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NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2008 HCV O663

IN CHAMBERS

IN THE MATTER of ALL THAT parcel of
land known as Abbey Green Estate in the
parish of Saint Thomas being:

ALL THOSE parcels of land Circuits 1, 3A
and 3B known as ABBEY GREEN in the
parish of Saint Thomas containing by survey
Two Hundred and Thirty Acres Three Roods
Thirty-Five Perches and Seven-tenths of a
Perch of the shapes and dimensions and
butting as appear in the plan thereof registered
at Volume 1322 Folio 20 and formerly being
part of the land comprised in Certificate of
Title registered at Volume 1034 Folio 50 of
the Register Book of Titles.

BETWEEN	TROPICROP MUSHROOMS LIMITED	CLAIMANT
AND	SAINT THOMAS PARISH COUNCIL	DEFENDANT
AND	ALFRED SAMUEL EDWARDS	1 ST ANCILLARY CLAIMANT
AND	IAN HARRIOTT	2 ND ANCILLARY CLAIMANT
AND	RUPERT BROWN	3 RD ANCILLARY CLAIMANT
AND	SHANE BROWN	4 TH ANCILLARY CLAIMANT
AND	PATRICK PATTERSON	5 TH ANCILLARY CLAIMANT
AND	MARCUS STEWART	6 TH ANCILLARY CLAIMANT
AND	SINCLAIR McDONALD	7 TH ANCILLARY CLAIMANT

Miss Malaica Wong and Miss Lisa Russell instructed by Myers Fletcher and Gordon for
Claimant.

Mr. Joseph Jarrett for Defendant and Ancillary Claimants

**Practice and Procedure - Application to discharge injunction – Injunction
restricting access to claimant's land – Issue whether road is a parochial road - Issue
as to whether prescriptive rights secured over claimant's land – Whether injunction
to be maintained**

Practice and Procedure – Modes for Initiating Ancillary claims – Part 18 of the CPR

16th, 17th July and 12th August 2008

BROOKS, J.

Tropicrop Mushrooms Limited is the registered proprietor of two lots of land in an area known as Abbey Green Estate in the parish of Saint Thomas. In December 2007, Tropicrop erected an iron gate across a roadway on the Southern boundary of one of the lots. It also posted armed guards at the gate to prevent access to the property by others. The Saint Thomas Parish Council claims that the roadway is a parochial road and that it therefore falls under its jurisdiction. The Parish Council objected to the gate being erected and demanded its removal. In response to the demand, Tropicrop commenced this claim and secured an *ex parte* injunction preventing the Parish Council from interfering with the gate. Subsequently, the *ex parte* injunction was varied by and with the consent of the parties.

In the present application, the Parish Council has been supported by some of the farmers in the Abbey Green Estate area and it now wishes for the injunction to be discharged. The basis for the application is that the restriction of access to the roadway is burdensome on the farmers in the area who were accustomed to using that roadway across Tropicrop's land to get to their farms. According to the Parish Council, that burden has been increased by Tropicrop's failure to comply with a term of the injunction by which it was to have provided transportation across Tropicrop's land for the farmers' produce. The balance of convenience therefore, it says, lies in favour of the injunction being discharged or at least varied to allow more farmers greater access to use the disputed roadway.

Tropicrop resists the application on the basis that the parties have agreed on the terms of the injunction, as varied and that justice requires that it be maintained unaltered.

It asserts that a discharge of the injunction, or a variation to allow more people access to its land for longer periods of time, for more days of the week, will cause it significant loss because of the exposure to praedial larceny.

The questions which the court must answer in resolving this issue are, firstly, what is the court order which is currently in place. Secondly, if there is an injunction in place, whether there has been any material change of circumstances which would cause the court to re-consider the order for the injunction. If any such change exists for reconsideration, whether that change is sufficient to warrant the discharge or modification of a consent order made by this court. As an alternative to the second question, if there is no injunction in place then the application for injunction may be considered anew.

It will also fall to be discussed, as a matter of procedure, whether a number of the said farmers are entitled (as they have sought to do) to become parties to the claim by simply filing and serving an Ancillary Claim Form and Particulars of Ancillary Claim.

What is the order which is in place?

