

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA**

SUPREME COURT CIVIL APPEAL COA2022CV00016

BETWEEN	ANTHONY THARPE	APPELLANT
AND	BUSINESS VENTURES & SOLUTIONS INC	RESPONDENT

Anthony Tharpe in person

Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

20 and 24 March 2023

ORAL JUDGMENT

V HARRIS JA

[1] The respondent, Business Ventures & Solutions Inc ('BVS'), is the registered owner of several parcels of land, together known as 15 Queens Drive, Montego Bay, in the parish of Saint James, which are comprised in certificates of title registered at volume 665 folios 10 and 11 and volume 650 folio 65 of the Register Book of Titles ('the property'). On 25 March 2021, BVS commenced proceedings against the appellant, Mr Anthony Tharpe, in the Supreme Court, seeking a permanent injunction to restrain him, his servants and/or agents from entering, altering, or otherwise dealing with the property. The claim also sought damages for trespass, loss of use, loss of profits, and interest plus costs.

[2] On the same date that the claim was filed, BVS also filed an application for an interlocutory injunction in identical terms as the permanent injunction ('the application'). The application was supported by an affidavit from Mr Steve Rapier, president and sole

director of BVS. On 3 November 2021, Bertram-Linton J ('the learned judge') heard the application and, on 1 February 2022, she granted the interlocutory injunction. Mr Tharpe is appealing this decision.

Background

[3] BVS is a company incorporated under the laws of New York, in the United States of America ('USA'), with its registered office in that state. Mr Tharpe is the former director, principal officer, and owner of 100% interest in BVS. The property was previously owned by Mr Alexander Burnham and managed by the Alexander Burnham Trust ('the Trust') through its then trustee, Capital One NA.

[4] During the time that Mr Tharpe was its principal officer, BVS entered into an agreement to purchase the property. On 6 April 2006, the registered titles for the property were transferred to BVS, although a significant portion of the purchase price was not paid. When BVS failed to pay the balance of the purchase price, Capital One NA commenced legal proceedings against BVS, Mr Tharpe and Ms Jacqueline Buchanan in the Supreme Court (claim no 2010HCV02692) to recover the outstanding sum. Mr Tharpe later filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court of the Southern District of Florida, West Palm Beach Division in the USA. As a result of those proceedings, Mr Tharpe's trustee sold Mr Tharpe's interest in BVS to the Trust, through Capital One NA. So, in October 2017, Mr Tharpe lost all his interest in BVS, and the Trust became the sole legal and beneficial owner of BVS and all its assets, including the property. BVS was then reincorporated in May 2019, and the Trust appointed Mr Rapier as BVS's president and sole director.

[5] On 18 May 2016, a judge of the Supreme Court enjoined BVS, its agents and/or servants from transferring, mortgaging, charging, encumbering, or otherwise dealing with or disposing of the property and restrained the Registrar of Titles from registering any dealing in respect of the property. That injunction remained in place until December 2020, when it was discharged on the application of the Trust to facilitate the sale of the property. After the injunction was lifted, it was discovered that Mr Tharpe, his servants

and or/agents had entered and constructed several buildings on the property. This led to the prospective purchaser withdrawing his interest in purchasing the property.

[6] By letter dated 11 March 2021, BVS's attorneys wrote to Mr Tharpe demanding that he cease construction and trespassing on the property, but he refused to do so. This refusal prompted BVS to file the claim and the application for the injunction. As indicated earlier, the learned judge granted the interlocutory injunction.

The appeal

[7] Disgruntled with the decision of the learned judge, on 7 February 2022, Mr Tharpe filed his notice and grounds of appeal. Although they are prolix, we have discerned from them that he is challenging the learned judge's findings of fact and law on the bases that:

- a) She erred by failing to consider that BVS was really Capital One NA in disguise, and this court and the court below had previously ruled that Capital One NA had no legal standing to pursue any claim against him (referring to this court's decision in **Business Ventures and Solutions Inc and Anthony Dennis Tharpe v Capital One NA (Trustee of the estate of Alexander Burnham)** [2012] JMCA Civ 49 and the decision of Lawrence-Beswick J in **Capital One NA v Business Ventures and Solutions Incorporated, Anthony D Tharpe and Jacqueline Buchanan** [2015] JMCA Civ 102).
- b) By order of G Brown J, made on 16 May 2018, he was named the only legal representative for BVS. Therefore, the learned judge exceeded her jurisdiction when she recognised and accepted Mr Rapier as being authorised to represent BVS in the application.
- c) She fell into error when she disregarded G Brown J's ruling that he had been occupying the property for over 12 years and had acquired title, in his own right, by virtue of adverse possession.

[8] Mr Tharpe is asking the court to, among other things, set aside the injunction, strike out the claim (presumably the substantive claim), permanently bar Capital One NA from filing further claims against him, and consolidate, as well as enter judgment in his favour on all claims that Capital One NA has commenced against him.

