

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT No. C.L 2001/B011

BETWEEN	CARMEN BRYCE	PLAINTIFF
AND	ANDREW ALPHANSO LINTON	DEFENDANT

Miss Aisha Mulendwe for the Plaintiff.

Mr. Lowell Morgan instructed by Henlin Gibson Henlin for the Defendant.

Heard on the 31st day of May 2001, and the 7th day of June 2001

JUDGMENT

RATTRAY J:

This is an application brought by the Plaintiff, Carmen Bryce, by way of Summons for an Interlocutory Injunction against the Defendant, Andrew Linton. The terms of the relief sought are that the Defendant, by himself, his servants and agents, or otherwise howsoever, be restrained from: -

1. Blocking and/or in any way, manner or form restricting access through the arch opening between premises known as Lot 633 and Lot 564 on the plan of part of Reids Pen now called West Chedwin, Greater Portmore in the parish of Saint Catherine registered at Volume 1272 Folio 270 and Volume 1272 Folio 269 respectively until the determination of this matter or further orders.
2. Preventing or in any way directly or indirectly doing any act calculated to prevent or impede the Plaintiff from entering physically by herself, her agents or servants or persons under her authority the

said Lot 633 West Chedwin, Greater Portmore and/or any other part of the said property until the determination of this matter or further orders.

3. Discontinuing and/or interfering with the supply and services and/or terminating his contract with the Jamaica Public Service Company Limited removing and/or causing to be removed electricity supply to the said Lots 564 and 633 West Chedwin, Greater Portmore and/or any other part of the said property and/or the adjoining Lot 564 West Chedwin, Greater Portmore hereinbefore mentioned until the determination of this matter or further orders.
4. Preventing or in anyway directly or indirectly doing any act calculated to prevent or impede the Plaintiff physically by herself, her agents or servants or persons under her authority from being in and using the common shared areas and facilities in the said Lots 564 and 633, West Chedwin, Greater Portmore and/or any other part thereof until the determination of this matter or further orders.
5. Removing any furniture, furnishings, household articles and appliances or any other items whatsoever which are in the said Lots 564 and 633 West Chedwin, Greater Portmore in the parish of Saint Catherine until the determination of this matter or further orders.
6. Selling, seeking an order for sale and/or in anyway dealing with the said Lot 633 West Chedwin, Greater Portmore in the parish of Saint Catherine registered in the name of **Andrew Alphanso Linton** pending the determination of the issues arising on the Writ and Statement of Claim herein filed.
7. Taking steps by way of sale assignment or otherwise of any right, title or interest which he now purports to have in the said property or do anything whatsoever to create any right, title, interest or incumbrance thereon by himself or by any other person.
8. In anyway whatsoever doing any act by himself, his agents and/or servants or persons under his authority calculated to interfere with the peaceful and quiet enjoyment of the whole premises on the said Lots 564 and 633 West Chedwin, Greater Portmore in the parish of Saint

Catherine by the Plaintiff and her agents or servants or persons under her authority.

The parties to this application became intimately associated in or about 1985 and the relationship developed to the point where the association produced two (2) children, Andrew O'Neil Linton, born on December 5, 1989 and April Sabrina Antoinette Samantha Linton, born on April 15, 1992.

In or about 1991, the Defendant moved in to live with the Plaintiff at the Plaintiff's apartment at Armada Apartments in Portmore in the parish of Saint Catherine.

Subsequently, as a result of an offer made by the Caribbean Housing Finance Corporation to sell housing units, the Plaintiff applied for and became the owner of Lot 564, 3 West, Greater Portmore in the parish of Saint Catherine registered at Volume 1272 Folio 269 of the Register Book of Titles. The Defendant also made a successful application and became registered as owner of Lot 633, 3 West, Greater Portmore in the parish of Saint Catherine being lands registered at Volume 1272 Folio 270 of the Register Book of Titles.

Both Lots 564 and 633 adjoin each other and the Plaintiff alleges, and it is agreed by the Defendant that the selection of adjoining lots was deliberately done by the parties as their intention and agreement was that the lots would be held together in accordance with the plan to improve and extend both as one unit for future accommodation for their family.

The Plaintiff contends, inter alia, in her Affidavit sworn to on the 11th day of January 2001; -

1. That the parties were not in a financial position to extend and improve the studio apartments which they had acquired on the respective lots.
2. That in order to earn more income to facilitate the planned extension and improvements, she went to the United States of America and worked and remitted funds to a joint account at the Jamaica Citizens Bank, which funds were made available to and utilized by the Defendant to effect the necessary extension and improvements.
3. That she remained in the United States of America for the period July 1994 to September 1997 and during that time, she sent food barrels, clothing and wire-transferred cash to the Defendant for the said

improvements. She also purchased roofing materials for the expanded premises and shipped same to the Defendant.