The history of the injunctions granted in this claim starts with an injunction granted by Marsh, J. on 12th February, 2008. That was the injunction which prevented the Parish Council from removing the iron gate. On March 11, 2008, the application for the further consideration of the injunction came on before Jones, J. Though Miss Wong, for Tropicrop, asserts that the order made at that hearing was a consent order, it was not so expressed in the formal order signed by the judge, and I have not seen a Minute of Order in respect of the hearing. The relevant part of the order made by Jones, J. was in the following terms:

“1. The injunction restraining the St. Thomas Parish Council from removing the iron gate be varied:

- a) The Applicant/Claimant shall allow access through the iron gate on each Monday, Tuesday and Thursday between 7:00 am and 5:00 p.m. to no more than fifteen persons each day from amongst the local farmers.
- b) The Applicant/Claimant shall transport the produce of the local farmers to the iron gate.
- c) Interim injunction extended to the 9th of April 2008.”

Miss Wong’s submissions that the order made by consent were concluded with the statement that the “justice of the case requires a maintenance of the injunction as varied and agreed between the parties”. There was no dissent from Mr. Jarrett, who represented the Parish Council and the farmers, to Miss Wong’s assertions concerning the order having been made by consent. Despite the absence of the term “by consent”, in the formal order, I shall treat the order as having been so made.

Since that order was made, the application for the extension of the injunction has come before Campbell, J. who, among other things, ordered that “the agreed varied injunction order made on March 11, 2008 continue until July 7, 2008”. There does not seem to have been any other order made, subsequent to Campbell, J’s., concerning the extension or variation of the injunction. It seems therefore, that when the application to vary or discharge the injunction, first came on before me on July 17, 2008, the interim injunction had already expired. It would seem then, that I am at liberty to consider the application anew, but not prevented from extending the previous order.

Analysis on the principles set out in *American Cyanamid*

In light of the expiry of the injunction I need not carry out an extensive examination of whether there has been any material change in the circumstances since the order of March 11, 2008 was heard. I shall therefore proceed to apply to the instant case, the principles set out in the case of *American Cyanamid Co. v Ethicon Ltd.* [1975] 1 All ER 504.

Is there a serious question to be tried?

The issues raised in the submissions, as indeed in the statements of case, are of serious import. Questions of the jurisdiction of the Parish Council in respect of parochial roads, as well as matters of the acquisition of prescriptive rights, featured in submissions. There are disputes as to fact which must be resolved at trial. I find that, from the point of view of Tropicrop, there is a serious issue to be tried. This satisfies the first test set out in *American Cyanamid*.

Are damages an adequate remedy?

In considering whether the second test, laid down by Lord Diplock in *American Cyanamid*, has been satisfied, I believe it fair to say that there is no threat, in this claim, of Tropicrop losing its interest in the land at Abbey Green Estate. What has been threatened, is its claimed right to prevent access to the property. It has however asserted that it stands to suffer significant loss from praedial larcenists, if it were obliged to allow unrestricted access to the roadway. This clearly, is a loss which could be compensated by an award of damages. However, according to Dr. Charles Lyn, one of its directors, should unrestricted access be granted, "Tropicrop will be adversely affected by squatters and thieves who will continue to trespass and raid the coffee farm thereby causing damage to Tropicrop's viability as a business". (See paragraph 9 of this affidavit sworn to on 8th February, 2008. Where viability of the enterprise is threatened, the issue then goes beyond mere damages. (See *Flowers, Foliage and Plants of Jamaica Ltd. and others v Jamaica Citizens Bank Ltd.* (1997) 34 J.L.R. 447.) It should be noted however that Tropicrop acquired the subject lands, approximately twenty years ago, yet it only erected the offending gate, a few months ago. In light of that information, Tropicrop's

claim of threatened doom, in the absence of an injunction, rings hollow. To be fair to Tropicrop, it has alleged that it had had another gate in place some time before and that that gate was periodically used to exclude trespassers. The allegation has been denied, but even then, the periodical closure does not seem to have been on the scale that Tropicrop seeks to enforce with the iron gate. No other changes in its situation have been alleged by Tropicrop.

On the other hand, the Parish Council may well be able to say that it cannot be held responsible for any loss suffered by Tropicrop, as a result of criminal activity. I express no view on the validity of that position, but must consider that it exists as an aspect affecting the decision whether damages is an adequate remedy in the event that the injunction is not granted/extended.