Discussion

[9] We recognise that in arriving at her decision, the learned judge was exercising a discretion given to her by section 49(h) of the Judicature (Supreme Court) Act, which allows judges of that court to grant injunctions. We also acknowledge that it is now well settled that this court will not disturb the exercise of a discretion by a judge at first instance unless it was based on a misunderstanding of the law or evidence or where the judge's decision is "so aberrant that it must be set aside on the ground that no judge regardless of his duty to act judicially could have reached it" (per Morrison JA (as he then was) in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1).

[10] We note that the principles that must occupy the mind of a judge in considering the grant or refusal of an interlocutory injunction are whether there is a serious issue to be tried, whether damages are an adequate remedy, and whether the requirements of the balance of convenience or the interest of justice lie in favour of the grant or refusal of the injunction (**American Cyanamid Co v Ethicon Limited** [1975] 1 All ER 504 (**American Cyanamid**) and **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] 1 WLR 1405 (**NCB v Olint**)). These factors will now be considered in the context of the submissions of the parties.

Is there a serious issue to be tried?

[11] The parties agree that there is a serious issue to be tried. Mr Tharpe has contended that the court needs to determine the rightful representative of BVS and the owner of the property given that Capital One NA has acquired BVS and its assets by fraudulent means. Mr Tharpe also contended that, nonetheless, he had acquired title to the property by virtue of adverse possession. Further, the learned judge failed to take into account the

ruling of G Brown J in this regard, thereby exceeding her jurisdiction when she granted the injunction.

[12] Mrs Robinson submitted that BVS was the registered proprietor of the property and that Mr Tharpe no longer held any interest in BVS and had no legal or beneficial interest in the property. As a result, he was trespassing on the property, and his actions interfered with BVS's right to sell the property and were prejudicial to its commercial interests. Additionally, in respect of Mr Tharpe's assertion that he had acquired title to the property by adverse possession, counsel posited that he would not have been in occupation of the property for over 12 years since time would not begin to run for the purposes of the Limitation of Actions Act until October 2017 (when his interest in BVS was transferred to the Trust). Counsel pointed out that up to October 2017, Mr Tharpe was acting for and on behalf of BVS as its principal and owner. In any event, the argument continued, even if it could be said that Mr Tharpe had been occupying the property since 2005 or 2006, his possession was not undisturbed, given the previous court claims against him.

Are damages an adequate remedy?

[13] Mr Tharpe submitted that the learned judge failed to consider that he would be more "damaged" than BVS because, having obtained building permits to construct a resort on the property, if he were not allowed to complete the construction and commence operation of the resort, his financial loss would be over US\$6 billion. On the other hand, based on the appraisal of the property, BVS's loss, if the property were not sold, would be at most US\$1,500,000.00.

[14] Mrs Robinson argued that the learned judge was correct in granting the interlocutory injunction because Mr Tharpe failed to present any evidence that he would be in a financial position to compensate BVS for the loss that it would have inevitably sustained as a result of his continued trespass on the property, should BVS succeed at trial. Counsel further contended, citing **American Cyanamid**, that the authorities are

clear that once the learned judge was satisfied that Mr Tharpe was “not able to make good on an award of damages” to BVS, the injunction should be granted.

In whose favour does the balance of convenience lie?

[15] Mr Tharpe posited that as the rightful owner of BVS and in the light of the substantial losses he would suffer should he not be allowed to complete construction on the property, the learned judge erred when she found that the course least likely to cause irreparable harm was to grant the injunction.

[16] Mrs Robinson advanced that the learned judge was correct in finding that the balance of convenience favoured the grant of the injunction because in the unlikely event, the claim is determined in Mr Tharpe’s favour, BVS was in a financial position to compensate him for the loss that he would have suffered as a result of the grant of the injunction. On the other hand, Mr Tharpe had failed to present any evidence that the converse would be true. Finally, relying on **Azurro Coast Limited v Dennis Atkinson et al** [2016] JMCC COMM 36, Mrs Robinson submitted that since BVS was the registered proprietor of the property, a feature that strengthened their case, this was an essential factor to be considered in assessing what course would cause the least irreparable harm.

Disposal of the appeal

[17] In determining the application, it was plain that the learned judge carefully considered the evidence and material before her. She was entitled, as she did, to accept the documentary evidence that Mr Rapier presented on BVS’s behalf (the copies of the order from the United States Bankruptcy Court dated 26 September 2017, the assignment agreement dated 6 October 2017, and the restated certificate of incorporation dated 2 May 2019) as *prima facie* evidence that: (a) Mr Tharpe had filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court of the Southern District of Florida, West Palm Beach Division on 22 February 2017 which was granted on 18 September 2017; (b) the United States Bankruptcy Court had approved the assignment agreement (termed “settlement agreement” in its order), which transferred all of Mr Tharpe’s interest in BVS to the Trust (through its then appointed

trustee Ms Lorraine Gallagher of Capital One NA) on 6 October 2017; and (c) on 2 May 2019, the restated certificate of incorporation of BVS stated that its president, secretary and sole member of the board of directors would initially be Mr Rapier, who was therefore authorised to initiate the claim on its behalf.