4. That on visits to Jamaica during the period, she would bring goods as well as cash for the extension of their home.
5. That the Defendant enclosed both Lots 564 and 633 by constructing a block and steel fencing, which surrounded the said lots, and erected one entrance/exit gate to the said lots.
6. That the Defendant carried out substantial improvements to Lot 633 including a new kitchen, additional rooms, carport and verandah. In comparison, the only improvement made to Lot 564 was that the original bathroom was remodelled and converted into helper's quarters and bathroom.
7. That access between the two premises was created by knocking down a portion of the adjoining wall, thereby creating an open archway.
8. That the relationship between the parties worsened, and after being abused by the Defendant and thrown out of the bedroom which was situated on Lot 633, the Plaintiff eventually moved into the helper's quarters located on Lot 564.
9. That the Plaintiff continued to expend money to pay workmen to put on the top floor to the premises and received advances from her sister to complete the renovation and expansion of the said lots and to extend the upper floor.
10. That as a result of the extension and improvements carried out, both units are now merged into one under one roof, but there is only one kitchen located on the side of Lot 633, which is shared by the parties. The meter for electricity supplied to the said kitchen is on Lot 633.
11. That due to the default of the Defendant in making payment for bills pertaining to both lots, in respect of which there was only one meter, the Plaintiff had to settle outstanding sums due to the Jamaica Public Service Company Limited and the National Water Commission. She further paid the electricity bills up to October 2000.

12. That subsequently the Defendant obtained a separate meter for Lot 633 but would turn off the said electricity when leaving the premises, thereby leaving the shared kitchen in darkness and severely affecting the Plaintiff's ability to prepare meals for their young children, who live at the premises, and herself.
13. That the Defendant has threatened to block the archway and deny the Plaintiff access to Lot 633. Further, the relationship between the parties has deteriorated to the point where the Defendant has threatened to beat the Plaintiff if she were to discipline their daughter and has physically abused their son.
14. That she has an interest in Lot 633, which is registered solely in the Defendant's name in light of the agreed intention of the parties as well as her contributions, financial and otherwise, and she seeks, inter alia, a declaration that the Defendant holds a three-quarter undivided interest in the said property in trust for her.
15. That in light of the conduct of the Defendant and her fears as a consequence of his actions, she seeks an Interlocutory Injunction as prayed in the Summons before the Court.

In response, the Defendant relies on his Affidavit sworn to on the 14th day of May 2001, to which is attached copies of Valuation Reports and Surveyors' Reports on both lots. In that Affidavit, the Defendant refers to the Defence filed on his behalf, but none of the allegations raised in the Defence are repeated in the Affidavit.

The Defendant's response to the Plaintiff's Affidavit as outlined in his said Affidavit is as follows: -

1. That access to the two premises created internally is in breach of the covenants endorsed on the title.
2. That the properties are separate entities and the Plaintiff has no interest in Lot 633 and that he would prefer that the Plaintiff not be allowed into his premises, i.e. Lot 633, until her interest therein is established.
3. That it is the Plaintiff who is abusive and violent.

4. That he makes no admission as to the Plaintiff's allegations that he turned off the supply of electricity when the premises only had one meter, thereby affecting her use of the room in which she lived and the shared kitchen.

On the 31st day of January 2001, on an Ex Parte application by the Plaintiff, a Judge in Chambers granted an Interim Injunction for a period of ten (10) days in the following terms: -

That the Defendant, Andrew Alphanso Linton, by himself, his servants and agents, or otherwise howsoever, be restrained from: -

1. Blocking and/or in any way, manner or form restricting access through the arch opening between premises known as Lot 633 and Lot 564 on the plan of part of Reids Pen now called West Chedwin, Greater Portmore in the parish of Saint Catherine registered at Volume 1272 Folio 270 and Volume 1272 Folio 269 respectively until the determination of this matter or further orders.
2. Preventing or in anyway directly or indirectly doing any act calculated to prevent or impede the Plaintiff from entering physically by herself the said Lot 633 West Chedwin, Greater Portmore and/or any other part of the said property until the determination of this matter or further orders.
3. Discontinuing and/or interfering with the supply and services with the Jamaica Public Service Company Limited removing and/or causing to be removed electricity supply to the said Lots 564 and 633 West Chedwin, Greater Portmore and/or any other part of the said property and/or the adjoining Lot 564 West Chedwin, Greater Portmore hereinbefore mentioned until the determination of this matter or further orders.
4. Preventing or in anyway directly or indirectly doing any act calculated to prevent or impede the Plaintiff physically by herself from being in and using the common shared areas and facilities in the said Lots 564 and 633, West Chedwin, Greater Portmore and/or any other part thereof until the determination of this matter or further orders.

