaica Limited-v- Olint Corp Ltd (Jamaica)*²³ where it was observed by Lord Hoffmann that

“in practice 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.”²⁴

[51] Learned counsel urged the court to take note of the words of Lord Hoffmann when **he said that “the basic principle is that the court should take whichever the court seems likely to cause the least irremediable prejudice to one part or the other”.** This is an assessment in which, as Lord Diplock said in *American Cyanamid*²⁵:

“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 be attached to them.”²⁶

[52] Learned counsel submitted that the court in considering whether to grant injunctive relief should ask whether the applicant should be confined to her remedy in damages.

[53] Learned Counsel Mr. Michael Bruney contended that an assessment at this stage of the proceedings of the possible market value of the property in the future when the cases would be determined can only be speculative and therefore problematic and that the loss of opportunity for and effective judgment in both of the pending claims cannot be compensated in damages. Counsel Mr. Bruney urged the court to consider the approach adopted by Ramdahni J when he adopted the approach

²³ [2009] UKPC 16 (28 April 2009)

²⁴ **Page 7 of the Claimant’s submissions**

²⁵ [1975] 1 All ER 504 at 511

²⁶ Paragraph 17 of the judgment in *National Commercial Bank of Jamaica Limited –v- OlintCort Ltd (Jamaica)* op cit

taken by Sachs LJ in the case of Evans Marshall –v- Bertola²⁷when he said

“The courts have repeatedly recognised that there can be claims under contracts in which, as here, it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damage which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and **trade reputation are examples**”

[54] Learned Counsel Bruney quoted the judgment of Ramdhani J in the Lemon Grove Company et anor case as follows

“Whether or not damages would be an adequate remedy is not to be determined on the basis of what outcome one party would desire, but on established principles of law. Where damages are shown to be adequate that would normally be sufficient to defeat an application for an interim injunction. In some cases where the assessment of damages would be an extremely complex and unsatisfactory exercise, damages may not be an adequate remedy. So too, in some cases if assessment involved a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction as damages may not be regarded as adequate.”²⁸

[55] Learned counsel urged the court to consider the finding of Ramdhani J when he found in the said Lemon Grove Case²⁹that the loss of opportunity to secure a **greater price required a “speculative ascertainment” of the value of the chance and** therefore it would have been a problematic mathematical exercise to assess the damage that the claimant would have suffered, and to rule in like manner in that in the circumstances of the case at bar assessment of the damages would be only speculative and therefore problematic. That likewise in the circumstances of this case that damages would not be an adequate remedy.

[56] Learned Counsel Mr. Michael Bruney further submitted that in any event it has been held that the purpose of an interim injunction was really to improve the chances of the court being able to do justice after a determination of the merits at

²⁷ [1973] 1 WLR 349 at 380 C to D

²⁸ Op cit at Paragraph 3 of the held

²⁹ Ibid

the trial. Mr. Bruney urged the court to consider the dicta of Lord Hoffmann in the National Commercial Bank of Jamaica Limited³⁰ when he essentially said that the court must assess whether the granting or withholding the injunction is more likely to produce a just result.

- [57] Learned Counsel Mr. Bruney submitted that in the case at bar there is a serious case to be tried as there is a real possibility that the Certificate of Title to the land which is subject of these proceedings may be cancelled. Counsel submitted that equity would intervene where a transaction has been improperly procured through misrepresentation. Counsel urged the court to preserve the status quo.

Court's Considerations

- [58] Out of the submissions made by counsel in the case at bar the following key issues arise namely:
- (1) Is there a serious issue to be tried?
 - (2) Are damages an adequate remedy?

The Law

- [59] The procedure for obtaining such injunctions is set out in CPR 2000 Part 17. In exercising this power our courts have adopted the test laid down by the House of Lords in American Cyanamid v. Ethicon³¹. Such a remedy may be granted whether or not there has been a claim for a final remedy of that kind, and any order made, may be made unconditionally or upon such terms and conditions as the court or judge thinks just fit.
- [60] The principles applicable to the grant or discharge of an interim injunction have previously been considered on numerous occasions by our court and the

³⁰ Op cit

³¹ 1975 AC 396

procedure to be adopted and the tests to be applied are those given by Lord Diplock in the landmark case of *American Cyanamid Co v Ethicon Limited*³². In fact in the case of *Cambridge Nutrition Limited –v- BBC*³³ Lord Kerr said that

