

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 95 OF 2008

**BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A.**

BETWEEN	TROPICROP MUSHROOMS LTD.	APPELLANT
AND	ST. THOMAS PARISH COUNCIL	1st RESPONDENT
AND	ALFRED EDWARDS	2nd RESPONDENT
AND	IAN HARRIOTT	3rd RESPONDENT
AND	RUPERT BROWN	4th RESPONDENT
AND	SHANE BROWN	5th RESPONDENT
AND	PATRICK PATTERSON	6th RESPONDENT
AND	MARCUS STEWART	7th RESPONDENT
AND	SINCLAIR MCDONALD	8th RESPONDENT

Christopher Kelman and Miss Lisa Russell instructed by Myers Fletcher and Gordon for the Appellant.

Joseph Jarrett instructed by Joseph Jarrett & Co. for the Respondents.

March 25 and November 13, 2009

SMITH, J.A.

I have had the benefit of reading in draft the judgment of Harrison, J.A. I agree with his reasoning and conclusion. I can think of nothing which I can profitably add.

HARRISON, J.A.

1. This is an appeal from an Order made by Brooks, J. on the 12th day of August, 2008 varying an interim injunction granted to Tropicrop Mushrooms Limited (the Appellant) who is the registered proprietor of two (2) lots of land situated at Abbey Green Estate in the parish of Saint Thomas.
2. The facts in summary are as follows: The Appellant cultivates coffee on its property and in 2007, it erected an iron gate across a roadway which it claims to be a private roadway on the southern boundary of one of the lots. The appellant also posted armed guards at the gate to prevent access to the property by persons who (the Appellant contends) have no right to use the lands.
3. The Ancillary Claimants who are now Respondents in this appeal are coffee farmers and have maintained that they have been using the said roadway for ingress and egress to their farms over a period of time and ought not to be prevented from doing so.
4. The Saint Thomas Parish Council (the 1st Respondent) is contending that the roadway is a parochial road and therefore falls under its jurisdiction. It therefore objected to the gate being erected and demanded its removal.
5. In response to the demand, the Appellant commenced a claim in the Supreme Court seeking the following orders:

- (a) A Declaration that the reserve road which services the land registered at Vol. 1322 Folio 20 of the Register Book of Titles situated at Abbey Green, St. Thomas is a private road and;
- (b) A Declaration that the St. Thomas Parish Council is not entitled to remove the iron gate erected on the said road by the Claimant.

6. An ex-parte injunction was granted by Marsh, J. on February 12, 2008 restraining the St. Thomas Parish Council for a period of twenty-eight (28) days from removing the gate. An inter partes hearing was fixed for March 11, 2008 and on that date Jones, J. made the following order:

"UPON THE FORMAL ORDER dated 12th of February, 2008 coming on for review on this day and upon hearing Ms. Maliaca T. Wong and Ms. Lisa Russell, instructed by Messrs. Myers Fletcher & Gordon, Attorneys at Law, for the Applicant/Claimant and upon hearing Mr. Joseph Jarrett, instructed by Joseph Jarrett & Company for the Defendant & Ancillary Claimants.

IT IS HEREBY ORDERED that:

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 pm 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 April 2008.
2. Matter is referred to Mediation.

3. The Applicant gives the usual undertaking as to damages.
4. Costs to be (sic) in the claim."

7. The Attorneys argued before Brooks, J. that the order made by Jones, J. was a consent order although the words "by consent" have not been recited in the above order. In the circumstances, Brooks, J. treated it as such.

8. On April 9, 2008 Hibbert, J. extended the order of Jones, J. to July 2, 2008. On the latter date, Campbell, J. ordered inter alia: "the agreed varied injunction order made on March 11, 2008 continue until July 7, 2008."

9. On July 17, 2008, Brooks, J. heard an application made by the 1st Respondent to vary or discharge the order of Jones, J. That order would appear to have expired but Brooks, J. was of the view that he was at liberty to consider the application anew and that he was also not prevented from extending the previous order.

10. The 1st Respondent contended before Brooks, J. that the restriction of access by the Respondents to the roadway was burdensome as it was the practice over the years that the farmers would use the said land in order to get to and from their farms.

11. Tropicrop resisted the application on the basis that the parties had agreed on the terms of the injunction, as varied and that justice required that it be maintained unaltered. Counsel for Tropicrop argued 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, would cause it significant loss because of the exposure.

12. On August 12, 2008 Brooks, J. made the following order:

"On the Claimant giving the usual undertaking as to damages:

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."

