IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION

2009: 394

BETWEEN:

MARSHALLE AUGUSTUS

Plaintiff

-v-

WENDY GIBBONS

Defendant

REASONS

Mr. Christopher E. Swan for the Plaintiff

Date of Hearing: November 23, 2009
Date of Reasons: November 30, 2009

Introductory

1. By letter dated November 10, 2009, the Plaintiff's attorneys wrote the Defendant and demanded that he cease trespassing on her property by renovating a shed located there. The Defendant was warned that the Plaintiff's attorneys were instructed if he did not cease and desist "*to immediately issue proceedings to address our client's concerns.*" Ten days later, on Friday November 20, 2009, the Plaintiff filed a Specially Indorsed Writ, an Ex Parte Summons and supporting Affidavit. The Summons sought an interim injunction restraining the Defendant from trespassing on the Plaintiff's property and requiring him to remove material and equipment situated there. The Affidavit complained that despite service (on a date uncertain) of the November 10, 2009 letter, the trespasses were continuing.

2. On the morning of Monday November 23, 2009, the Summons was issued returnable for 2.30pm that afternoon. The Affidavit in support gave no indication that this was an appropriate case for an ex parte without notice hearing. At the commencement of the hearing, counsel (a) confirmed that the standard grounds for omitting service did not apply to the present case, and (b) informed the Court that the Defendant had not been given notice of the hearing and submitted that it was his understanding that the established practice of the Court was to grant interim injunctive relief on the basis of urgency alone without requiring the applicant to notify the respondent of the hearing.

3. I rejected this submission and adjourned the application until 4.00pm so that the Defendant and/or his attorneys could be given notice of the hearing. The history of the application made it obvious that this was not a case of extreme urgency and an ex parte application was only marginally justified. The Defendant's attorneys were notified and the application was granted at the resumed hearing at 4.00pm when the Defendant did not appear.

4. As it appeared to me based on the way the present and similar ex parte applications had been dealt with by a variety of counsel that the correct practice on ex parte applications (particularly in non-commercial cases) was unclear, I indicated that I would give reasons for my decision to insist that the Plaintiff give notice of the ex parte hearing so that the Defendant would have an opportunity to appear.

The rules of practice applicable to the requirement to give notice of ex parte applications

5. Order 29 of the Rules of the Supreme Court provide in salient part as follows:

"*ORDER 29*

INTERLOCUTORY INJUNCTIONS, INTERIM PRESERVATION OF PROPERTY, INTERIM PAYMENTS, ETC.

I. Interlocutory Injunctions, Interim Preservation of Property, Etc.

29/1 Application for injunction

1 (1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons.

(3) The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."

6. Order 29 rule 1 is substantially similar to the English version of the Rule contained in Order 29 rule 1of the Supreme Court Practice 1999. However, the ability to apply in urgent cases on affidavit without a summons or motion is no longer limited by paragraph (2) of Order 29 rule 1 in England to plaintiffs. The practice under this rule is described in paragraph 29/1A/21 of the 1999 White Book as follows:

> "*Generally, an injunction will be granted ex parte only in cases of emergency or, as r.1 puts it, in cases of 'urgency', and it must be shown that there are strong grounds to justify the application being made ex parte (per Lindley J., Anon[1876] W.N. 12). A case may be one of 'urgency' either (1) because a case is too urgent to await a hearing on notice, e.g. where property is in danger of being lost or destroyed (Brand v. Mitson (1876) 24 W.R. 524, London and County Banking Co. v. Lewis (1882) 21 Ch.D. 490, Evans v. Puleston [1880] W.N. 127, Fenwick v. East London Railway (1875) L.R. 20 Eq. 544 at 547), or (2) because the very fact of giving notice may precipitate the action which the application is designed to prevent (Brink's-MAT v. Elcombe [1988] 1 W.L.R 1350; [1988] 3 All E.R. 188, CA, at 1358 and 193, respectively, per Balcombe L.J.).*"

7. Paragraph 29/1A/25 also describes the development of the practice in the Chancery Division of "*opposed ex parte applications*". These are effectively *inter partes* hearings. However, in addition to opposed *inter partes* hearings, there is in an established (or at least an emerging) practice of *ex parte* on notice hearings where the respondent is given notice and either attends without making submissions or does not attend at all. Referring to the then new English practice of opposed ex parte applications in *Pickwick International Inc. (G.B.) Ltd v. Multiple Sound Distributors Ltd* [1972] 1 W.L.R. 1213 at 1214E-G, Megarry J opined:

> "*The practice supplements, without supplanting, the former practice of moving ex parte, with the party moved against being silently present and taking no part in the proceedings unless an injunction was granted, in which case he thereupon moved ex parte to vary or discharge that injunction. Of course, if the party moved against is not present he can similarly move ex parte to vary or discharge the injunction when he learns of it.*"[1]

8. This suggests that the English practice under the counterpart to Bermuda's Order 29 rule 1 was to give notice of urgent ex parte applications unless there was good reason for not doing so.

9. The English CPR rule on notice and interim relief applications is broad, but is explained by a supporting Practice Direction. Rule 25.3(1) provides: "*The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.*" The complementary '*Practice Direction-Interim Injunctions*' in describing the procedure in relation to urgent applications states in paragraph 4.3:

> "(3) *except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.*"

10. In my judgment this rule of practice merely formalises the way Order 29 rule 1 has been or ought to be applied under Bermuda law. Urgency by itself is only a basis for seeking an expedited hearing without being required to give the usual notice and without formally summoning the respondent to the application to attend. The applicant having decided it is appropriate to issue an ex parte application must then consider whether there are any additional grounds justifying withholding notice of the application from the respondent. The most obvious reason will be that the viability of the application itself depends on secrecy; however, there may be cases where the respondent cannot easily be found or notified so that prior notice is impracticable.

11. These are the principles which will apply in most interim injunction application contexts, whether they arise out of commercial, property or other disputes. These

[1] Goldrein, '*Commercial Litigation: Pre-emptive Remedies*', 3rd edition (Sweet and Maxwell: London, 1997) pages 101-102.

rules may not necessarily apply in other contexts, such as applications for leave to appeal, where the rules expressly permit ex parte applications and provide for an inter partes hearing before any decision adverse to the respondent is made. The dominant rationale for the practice is that an applicant for interim relief ought not, to without just cause, be permitted to obtain an order against a respondent without affording his opponent an opportunity to be heard. In addition, if a respondent does appear and oppose the application, there may be a saving of time and costs.

Conclusion

12. For the above reasons I declined to grant the Plaintiff's application for an interim injunction before the Plaintiff's counsel had taken steps to notify the Defendant of the pending *ex parte* application.

Dated this 30th day of November, 2009 _____
KAWALEY J