[18] The learned judge then went on to apply the principles in the seminal authorities of **American Cyanamid** and **NCB v Olin** to the evidence she accepted and made the following findings:

- a) There was a serious issue to be tried because BVS was the lawful owner of the property, and Mr Tharpe no longer had any legal or equitable interest in the property. She observed that Mr Tharpe's actions interfered with BVS's use and enjoyment of the property and prevented it from being sold.
- b) An interim injunction should not be granted if damages are an adequate remedy and Mr Tharpe is able to pay them. However, there was no evidence from Mr Tharpe, having filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court of the Southern District of Florida, West Palm Beach Division on 22 February 2017, that he was in a position to compensate BVS for the "extent of loss and damage caused by his actions". The appropriate remedy, therefore, was to grant BVS the interlocutory injunction to protect its interest in the property if the claim is successful.
- c) The course that would likely cause the least injustice would be to grant the interlocutory injunction because if the injunction were not granted, Mr Tharpe would continue to trespass on and make alterations to the property. This would result in irreparable harm to BVS as the registered proprietor of the property since it would

not be able to peacefully enjoy the property and exercise its right to sell it if successful in its claim. On the other hand, the grant of the injunction would not likely cause Mr Tharpe significant disadvantage. Also, Mr Tharpe had failed to satisfy the court that he could adequately compensate BVS for any loss it would suffer if the permanent injunction is granted and he is unsuccessful at trial.

[19] We have reviewed the learned judge's approach to the application. In our judgment, she amply demonstrated the required appreciation of the law and evidence, and there is no basis upon which we could conclude that she was plainly wrong in arriving at her decision.

[20] Before concluding, we wish to make a few observations to address some of the assertions made by Mr Tharpe before us, which we consider to be inaccurate.

[21] Firstly, in addition to Mr Tharpe's contention that he is the owner of BVS, he also stated that BVS was incorporated in the state of Florida, in the USA, although he has produced no documentary evidence to validate this claim. Contrary to this assertion, the documentary evidence confirms that BVS was incorporated in the state of New York, and its original certificate of incorporation was filed with the New York State Department of State on 20 July 2001. Documents from the Florida Department of State, clearly illustrate that BVS (regarded as a foreign corporation in Florida presumably on account of being incorporated in the state of New York) was registered in the state of Florida to obtain authorisation to "transact business or conduct affairs" in that state on 10 January 2002. However, that registration was terminated on 9 December 2019, and BVS's status in Florida is now documented as being "withdrawn".

[22] Secondly, G Brown J's order dated 16 May 2018, which permitted Mr Tharpe to represent BVS, was a case management conference order made in claim no 2010HCV02692. That order stated "Mr Anthony Tharpe is permitted to represent [BVS]

in these proceedings” (emphasis added). It is clear that G Brown J’s order was not intended to permit Mr Tharpe to represent BVS in all proceedings before the court and was specific to that claim before him.

[23] Thirdly, in the decision of this court in **Business Ventures and Solutions Inc and Anthony Dennis Tharpe v Capital One NA (Trustee of the estate of Alexander Burnham)**, Brooks JA (as he then was) at paras. [9] – [11] of the judgment indicated that one of the “flaws” in the claim (no 2010HCV02692) was that Capital One NA, the appointed trustee of the Trust, had taken no steps in Jamaica to be recognised by the Supreme Court as having legal standing to institute legal proceedings on behalf of the Trust against BVS and Mr Tharpe. However, Capital One NA subsequently acquired standing to represent the Trust in legal proceedings in Jamaica when it obtained a grant of administration with will annexed *de bonis non* from the Supreme Court on 9 July 2015. This would have been after the decision of Lawrence-Beswick J in claim no 2010HCV02692. The interlocutory applications in that claim were heard on 24 November 2014, and judgment was delivered on 29 May 2015. It is, therefore, not surprising that Lawrence-Beswick J would have pronounced (correctly so, in our view) that Capital One NA lacked legal standing to initiate the claim against BVS, Mr Tharpe and Ms Buchanan.

[24] Finally, we have been unable to locate any written decision or order in the record of appeal which could give credence to Mr Tharpe’s claim that G Brown J had declared that he had acquired title to the property by adverse possession. We wish to indicate that while evidence relating to our observations at paras. [21] - [23] above was before the learned judge when she considered the application; aside from Mr Tharpe’s bald assertions in his affidavit and submissions concerning judicial pronouncement on his acquisition of title to the property, absolutely no documentary evidence had been produced to substantiate them.

Conclusion

[25] For the preceding reasons, we are of the view that the learned judge correctly exercised her discretion when she granted the interlocutory injunction. Accordingly, there is no basis for us to disturb her decision. The court, therefore, orders as follows:

1. The appeal is dismissed.
2. The decision of Bertram-Linton J given on 1 February 2022 is affirmed.
3. Costs to the respondent to be agreed or taxed.