



IN THE SUPREME COURT OF NAURU

AT YAREN

CIVIL JURISDICTION

Civil Suit No.09 / 2020

BETWEEN

Madonna Dongobir

And

Danard Dongobir

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Applicant: D.Aingimea  
Counsel for the Respondent: F.Ribauw

Date of Hearing: 5<sup>th</sup> May 2020  
Date of Judgement: 12<sup>th</sup> May 2020

Case may be cited as: *Madonna Dongobir and Danard Dongobir*

**JUDGEMENT**

**Introduction**

1. These proceedings are concerned with the motion by the defendants to set aside and discharge the order of interim injunction granted ex-parte on the 31<sup>st</sup> March 2020 which restrained the defendants from interfering with the operation of businesses on and/or the

possession and enjoyment by the plaintiff of the buildings on land portion 267 Denigmodu District.

2. The plaintiff is the widow of Starret who died in 2016. Starret was the brother of the defendant. Both the defendant, Starret and their other siblings are part owners of portion 267 which they inherited from their late father.
3. Before the death of Starret, he and his wife, the plaintiff, operated a store on portion 267. The original store has since been rented out before Starret passed away. A restaurant operated by Chinese nationals before Starret's death is also housed in one of the buildings and rent monies are paid to the plaintiff.
4. The buildings which housed the store and the plaintiffs businesses is the subject of these proceedings. On the early morning of the 27<sup>th</sup> March 2020 the defendant and others entered the building and told the tenants to vacate the premises. The defendant claims the buildings belong to their late father's estate.

#### **Notice of Motion to set aside**

5. The motion simply states that defendant rely on his affidavit in support of the application to discharge the injunction. He admitted he did confront the proprietors of the restaurant and advised them the family needs the space. He claimed the restaurant was not operational.
6. As to ownership of the building he alleged that it is an extension of the family home built by their late father and it was handed to him by their father but Starret requested him for the use of it until Starret builds somewhere else.

#### **Serious question to be tried**

7. The contents of the affidavit by the defendant is a blatant admission that there is a serious question to be tried. Not only is he claiming that the building which houses the restaurant

and store was built by his father, he is also claiming that the building was given to him by his late father.

8. The plaintiff on the other hand contended that the buildings were constructed by Starret and her during Starret's lifetime and she has also continued to collect the rent from the leases since Starret's death in 2016, so that for four years the plaintiff has collected rent and occupied the alleged buildings without interruption or indication from the other landowners including the defendant that the plaintiff and her late husband were not the owners of the buildings in dispute. It is therefore illogical for the defendant to contend that there is no serious question to be tried.

### **Balance of Convenience**

9. Assessment of the balance of convenience between the parties is the dominant consideration which determines the grant or refusal of an interlocutory injunction. Some texts suggest it may be more appropriately described as the balance of the risk of doing an injustice. In *Equity and Trusts in Australia and New Zealand*<sup>1</sup> it is said at page 817-818:

"Once the plaintiff has persuaded the court that there is a serious question to be tried, the Court must consider whether the balance of convenience is in favour of the grant or refusal of the injunction sought. This is the classic exercise of the equitable discretion. It is the balance of convenience component of the test which ensures flexibility in the application of equitable principles in diverse situations. Though expressed as a balance of convenience, the balance that the court seeks is more fundamental and weightier than mere convenience – it is the balance of the risk of doing an injustice that better describes the process."

10. The above text goes on to say that where the balance of convenience clearly does not favours either party the Court may, for reasons of prudence decide to preserve the status quo.

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<sup>1</sup> 2<sup>nd</sup> ed Dalpont and Chalmers

11. The expression, balance of the risk of doing injustice, was given judicial recognition in England and Australia. In *Total Marine Services v Walker*<sup>2</sup> Roberts – Smith J. of the Western Australia Supreme Court said at para 72;

"The principle is also aptly referred to as the balance of the risk of doing an injustice; per May LJ in *Cayne v Global Natural Resources*<sup>3</sup> What is to be weighed is the damage the respondents will suffer if the injunction is granted against that which the applicant may suffer if the injunction is refused."

12. Adequacy of damages is a factor which in practice has often in the past determined the grant of an interlocutory injunction. If damages would be an adequate remedy to the plaintiff, an injunction would usually be refused; or if adequate to the defendant the injunction would be granted.

But there seem to be a shift in emphasis from whether damage is an adequate remedy for the applicant to whether damages is a just remedy in all the circumstances.

In *Total Marine Services v Walker*<sup>4</sup> it is stated at paragraph 61;

"I accept the applicant's submissions that the test here is not simply whether damages will provide it with an adequate remedy but rather whether it would be just in all the circumstances to confine it to that remedy: *Evans Marshall and Co.Ltd v Bertola*<sup>5</sup>; *State Transport Authority v PTO Apex Quarries*<sup>6</sup>

13. The respective strengths and weaknesses of the plaintiff's case and the defendant's case is another relevant factor in the assessment of the balance of convenience whether to grant or refuse the injunction. This factor needs no consideration here.
14. To discharge the interim injunction at this stage tantamount to the Court condoning the conduct of the defendant who took the law into his own hands and demand possession as well as ownership of the premises which the plaintiff and her late husband had occupied;

<sup>2</sup> (2002) WASC 8

<sup>3</sup> (1984), All ER 225 AT 227

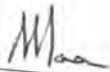
<sup>4</sup> Supra

<sup>5</sup> (1973) 1WLR 349

<sup>6</sup> (1998) VR 182

conducted business on and leased out to third parties for a number of years. If the defendant genuinely believed as to his ownership of the premises there is a civilised, legal and common sense avenue to pursue his claim. He has waited for four years since the death of his late brother to advance his agenda by force and intimidation.

15. If the defendant is serious about his allegations that the ownership of the buildings were vested in their late father who also gifted to him one of the buildings he should have at least raised the issue with the Nauru Lands Committee before his late father's estate was distributed.
16. The balance of convenience obviously favoured the grant of the interim injunction and as a consequence the application to discharge and set aside is refused.
17. The defendant is ordered to pay costs to be fixed by the Registrar.
18. This matter will take its normal course.



**Judge Rapi Vaai**

