

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2010/0666

BETWEEN:

[1] ROSEMARY GARRAWAY
[2] CYPRIAN FERDINAND

Applicants/Claimants

and

[1] ALOYSIUS FERDINAND

Respondent/Defendant

Appearances:

Ms. Diana Thomas for the Applicants
Mr. Dexter Theodore for the Respondent

2011: January 24
February 3

DECISION

[1] **Belle J:** On July 27th 2010 the claimants Rosemary Garraway and Cyprian Ferdinand filed an application in which they prayed for the following orders:

- (1) The respondent, Aloysius Ferdinand, do pay into an escrow account 1/3 of the rental proceeds of Parcel 0849E 466, situate at Sans Souci, Castries and registered at the Land Registry of Saint Lucia for the Registration quarter of Urban Castries.
- (2) That the said proceeds be paid to the legal practitioners for the applicants to be held in an interest bearing savings account at a financial institution opened for that specific purpose.
- (3) That this order be served on Monroe College together with a Notice in Form 13.
- (4) That Monroe College, the tenant of the said property is bound by this order.

- (5) Until after the return date of this order the respondent must not, without the prior written consent of the legal practitioners for the applicants or the court, in any way dispose of, deal with or diminish the value of any of the assets (including the income derived therefrom) in the name of the respondent as administrator of the estate of Mary Helen Ferdinand, also known as Mary Helena Baptiste, also known as Mary Helena Ferdinand, deceased or which the respondent holds on behalf of the estate of the deceased, or to which the respondent has access by reason of his administration of the said estate whether they are in or outside of Saint Lucia.
- (6) The costs of this application be costs in the cause.
- [2] The central or overriding issue in the matter is:
(1) Are the circumstances of this case appropriate for the imposition of a mandatory injunction?
- [3] The applicants' counsel argued that their choice of remedy was prompted by the fact that the defendant was a trustee who had admitted being in possession of trust property. A trustee can be required to preserve the trust property to avoid the risk of dissipation. The defendant/respondent has indicated that he wishes to be reimbursed from the property of the estate and this is clear evidence that the property could be dissipated.
- [4] Another basis for the action being taken is that the trust property is in danger because the defendant as the administrator is a person who has managed a number of failed projects. Among the reasons for the failure of these projects is bad management counsel argued. An example of continued bad management is that the defendant has stated that he spent some \$397,487.75 on the renovation to the property of the estate while not being able to realise that sum even after eight years from the rent received. The rent has only realised \$144,000.00. According to counsel the defendant placed himself in a conflict of interest with the estate having taken this money from his pocket to renovate the estate's property. This was sufficient to justify the action of a Moreva injunction and Aton Pillar order.
- [5] Mr. Theodore for the defendant stated however that this was an administration action through the back door. Such an action should have been brought under

part 67 of the CPR 2000. Instead of this mandatory injunction the claimant should have asked for an account to be put forward by the Respondent.

- [6] Counsel argued that the effect of a mandatory injunction would be to extract from the administration the only source of revenue being generated by the estate. The result would be that the defendant would have to put his hand in his pocket to pay utility bills of the estate. But an order under part 41 of the CPR 2000 would kick in if the claimant asked for an account rather than a mandatory order to pay money into an escrow account.
- [7] Counsel submitted that the defendant's case was that in order to attract Monroe College to be a tenant he had to renovate the property of the estate to the tune of over \$397,487.75. Since this was accomplished everyone came looking for their shares.
- [8] Counsel's view was that an administrator had the right to hold property which was not his. He was not claiming any right to the property beyond what was owed as a beneficiary. This did not amount to a dissipation of the property. Indeed there is no risk of dissipation. Indeed the property increased in value because of his investment and his money is in the property. So it would not make sense for him to allow the property to be dissipated.
- [9] As a matter of law, counsel submitted the application for a mandatory injunction was not lightly granted. Counsel cited the case of **Zockoll Group v Mercury Communications Limited** 1997 CH where the court of appeal considered the principles governing the granting of mandatory injunctions. The principles in *American Cyanamid* were not relevant to such an application counsel submitted based on dicta in this decision. The overriding factor in the case of a mandatory injunction was that the case must be clear.
- [10] Counsel emphasized the fact that this case was not against "anybody". The defendant/respondent has duties as an administrator. The proper approach in these circumstances was an application for the taking of an account. He

thought that the claimants' application to freeze the monies of the estate was premature and wondered why they did not offer to assist instead.