I am of the view that the balance would be in favour of finding that though damages may be an adequate remedy for any loss incurred by Tropicrop, the source for funding those damages is not as certain. Certainly the farmers, whose interests the Parish Council seeks to protect, have not been shown to possess the resources to reimburse Tropicrop for any of the losses it anticipates. The evidence is that the farmers, or the majority of them, are occupying lands not belonging to them, and doing so without permission of the owners of those lands. In fact, I am of the view that they are properly, not parties to these proceedings. I shall however address that issue separately.

On the other side of the coin, are the consequences of extending the previous or granting a new injunction to Tropicrop. The Parish Council will suffer no direct loss as a result. It however, asserts that the livelihood of the farmers will be seriously affected by an order excluding them from the roadway. The promise of disaster to the farmers in the

event that they are denied access to their cultivations is far more realistic than the claimed threat to Tropicrop's existence. Although I am not convinced that the farmers have been properly joined as parties to these proceedings, their attempts at becoming ancillary claimants, notwithstanding, the effect that an excluding order would have on them, would be a fact which should be borne in mind.

The balance of convenience

At page 511a of *American Cyanamid*, Lord Diplock asserts that "where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises". His Lordship goes on to explain that "[w]here other factors appear to be equally balanced it is a counsel of prudence to take such measures as are calculated to preserve the *status quo*".

With the exception of a complaint by the farmers, the current situation is that regulated by the order made by Jones, J. with the consent of the parties. The farmers have complained that Tropicrop has failed to consistently obey one of the terms of the consent order. The term in question is a requirement that Tropicrop should provide transportation for the farmers' produce from one part of Abbey Green Estate to another. Tropicrop, by its own admission, has fallen short on this aspect of the order. Normally a breach such as this would be addressed by an application for sanctions to be imposed against Tropicrop for contempt of court. No such application has however, been made.

The element of mandating Tropicrop to perform a service to the neighbouring farming community brings to consideration a formulation which is more often seen in the context of applications for mandatory injunctions. The concept was recently referred to by Sykes, J. in his judgment in *World Wise Partners Ltd. v RBTT Bank Jamaica Ltd.*

2008 HCV 02574 (delivered 13/6/08). At paragraph 55, Sykes, J. quoted from the judgment of Chadwick, J. in *Nottingham Building Society v Eurodynamics Systems Plc and Others* [1993] F.S.R. 468 at p. 474, in which the latter judge stated:

“In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” in the sense described by Hoffmann J. [in *Films Rover International and others v Cannon Films Cells Ltd.* [1986] 3 all E.R. 772 at page 780]

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the *status quo*.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.”

The passage was highly commended by the Court of Appeal in England in *Zocoll Group Ltd. v Mercury Communications Ltd* [1998] F.S.R. 354 at p. 366.

In applying the principle of adopting the course which “is likely to involve the least risk of injustice if it turns out to be “wrong””, I am of the view that I am entitled to consider the effect that the order will have on third parties, such as I believe the farmers to be. I am also bolstered in this view by the fact that Miss Wong was prepared to have the farmers remain as ancillary claimants, on the basis that it would eliminate a multiplicity of suits.

Mr. Jarrett has submitted that the number of farmers affected by Tropicrop's action exceeds 40. The evidence of Mr. Alfred Edwards at paragraph 3 of his affidavit sworn to on July 3, 2008, is that the number exceeds 50. Though there is a dispute as to the number of persons occupying Tropicrop's land without its permission, there has been no denial by Tropicrop as to the number of farmers using the roadway. It is to be noted that the status of the farmers in respect of the lands which they occupy is not certain, insofar as the majority do not seem to be doing so with the permission of the owners thereof. However, it is not their right to the lands which they occupy which is in question at this stage. The issue is instead, whether they have the right to use the roadway over Tropicrop's land.

The present order severely restricts the access of the majority of the local farmers to their cultivations. I have indicated above, that the effect on them of extending the present injunction is likely to be far more deleterious than would be the effect on Tropicrop, of a refusal to extend, or of varying the restriction.