5. In anyway whatsoever doing any act by himself, his agents and/or servants or persons under his authority calculated to interfere with the peaceful and quiet enjoyment of the whole premises on the said Lots 564 and 633 West Chedwin, Greater Portmore in the parish of Saint Catherine by the Plaintiff.
6. Plaintiff gives usual undertaking as to damages.
7. Costs to be costs in the cause.

On the 12th day of February 2001, a further Injunction was granted in the same terms as the Interim Injunction until the 20th day of March 2001. On that date, the said Injunction was further extended for a period of thirty (30) days.

This application again came up for hearing in Chambers on the 18th day of April 2001, and on the 1st and 16th days of May 2001. On each occasion, the Injunction was further extended until the 31st day of May 2001, when this Summons came up before me, seeking an Order that the Injunction continue until the determination of this matter.

Miss Mulendwe, on behalf of the Plaintiff, after referring to the Affidavits filed herein, submitted that the Plaintiff, in an application for an Interlocutory Injunction, is required to satisfy the Court as to the following:-

- i) Full disclosure of all material facts.
- ii) There is a triable issue in that the application is not frivolous, vexatious or meant to cause delay.
- iii) There is a chance of success in the substantive matter.
- iv) Where the balance of convenience lies.

She referred to the leading authority of American Cyanamid Company vs. Ethicon Limited and submitted that the Plaintiff had satisfied the requirements for the grant of an Injunction and argued that the balance of convenience lay in maintaining the status quo.

Counsel for the Plaintiff further submitted that with reference to the Defendant's Affidavit, the Court ought not to consider the Defence exhibited thereto, as it was

not sworn testimony. She therefore asked for an Order in terms of all the reliefs identified in the Summons for Interlocutory Injunction.

Mr. Morgan, in reply, agreed that the leading authority was the American Cyanamid case, but submitted firstly, that a claim for injunctive relief was an equitable remedy not granted as of right. Secondly, that in order to obtain this relief, the Plaintiff must show that there is a serious issue to be tried, and thirdly, any finding of a serious issue must be based on evidence submitted to this Court.

Counsel for the Defendant further submitted that for the Court to determine whether or not there was a serious issue to be tried, the Affidavit evidence needed to be examined, but that the Court should not attempt to resolve questions of conflict raised by the Affidavits. He argued that if there were conflicts, that would be a reason for the grant of the Injunction.

The major thrust of Mr. Morgan's submissions was that the Plaintiff had provided no evidence to show that there was a serious issue to be tried, as no exhibits were attached to the Plaintiff's Affidavits to support her allegations. He argued that nowhere in her Affidavit did the Plaintiff allege that she contributed to the deposit for the acquisition of Lot 633. He further argued that there is no evidence that any right of the Plaintiff has been, or is about to be infringed by the Defendant.

Insofar as each and every relief sought by the Plaintiff in the Summons, Mr. Morgan contended that there was no evidence to show that the Plaintiff was entitled to such relief, and as such, the Plaintiff had failed to clear the first hurdle, which would entitle her to injunctive relief, that is, that there is a serious question or issue to be tried.

It is of interest to note that in his submissions, the Defendant's Counsel at no time referred to the Defence filed on behalf of his client, perhaps thereby conceding that the objection raised by Miss Mulendwe that the exhibited Defence was not sworn testimony, was a point of merit. I am of the view that the Affidavit of the Defendant ought properly to set out the evidence on which he seeks to rely in opposition to the application by the Plaintiff. Merely referring to the exhibited Defence in answer to the allegations contained in the Plaintiff's affidavit is not sufficient.

In those circumstances, I agree with Counsel for the Plaintiff that the Defendant ought not to be allowed to refer to the allegations in his Defence in answer to the Plaintiff's Affidavit.

In the event that I am wrong on this point however, the Court has also carefully examined the Defence filed on behalf of the Defendant herein and has noted the responses made to the allegations contained in the Plaintiff's Affidavit.

It is not disputed that when the parties selected the said lots, it was their intention to jointly fund and develop the said lots into a family home for themselves and their children. The Defendant also admits that the Plaintiff made sacrifices of a social and financial nature, so as to save towards their joint project and that monies were sent to him by the Plaintiff through their joint account "for the development of their family home on the said lots".

He states in his Defence, however;

- (a) That he paid the deposit in respect of both lots and a further sum towards the closing costs.
- (b) That he also deposited money in their joint account at the Jamaica Citizens Bank.
- (c) That while the Plaintiff was overseas, he had full responsibility for the household expenses as well as school expenses and mortgage payments on both lots.
- (d) That a fence wall was constructed around the perimeter of both lots at his own expense, from his own funds, but that each lot has separate entrances. Further that the premises were grilled and the gates installed at his sole expense.
- (e) That the construction carried out on both premises is not as described by the Plaintiff and he identifies the nature and extent of the construction done with respect to both lots.
- (f) That he denies forcibly removing the Plaintiff from their bedroom and says that she removed of her own accord. Further that the accommodation in Lot 564 is spacious and not as described in her Statement of Claim.