[11] To these arguments the claimants' counsel rebutted that Part 67 did not provide an interim remedy if the claimant apprehends that there is something wrong going on. In respect of the taking of an account, the defendant would have been aware that the claimant was demanding such an account but he never offered one in response to written demands such as that of the letter of May 26th 2006.

[12] Counsel for the Applicant accepted that the threshold for a mandatory injunction was higher than for a prohibitory injunction. But the principles applicable in this case would not be on all fours with the **Zockoll** case. The applicant must show entitlement which they are able to show. They are asking for 1/3 of the sum of \$397,487.75

[13] These arguments give rise to the following issues:

- (1) Should the matter have been instituted pursuant to Part 67 of the CPR 2000?
- (2) Are the **American Cyanamid** principles relevant to an application for a mandatory injunction?
- (3) What are the principles relevant to a mandatory injunction or an interim order of this nature?
- (4) Is the existence of the competing interest of Anthony Ferdinand of any significance in the determination of the first issue raised?
- (5) What is the significance of the passage of time to the choice of interim relief?
- (6) Should the interim injunction be granted based on the principles gleaned from the cases?

[14] To deal with the first issue, the manner in which a litigant decides to conduct litigation is often one of strategy not prescribed by the rules. Counsel for the applicants explained that Part 67 did not contain any provisions which would guide the making of the kind of order which they were asking for. Part 67

contained provisions which would permit an application for an account from the administrator or executor of an estate. But the applicants had already asked for an account to no avail.

[13] On this issue I think it would be overstated to come to the conclusion that the applicants should have made an application pursuant to Part 67 rather than Part 17. However it is instructive that Part 67 has no express provision for a mandatory injunction, although other interlocutory orders are provided for. See Part 67.5 (1).

[14] Counsel for the applicants relied on a section from **Commercial Injunctions Fifth Edition** by Steven Gee beginning at page 1104 Article 93 which is captioned, "Application By Interim Claim to Safeguard The Trust Property If Endangered. "

[15] The writer first deals with circumstances where the court is satisfied that trust property is in danger:

- (a) by reason of the active or passive misconduct of the trustees, or
 - (b) by reason of the trustees residing out of the jurisdiction of the court;
- an injunction will be granted on an interim claim at the instance of

any person with a right to make the trustees account for the trust property (including a co-trustee even if he himself breached the trust) either compelling the trustees to do their duty, or restraining them from interfering with the trust property, as the case may require; and, if expedient, a receiver will be appointed.

[16] Relying on the case **London Syndicate v Lord** (1878) 8 Ch D 84 at 90 the author states,

"Where a trustee has admitted that he has trust moneys in this hands, and the court considers the trust property is endangered, an interim order may be made for payment of the amount into court; but there must be an admission direct or implied , written or verbal , and no dispute as to the defendant's liability, as the court cannot try the claim on an interim injunction."

[17] It is clear then that where the conditions of (1) there being trust moneys in the trustees hands, and (2) the trust property is endangered, exist the kind of

interim order being prayed for may be granted as long as the final hurdle is surmounted which is (3) an admission direct or implied and no dispute as to the defendant's liability. The issue which arises here is whether this is a case where these conditions have all been fulfilled. My answer would be no, because it cannot be said that there is no dispute as to the defendant's liability. The claimant/applicant has asked for a number of orders which the respondent would not be able to resist however the issue on which the case would be disputed would be that of damages and the applicants would not be able to establish that the Respondent is liable to pay damages at this stage of the proceedings.

[18] However it is evident that the writer of this section of Commercial Injunctions would seek to apply the **American Cyanamid Co v Ethicon Ltd** principles to an interim injunction. To satisfy those guidelines the Applicants must first show an arguable case. If there is an arguable case then the court should look for the balance of convenience. It is possible to take into account the strength of respective cases if the cases are equally balanced. But even if the case is weak the court may make an interim order in a party's favour. But in my view a decision in the latter circumstances would then be based on the principles enunciated in **Zockoll Group Ltd v Mercury Communications Limited**. Counsel for the applicants argued that this case was not on all fours with the circumstances applicable to the case at bar. But I disagree.

[19] I will not traverse all of the facts of **Zockoll** but the main distinction between the cases would be that the **Zockoll** case discussed the appropriateness of a mandatory injunction in a case where the applicant was claiming breach of contract based on a statutory provision Section 3(2) of the **Unfair Contract Terms Act 1977 (UK)**. Clearly those circumstances are different to the need to protect property being held in trust.