“... The American Cyanamid Case is no more than a set of useful guidelines which apply in many cases it must never be used as a rule of thumb, let alone as a straight jacket ... The American Cyanamid case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interim injunctions is to hold the balance as justly as possible in situations where the **substantial issues can be resolved by the parties at a trial**”³⁴

[61] It is well established that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is to be noted that at this stage of the proceedings that the court is not required to try to resolve conflicts of evidence on the affidavits as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

[62] The key principles which are applicable in an application for interlocutory injunctions are to be gleaned from the decision of Lord Diplock in the *American Cyanamid*³⁵ case and can be stated as follows:

- (1) The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case;
- (2) There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.
- (3) The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.
- (4) **It is no part of the court's function at this stage to try** to resolve conflicts of

³² *ibid*

³³ [1990] 3 All E R 523

³⁴ *Ibid* at page 534 paragraph j

³⁵ *Ibid* at pages 406 to 409

evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed and mature considerations. These are matters to be dealt with at the trial.

- (5) The object of the interlocutory injunction is to protect the claimant against injury by violation of her right for which she could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at **the trial; but the claimant's need for such** protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from their having being prevented from exercising their own legal rights for which they could not **be adequately compensated under the claimant's undertaking in damages** if the uncertainty were resolved in the defendants' favour at the trial;
- (6) The court can also take the following additional factors into consideration that:
 - (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay;
 - (b) the balance of convenience;
 - (c) maintenance of the status quo, and
 - (d) any clear view the court may reach as to the relative strength of the parties' **cases**.
- (7) Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
- (8) The court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[63] The first question therefore at this stage is whether there is a serious question to

be tried? Lord Diplock in the American Cyanamid case said it is sufficient if the **court asks itself: is the applicant's action "not frivolous or vexatious"?** is there **"a serious question to be tried"**?

[64] The court has reviewed the quite lengthy submissions filed by both counsel in this matter. Reference will be made to those submissions which were considered necessary to explain the **court's conclusions. It is to be noted that failure to make** specific mention of any point of submission does not mean that it has been ignored or there has been a failure to take it into account. Similarly, a good many issues of and points have been raised **by both counsel which in the court's view is** not necessary to discuss in order to resolve or to decide the main issue in the case at bar.

[65] As I understand the case as presented by the claimant is that the parcel of land subject of this application was sold to Wilson Ismael deceased and to that end a Memorandum of Transfer was signed by the Deveril Lawrence as the then **personal Representative of the estate of Judith Lawrence. It is the claimant's** contention that there is pending litigation regarding that transaction and involving the third named defendant and in the face of that litigation the third named defendant proceeded to sell the said piece of land to the first and second defendants.

[66] It is clear on the face of the averments contained in the affidavit sworn in support of the application for the interlocutory injunction that based simply on these facts the claimant would have a case against the third named defendant.

[67] It is noted that the defendant acknowledged the existence of the previous litigation touching and concerning the said land. There is nothing presented to this court by either party that that matter is completed, in fact, the third named defendant says in his affidavit that he challenged the Memorandum of Transfer presented by Wilson Ismael which was subject to litigation, however no mention is made as to

the status of that litigation by the third named defendant one would have thought that it was in his best interest to make a statement as to the status of that litigation. It is noted that the claimant contends that that litigation is currently awaiting the ruling of the court.

[68] Therefore quite simply, if the land subject of this application is subject to litigation particularly questioning the ownership of the land clearly it would not be right or it could not have been correct based on the facts currently presented to this court for the defendant to have sold the said land knowing full well that the title of that land was challenged. In these circumstances alone the injunction will stand until the issue of the ownership of the land is decided by the court in the matter between the Estate of Wilson Ismael and the third named defendant. Applying one of the principles in *American Cyanamid*, the deponents have not been cross examined **nor the evidence presented by both parties tested. Therefore, the court's finding at** this interlocutory stage is based on a review of the untested evidence.

[69] Learned counsel for the defendant also made submissions based on the *George – v- Rosalie Estates Ltd*³⁶ in support of his submission that the claimant is not the registered owner of the land subject of the application, that her statement that the property is hers is misstated and erroneous and that because she is not the registered owner of the land she does not have the locus standi to bring the application.

[70] The *George –v- Rosalie Estate* case³⁷ **is in the court's view** to be distinguished **from the case at bar on two grounds. That the claimant's contention is that the claim regarding the land subject of the application predated the defendant's** ownership of the land. That in fact there was a previous case before the court **which the third named defendant accepted was in existence ... he spoke of it in his** affidavit. Yet he went ahead and sold the land that was in fact subject of litigation.