Bearing in mind all these considerations, I am of the view that the balance of convenience lies in favour of continuing the injunction on the basic principles which were agreed by the parties on 11th March before, Jones, J. I however, think that a case has been made out for an increase in the number of persons who should have access to the roadway, and the times of that access. In light of Tropicrop's failure to consistently provide the transportation which it promised the farmers when the consent order was made, I am also of the view that a case has been made out for allowing the farmers to utilize the roadway by means of their own vehicles.

Are the farmers properly joined as ancillary claimants?

When this claim was filed, the only parties were Tropicrop and the St. Thomas Parish Council. That remained the situation until March 7, 2008 when a Defence and Counterclaim was filed along with a number of other documents. Included in those documents were an application for court orders, affidavits in support of the application, and documents entitled “Ancillary Claim Form” and “Particulars of Ancillary Claim” respectively. All these documents included the following as part of the title of the claim:

AND ALFRED SAMUEL EDWARDS	1 ST ANCILLARY CLAIMANT
AND IAN HARRIOTT	2 ND ANCILLARY CLAIMANT
AND RUPERT BROWN	3 RD ANCILLARY CLAIMANT
AND SHANE BROWN	4 TH ANCILLARY CLAIMANT
AND PATRICK PATTERSON	5 TH ANCILLARY CLAIMANT
AND MARCUS STEWART	6 TH ANCILLARY CLAIMANT
AND SINCLAIR McDONALD	7 TH ANCILLARY CLAIMANT

The individuals named above are identified by paragraph 3 of the Particulars of the Ancillary Claim, to be farmers from the local communities in the same area as Abbey Green Estate. The Defence refers to “the Ancillary Claimants” and all documents filed subsequently to the 7th April include the reference to the “Ancillary Claimants” in their titles. There is, however, no indication of any order being made which authorized the addition of these persons as ancillary claimants. In the absence of such an order, are these farmers entitled to be properly considered parties to this claim?

Part 18 of the Civil Procedure Rules 2002 (CPR) regulates ancillary claims. Rule 18.1 (2) stipulates what is an ancillary claim. It states:

“An “ancillary claim” is any claim other than a claim by a claimant against a defendant or a claim for a set off contained in a defence and **includes** –

- (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;

- (b) a claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
- (c) a claim by an ancillary defendant against any other person (whether or not already a party).” (Emphasis supplied)

The use of the word “includes” contemplates that there may be methods, other than those stated, by which an ancillary claim may be made. A reading of Part 18 in its entirety however, only contemplates that persons, who are not parties to the claim, may only become parties if some action is initiated against them by a party. In Britain the equivalent of Part 18 of the CPR is Part 20 of the Civil Procedure Rules of that jurisdiction. The provisions of both parts are very similar in a number of respects and in particular rule 20.2 (1) of the British rules is almost identical to rule 18.1 (2) cited above including the word “includes”.

The learned editors of *Civil Procedure 2003* (The White Book), in their introduction to Part 20, state as follows:

“Part 20 applies to counterclaims plus claims by a defendant for a contribution, an indemnity or any other remedy against any other person, whether or not that person is already a party.”

They identify, correctly in my view, that Part 20 claims, or ancillary claims, as they are referred to in this jurisdiction, are initiated by the defendant to a claim.

The essential functions of ancillary claims remain identical to those of their predecessors, known as “third party” claims. At paragraph 17.3 (6) of “*A Practical Approach to Civil Procedure*” (9th Ed), the learned author Stuart Syme in applying the reasoning of Scrutton, L.J. in *Barclays Bank v Tom* [1923] 1 KB 221 at page 224, to the context of the Civil Procedure Rules, opined that those functions would be:

“(a) to safeguard against differing results, and to ensure that the Part 20 defendant is bound by the decision between the claimant and the defendant. If instead

separate proceedings are taken, the court hearing the second action is not bound by the decision in the first action;

(b) to ensure the question between the defendant and the Part 20 defendant is decided as soon as possible after the decision between the claimant and the defendant ;

(c) to save the expense of two trials. A party commencing separate proceedings unnecessarily where a Part 20 claim could have been used may be penalized in costs.”

These views are consistent with the terms of rule 18.9 which sets out the matters which the court should consider when deciding whether to permit an ancillary claim to be made, continued or dealt with separately from the original claim. Rule 18.9 (2) stipulates that the court, in making that decision “must have regard to all the circumstances of the case including-

- (a) the connection between the ancillary claim and the claim;
- (b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant;
- (c) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim; and
- (d) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings-
 - (i) not only between the existing parties but also between the existing parties and the proposed ancillary claim defendant; or
 - (ii) to which the proposed ancillary defendant is already a party but also in some further capacity.”