[20] However the Learned Judges who delivered the decision in **Zockoll** delved into an extensive examination of the law relevant to interim injunctions and made a number of important pronouncements. Counsel for the respondent referred to

the reference to the note at Order 29/1/5 of the White Book, ending with a paragraph which begins:

“The Cyanamid guidelines are not relevant to mandatory injunctions. The case has to be unusually strong and clear before a mandatory injunction will be granted at the interlocutory stage even if it is sought in order to enforce a contractual obligation.”

- [21] Simon Brown LJ opined that the note was consistent with the statement of Megarry J. in **Sheperd Homes Ltd v Sandham** [1971] 1 Ch 340 at 351 that:

“on motion , as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.”

- [22] Lord Simon Brown referred to several cases in which the principles applied in mandatory and prohibitory injunctions are discussed. He summed up the approach to be taken under the broad principle extracted from the words of Eveleigh LJ in **Cayne v Global Natural Resources** [1984] 1 All E. R. .225 at 233 as follows:

“What can a court do in its best endeavour to avoid injustice?”

And to the statement of May L.J. in the same case that:

“the balance of the risk of doing an injustice better describes the process involved.”

- [23] But Simon Brown L.J. approved the summary of the cases provided by Chadwick J. in **Nottingham Building Society v Eurodynamics Systems** [1993] FSR 468 at page 474 in the following passage:

“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 Hoffman J.

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 this right at 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.”

[24] The fact is that the order asked for in the application assumes that the applicant will be entitled to a substantial sum of money. Since there has been no accounting done the applicants are unable to establish how the money should be divided even though they allude to 1/3 entitlement.

[25] The applicants' application is based largely on the grounds;

1. Mary Helen, Ferdinand died intestate on 26th June 1996 leaving , among other things, a half share in and to the property known as Parcel 0849E466 and situate at Sans Souci in the registration quarter of Urban Castries.
2. The applicants are, together with the respondent, heirs-at-law of Mary Helen Ferdinand, deceased, and are each entitled to a 1/6 share of the estate of the deceased.
3. The Letters of Administration were wrongfully obtained by the respondent as they were granted despite the registration of two caveats filed on behalf of the Applicants.
4. Further or alternatively, the respondent has failed and refused to vest the applicants' share of the property to them.
5. Further, the respondent has collected rental income from the property as the rate of \$12,000.00 monthly from august 2008 and has not paid any sums to the applicants.

[26] The applicants expressed the fear that unless the court restrained him the respondent may dissipate the said rental income to the detriment of the applicants.

[27] The applicant Rosemary Garraway said in paragraphs 12-15 of her affidavit;

"We are fearful that our share of the rental and inheritance will all be dissipated and get tied up in the respondent's huge debts. The loan over the Mamiku Property stood at \$900,000.00 in January 2008. I believe that the rental should be paid into an interest bearing account to be held in escrow until final determination of this matter since this is the only way that Cyprian and I can be assured that our inheritance will be protected.

We have repeatedly demanded that the respondent vest the property and pay us 1/6 share of the rental. I attached hereto a letter dated 26 May 2010. The respondent has refused. By this said letter the Respondent was requested to amicably consent to the revocation of the Letters of Administration obtained by mistake. A true copy of the said letter is now shown to me exhibited hereto and marked "RG5" "

[28] In response to these grounds and the applicants' affidavits the respondent described the interest he paid in his parents lives by supervising the construction of their dwelling house in Sans Souci. He also admitted that there were cost overruns on the site caused by substantial theft. He related bearing the hospital and funeral expenses for his mother and later assisting his father who was a pensioner.

[29] At paragraph 5 (e) of his Affidavit of 21st October 2010 he states:

"From the time our dad retired he, being a pensioner receiving a monthly pension of \$500.00 was unable to pay his electricity and water bills, medical bills and the full time helper that he needed owing to his failing eye-sight and a heart condition. Eventually the ground floor deteriorated and was in serious need of repair and was no longer rentable. Anthony Ferdinand, who is now turning 88 years old, with mounting hospital and doctor's bills was only able to survive with financial and emotional assistance from the defendant"

[30] At paragraphs (f) to (j) the Respondent states:

- (f) The claimants have never made any financial contribution to our Dad's upkeep or the construction, maintenance or refurbishment of the Sans Souci premises.
- (g) Following numerous break-ins the decision was taken in August 2008 for my father to move out and for me to approach Monroe College to rent the entire premises;
- (h) I negotiated a monthly rent of \$12,000.00 and, with my father's encouragement, spent \$397,487.75 of my personal funds to refurbish

the premises to accommodate the educational institution and to meet the incidental expenditure ...”