³⁶ Op cit

³⁷ ibid

Also it is to be noted that the claimant is not claiming ownership based solely on the question of adverse possession but that the property was in fact purchased by her predecessor in title from the third named **defendant's predecessor in title**.

[71] In **the circumstances of this case it is the court's ruling that the** Rosalie Estates case³⁸ is to be distinguished from the case at bar and cannot be applied to say that the claimant does not have locus standi. This is based on the fact that it is clear to the court that prior to the sale of the land to the first and second named defendants the third named defendant was involved in litigation concerning the title of the said land.

[72] The defendants have submitted that the claimant has no locus standi to bring this claim on the basis that the issue of fraud which the claimant is asserting can only be raised by the Registrar of Titles as provided by section 142 of the Title By Registration Act which states:

“ In case it appears to a Registrar of Titles that any Certificate of Title has been issued in error, or contains any misdescription of land or boundaries, or that any noting of any mortgage or incumbrance or otherwise has been made in error, either wholly or as to any part thereof, or that the Certificate of Title, or noting thereon, has been obtained by fraud, or that any Certificate of Title has been fraudulently obtained or is fraudulently retained, he may require the duplicate Certificate of Title issued from the registry to be returned for correction, or to be delivered to the true owner thereof, and, if the person so required fails to return the Certificate of Title, or to deliver the same to the true owner, the Registrar of Titles may apply to the Court for a summons to bring the person before the Court for examination; and the Court may thereupon examine the person, and may direct the Certificate of Title to be given up to the Registrar of Titles or to the true owner thereof, or may grant a warrant for searching for and recovering the same, or, if the said person refuses to be examined or refuses to deliver up the Certificate of Title, or deliver it up to the true owner, either then or at any time ordered by the Court, may commit the **said person to prison for any term not exceeding six months.**”

[73] I whole heartedly disagree with learned counsel as it regards his submission that the issue of fraud in relation to a purported fraudulent title can only be raised by

³⁸ *ibid*

the Registrar of Titles. To accept that as being accurate would amount to a travesty and would operate to deny persons from approaching the court for relief where a Certificate of Title has been issued as a result of fraudulent dealings.

- [74] An allegation of fraud is always considered a serious issue to be tried and not lightly made clearly this is a matter which is best determined after a trial on all the issues. Accordingly, an application such as this the court need not engage itself in a mini trial and all that is required is that the court be satisfied as to the existence of a dispute at this stage³⁹. Where it was stated that

“It is no part of the court’s function at this stage of the litigation to 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 call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”

- [75] I am satisfied that the claimant has made out a serious issue to be tried having regard to the nature of the allegations before this court.

Adequacy of Damages

- [76] Mr. Lennox Lawrence is seeking to have the order discontinued by reason that claimant has not established that damages are not an adequate remedy and submitted that where there is a doubt of the adequacy of damages that the question of the balance of convenience arises⁴⁰

- [77] Mr. Michael Bruney is of a different view and submitted that damages will not be an adequate remedy in this case where the wrongs complained of in this matter **and urged the court to find that “an assessment at this state of the possible market value of the property in the future when the pending cases are eventually**

³⁹See American Cyanamid op cit at page 407, para H

⁴⁰ See Paragraph 51 of the Defendants’ submissions

determined can only be speculative and therefore problematic.”⁴¹ Learned Counsel made reference to the Privy Council in the matter of National Commercial Bank of Jamaica Limite –v- Olint Corp. Ltd⁴²where Lord Hoffman observed that

“... in practice 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”.⁴³

Balance of Convenience

- [78] Does the balance of convenience favour the grant of the injunction? It is this **court’s view that the balance** of convenience lies in favour of the grant of the injunction on the terms that the first named claimant will be allowed to continue accessing the container which is on the land and that the Mr. Warrington is permitted to access his cultivation until the hearing and outcome of this matter.
- [79] This court notes that it would be in the best interest of both parties if the defendants are represented by different counsel in the defence of this matter as based on the suggestion of the evidence presented to the court that their interest are not the same in this matter.
- [80] **Accordingly, the defendants’ application to discharge the injunction is dismissed** with costs in the sum of \$750.00 to the claimant.

M E Birnie Stephenson

M E Birnie Stephenson
High Court Judge

⁴¹ See Page 8 of the Claimants submissions

⁴² [2009] UKPC 16

⁴³ Ibid Paragraph 17