In applying that learning and the provisions of Part 18 to the instant case, I believe two observations may be made. The first is that the farmers do not qualify to be ancillary claimants; they have not been brought into the proceedings by any claim brought against them initiated by the Parish Council.

The second observation is that, apart from their ineligibility as mentioned above, all the issues raised in the farmers' ancillary statement of claim, as filed, merit a simultaneous hearing with Tropicrop's claim and the Parish Council's defence. The Parish Council's statement of defence asserts that the disputed roadway falls under its jurisdiction by virtue of the Parochial Roads Act. It also asserts that the "Ancillary Claimants have been using the [roadway] for a period exceeding twenty years", and are entitled to use the roadway "by way of prescription" (paragraphs 19 and 22 of the defence). Apart from advancing the cause of prescriptive rights over the use of the roadway, the Amended Particulars of Ancillary Claim also go on to assert a claim for ownership of portions of Tropicrop's land by virtue of adverse possession. In their prayer at the end of the Amended Particulars of Ancillary Claim, the farmers included the following claim:

"(v) a declaration that the Ancillary Claimants having enjoyed uninterrupted possession of lands claimed by the Claimant for a period exceeding twelve years are entitled to occupy the same as of right by way of adverse possession."

Although the aspect of adverse possession differs in substance from the issues raised by the Parish Council, it is so closely related to the claim of prescriptive rights that it would seem to be convenient for the issues to be tried together, though it would result in a longer trial, with the claims of each farmer having to be assessed.

The farmers' concerns, having been brought by the wrong procedure, the question is whether the court may, in its quest of saving expense and allotting its resources in an efficient way, make any order which will achieve the aims which the concept of ancillary claims was meant to achieve. I bear in mind that Tropicrop's counsel has not objected to the method utilized by the farmers. Miss Wong was of the view that it would have

prevented a multiplicity of claims. Whereas I have agreed in principle for the joint trial of the matters, I am of the view that the better approach would be for the farmers' claim to be embodied in a separate claim which claim would be consolidated with Tropicrop's claim. Appropriate orders would be required to rectify the situation caused by the defective procedure embarked on by the farmers.

Conclusion

Tropicrop has established that it has serious issues to be tried. I also find that there is a real risk that its losses which may be incurred if an injunction is not granted, may not be able to be recovered. Applying the procedure laid down by Lord Diplock in *American Cyanamid*, I find that Tropicrop is entitled to an extension of the injunction preventing an interference with its gate until the trial of the claim. The basic concept of the consent order by Jones, J. is a fair method of maintaining the *status quo* and minimizing the risk of injustice in the event that the decision to grant the injunction is found to be wrong.

The Ancillary Claim filed by the farmers is without authority. It cannot be justified by the provisions of the CPR and was initiated without the permission of this court. It therefore must be struck out. It however, raises issues which may be conveniently tried at the same time as Tropicrop's claim against the Parish Council and therefore it only needs for the farmers' claim to be regularized.

The orders therefore, on the Claimant giving the usual undertaking as to damages, are as follows:

1. The St. Thomas Parish Council is hereby restrained, by itself its servants and/or agents, from removing the Claimant's iron gate erected on the Claimant's lands at Abbey Green Estate in the parish of Saint Thomas;
2. The Claimant shall allow access through the said iron gate each week from Monday to Friday, between 6:00 a.m. to 6:00 p.m. to no more than fifty persons each day from amongst the local farmers;
3. These orders shall remain in force until the trial of this claim or until further order of this court;
4. The Ancillary Claim and Particulars of Ancillary Claim filed herein are hereby struck out;
5. The Ancillary Claimants shall be at liberty to file and serve a separate claim against Tropicrop Mushrooms Limited;
6. In the event that the separate claim so filed by the Ancillary Claimants is in substantially the same terms as the Ancillary Claim and the Particulars of the Ancillary Claim herein, that claim shall be consolidated with this claim;
7. The Case Management Conference shall be held on a date and at a time to be fixed by the Registrar;
8. Costs of the application to be costs in the claim;
9. Leave to appeal granted.