- (i) In January 2009 the First claimant induced out father to convey his half-share of the San Souci property to her on the pretext that the conveyance was necessary to save the property from foreclosure and she has since refused to re-convey it to our Dad despite his repeated requests.
- (j) To date, Monroe College has paid rental in the sum of \$312, 000.00 and I have not recovered the sums that I expended to refurbish the Sans Souci property to make it acceptable to Monroe College

[31] In paragraph 6 the respondent replies to the applicants’ allegation that he has collected the rent from Monroe College and failed to give them their share. He says;

”Presently I collect the rent from the premises and use it to recoup my expenditure and to maintain our father. If I were made to deduct \$4,000 and place it into an escrow account it would cause great hardship to me and indirectly my father since he is dependent upon me and I have not yet fully recouped what I have spent on the refurbishment and the funds that I used to renovate my Dad’s house were funds which I had earmarked to help pay off my mortgage which plan has been on hold for nearly two years now. The Balance on my mortgage presently stands at approximately \$336,000.00”

[32] Counsel for the applicants argues that this evidence points to the veracity of the point they make that the respondent is a bad manager who has mismanaged many several businesses, does not pay his mortgage and will dissipate the proceeds of the rent.

[33] The respondent’s father Anthony Ferdinand swore to an affidavit on 20th October 2010 in which he supported the respondent’s position on almost all of the issues raised by the applicants. In particular he said that he had investigated and discovered that the story he was told pursuant to which he conveyed his half share in the property to one of the applicants Rosemary Garraway, was untrue. No judgment was ever entered over the Sans Souci property and the law firm of Francis and Antoine has purchased the bank debt of Informatics 2000 and his property had never really been in jeopardy. He immediately asked Rosemary to return his half share to him but she has not

done so to date. He also states that he never received the purported purchase price of \$50,000.00.

[34] It is notable that the applicants in this matter sat back and did nothing about the situation since 1996. It is in March 2009 when the applicants found out that the respondent had applied for Letters of Administration in the Estate of the deceased Mary Helen Ferdinand that they became disturbed because according to them they are aware that the respondent has a history of untrustworthy and dishonest behaviour and would dissipate their inheritance without allowing them to enjoy it. It therefore begs the question why did neither of them take steps to apply for Letters of Administration? The answer probably is because they reside overseas, something the respondent pointed out in his affidavit.

[35] But the applicant Rosemary Garraway explained her true feelings about the matter at paragraph 4 of her most recent affidavit, where she states;

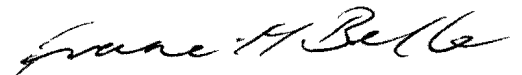
“As regards paragraph 41 and 42 of my father’s affidavit I wish to state that it is because Aloysius has taken away our family home, and all my mother’s memories with it , that I have decided that this is the last straw and to put right where right is. I always had a place to stay when I travelled to Saint Lucia. I find now that I have to stay with friends when I travel. I am not interested in Aloysius’ share of the property. I am only asking that this court grants me interim relief and to put mine and Cyprian’s 1/3 share of the rental of the property into an escrow account so that Aloysius will not have the opportunity to further dissipate what is rightfully ours.”

[36] The court holds that the scenario is one in which an individual who once held a half share interest in the San Souci property which is at the centre of the dispute agreed that it should be dealt with in the manner in which the respondent who held a 1/6 share dealt with it. The respondent and his father agree that the Applicants never showed any interest in the property until they discovered that it was bringing in \$12,000.00 rent per month. So they came looking for their share. The history of the matter shows that the applicants only started showing an interest in the property after it was rented to Monroe College. Their interest became more acute after the house was no longer available for them to stay in it when they travelled from overseas.

[37] It is my view that this case involves many disputed facts which are pivotal to the outcome of any case for damages, for revocation of letters of administration or the like. An order of the nature of a mandatory injunction compelling the respondent to pay the sums contemplated into an escrow account could conceivably cause injustice to the respondent and hardship to his father since he would not be able to use the money for any purpose even if there are bills to be paid in relation to Anthony Ferdinand's upkeep or the maintenance of the property. It would be better at this time to refrain from making such an order and avoiding the risk of injustice which according to the authorities should be the adopted approach.

[38] In the language of Lord Simon Brown I do not feel a high degree of assurance that at trial it would be established that a mandatory injunction was appropriate and even though the applicants have an arguable case there are substantial issues of fact and law which are to be resolved.

[39] In light of my findings I dismiss the application for the orders sought and order costs in the cause.



Francis H V Belle
High Court Judge