- (g) That he denies taking any steps to harass the Plaintiff by cutting off the electricity and says that the breaker for Lot 564 is on her premises to which he has been denied access.
- (h) That he made significant contributions to the acquisition and improvement of both premises from his own funds and from funds obtained from his mother.

In coming to a decision in this matter, I am guided by the principles outlined by Diplock L. J. in American Cyanamid Company vs. Ethicon Limited 1975 1 All E. R. 504 at 508 d, where he said:-

“The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.”

And at 509 c

“The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff’s undertaking in damages if the uncertainty were resolved in the defendant’s favour at the trial. The court must weigh one need against another and determine where ‘the balance of convenience’ lies.”

The Plaintiff, in her Statement of Claim is seeking inter alia, a declaration that the Defendant holds a three-quarters (3/4) undivided interest in Lot 633, for which he is the sole registered owner, in trust for her. This claim is based on her allegations of the intentions of the parties and the agreement between them, as a result of which she made substantial financial contributions towards the construction which led to the expansion and improvements of both lots, her payments of mortgage arrears, electricity bills and water rate bills for both lots.

She further alleges abusive conduct and harassment by the Defendant, as a consequence of which interlocutory injunctive relief is now sought.

Both in his Affidavit and on the Amended Defence filed, the Defendant joins issue with the Plaintiff as to her entitlement to any part of Lot 633 and puts her to proof of the allegations contained in her Statement of Claim.

I am further guided by the words of Diplock L. J. in the American Cyanamid case at page 509, where he stated:

“In those cases where the legal rights of the parties depend on facts that are in dispute between them, 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.”

Lord Diplock further goes on to point out at page 510;

“The court no doubt 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 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.... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff 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.”

I adopt wholeheartedly the dicta of the learned Law Lord, and after carefully considering the issues raised in this matter and the submissions of Counsel for the respective parties, I find that there is a serious question to be tried.

No evidence has been led by either party in this matter on the issue of whether damages would be adequate compensation for the other party, nor has any evidence been adduced by way of Affidavit as to the ability of either litigant to pay damages. The Court therefore has no basis on which to make any finding in this regard.

Lord Diplock at page 511a of the American Cyanamid case stated: -

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both, that the question of balance of convenience arises.”

The Plaintiff, in her Affidavit, has indicated how she would be detrimentally affected if an Interlocutory Injunction were not to be granted as prayed in this matter. The Defendant on the other hand has not specifically alleged in what way he would be prejudiced in the event that the orders sought be granted.

In the exercise of the Court’s discretion, I find that the balance of convenience lies in favour of my granting Interlocutory Injunction and prudence dictates that the status quo be preserved until the trial of this action.

I am not however satisfied that the Plaintiff is entitled to all the reliefs sought in Summons for Interlocutory Injunction. No evidence has been led by the Plaintiff of any attempt by the Defendant to remove furniture, furnishings, household articles or appliances from any of the said lots, nor has there been any allegation that the Defendant has attempted to sell or is in the process of selling or disposing of Lot 633 of which he is the registered owner.

In those circumstances, I hereby order that on the Plaintiff giving the usual undertaking as to damages, the Defendant, by himself, his servants or agents, or otherwise howsoever be and is hereby restrained from:-

1. Blocking and/or in any way, manner or form, restricting access through the arch opening between premises known as Lot 633 and Lot 564 on the plan of part of Reeds Pen now called West Chedwin, Greater Portmore, in the parish of Saint Catherine registered at Volume 1272 Folio 270 and Volume 1272 Folio 269 respectively until the determination of this matter or further orders.
2. Preventing or in anyway directly or indirectly doing any act calculated to prevent or impede the Plaintiff from entering physically by herself the said Lot 633 West Chedwin, Greater Portmore and /or any other part of the said property until the determination of this matter or further orders.
3. Discontinuing and/or interfering with the supply and services with the Jamaica Public Service Company Limited, removing and/or causing

to be removed electricity supply to the said Lot 633 West Chedwin, Greater Portmore and/or any other part of the said premises until the determination of this matter or further orders.

4. Preventing or in anyway directly or indirectly doing any act calculated to prevent or impede the Plaintiff physically by herself from being in and using the common shared areas and facilities in the said Lots 564 and 633, West Chedwin, Greater Portmore and/or any other part thereof until the determination of this matter or further orders.
5. In anyway whatsoever doing any act by himself, his agents and/or servants or persons under his authority calculated to interfere with the peaceful and quiet enjoyment of the whole premises on the said Lots 564 and 633 West Chedwin, Greater Portmore in the parish of Saint Catherine by the Plaintiff until the determination of this matter or further orders.
6. Costs to be costs in the cause.
7. Leave to Appeal granted