The Grounds of Appeal and Orders Sought

13. These are the grounds of appeal:

- “(a) The Learned Judge erred in varying the injunction having found that there are serious issues to be tried and that there is a real risk that Tropicrop’s losses which may be incurred if an injunction is not granted, may not be able to be recovered and yet ordering a variation of the injunction which was tantamount to a discharge thereof;**
- (b) The Learned Judge erred in having found that the consent order by Jones J was a fair method of maintaining the status quo and minimizing the risk of injustice yet ordering a variation of the order which creates injustice to the Appellant and which variation is inconsistent with the findings;**
- (c) The Learned Judge erred in finding that Tropicrop consistently breached the order of Jones J when issue was joined on the evidence and in light of the submission as to reason for the order for the transportation by Tropicrop viz to reduce traffic into its coffee farms;**
- (d) The Learned Judge erred in failing to have regard to the evidence of the Appellant that there was no necessity for a variation of the consent order as the reaping season was at an end and therefore, no need for an increase in numbers as well as the Appellant’s evidence that there is no need for more than 15 persons to reap the crops on the lands of the farmers.**
- (e) The Learned Judge erred in ordering a consolidation of an action which had not at the date of the order been filed without having regard to the prejudice which a fresh suit may have on the existing suit and particularly in light of the application for summary judgment set for hearing December 12, 2008.”**

The Appellant seeks an order that:

- a) The appeal is allowed and the portion of the Order of the Honourable Mr. Patrick Brooks J made on August 12, 2008 allowing access through the iron gate each week from Monday to Friday between 6:00 a.m. and 6:00 p.m. to no more

than fifty persons each day from amongst the local farmers is set aside;

- b) The order of Jones J. be reinstated until trial or further order;
- c) Costs of this appeal and of the proceedings below to be the Appellant's/ Claimant's.

The Law

14. The principles in relation to the grant of interlocutory injunctions are well known and have been discussed in several authorities; the leading case being **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504.

15. The purview of this court in an appeal against the exercise of discretion by a judge, is to determine whether there is any basis for interfering with the judge's decision. It is settled law that an appeal will not be allowed unless the appellate court is satisfied: (a) that the judge below erred in principle, either by failing to take into account or giving too much or too little weight to relevant factors or by taking into account irrelevant factors; and (b) that, as a result of the error in principle, the judge's decision 'exceeded the generous ambit within which reasonable disagreement is possible' and may therefore be said to be plainly wrong.

16. In **Charles Osenton & Co v Johnston** [1942] AC 130, [1941] 2 All ER 245 at page 250 Viscount Simon L.C. said:

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal

reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then reversal of the order on appeal may be justified.”

17. In **Chanel Ltd. v F.W. Woolworth** [1981] 1 All ER 745 it was held, inter alia, that a defendant would not be allowed to reopen a particular order since a party was not entitled to a rehearing of an interlocutory matter unless there had been some significant change of circumstances or he had become aware of facts which he could not reasonably have known or found out at the time of the original hearing.

The Discussion

18. It is clear from the records referred to above, that prior to Brooks J. hearing the application to vary or discharge the order of Jones, J., there was a lapse between the last order granted by Campbell, J. on July 2, 2008 and the date of the hearing on July 17, 2008. It would appear that no injunction was in place between July 7 and 17.

19. Mr. Kelman, for the Appellant, has argued that two questions needed to be answered for a resolution of the issues in this appeal. He argued that the court must firstly, determine what is the order that is currently in place, and 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. He further argued that even if there was a change of circumstances, the question is whether that change is sufficient to warrant the discharge or modification of a consent order made by the Court. As an alternative to the second question, Mr. Kelman queried that if there is no

injunction in place whether the application for an injunction may be considered anew having regard to the application for variation and/or discharge of the injunction.

20. I turn my attention first to the alternative argument. It is a fact that there was a short lapse of time between the last application and the time when the matter came before Brooks, J. Technically speaking, there would have been no injunction in place between July 7 and 17 but it does not seem from the court record that any issue was made of the lapse on the 17th July. I will therefore move on to the fundamental issue, that is, whether or not there were changes in the circumstances between the parties which were sufficient to warrant a modification of the consent order.

21. In my judgment, it is clearly beyond dispute that the facts of the instant case do establish that there are serious issues to be resolved at trial. Brooks J. correctly identified, in my view, that the jurisdiction of the Parish Council in respect of parochial roads as well as the acquisition of prescriptive rights by the Respondents, were issues which needed to be resolved at a trial. The question is, in whose favour would the balance of convenience lie?

22. The learned judge stated inter alia, in his written judgment as follows:

"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.

...

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".

He also said:

"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".

23. I do agree with the reasoning of Brooks J when he stated that the variation of the injunction "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". I can find no valid reason to differ from the finding of the learned judge that a case had

been made out for an increase in the number of persons who should have access to the roadway, and the times of that access. I therefore find no error in principle in the judgment of Brooks, J. Certainly, the balance of convenience lies in favour of the injunction being varied until the matter is resolved at trial.

Conclusion

24. For these reasons, I would dismiss the appeal and affirm the order of Brooks, J. I would do so with costs to the Respondents to be taxed if not agreed.

DUKHARAN, J.A.

I agree.

ORDER

SMITH, J.A.

Appeal dismissed. Order of Brooks, J. affirmed. Costs to the respondents to be taxed if not agreed.