



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CIVIL JURISDICTION

CIVIL CASE NO. 9/2023

BETWEEN

KHEMINDRA DOWEIYA of Uaboe
District, Republic of Nauru

Plaintiff

AND

GRETA HARRIS of Uaboe
District, Republic of Nauru

Defendant

Before: Khan, ACJ
Date of Hearing: 19 June 2023
Date of Ruling: 21 June 2023

Case to be known as: *Doweiya v Harris*

CATCHWORDS: Application for interlocutory injunction for obstruction for use of access way – Naoero Roads Act 2017 – Section 24 provides usage for more than 10 years or establishment of prescriptive right by usage – Where no time limit is provided

APPEARANCES:

Counsel for the Plaintiff: L Aingimea
Counsel for the Defendant: J Olsson

RULING

INTRODUCTION

1. On 9 May 2023 the plaintiff filed an inter parte application for interlocutory injunction against the defendant seeking orders that the defendant remove the water tank and be restrained from obstructing the plaintiff in the use of the access way which goes past the defendant's land onto her land.
2. The defendant is the owner of land portions 125 and 126 Uaboe District and the plaintiff is the owner of land portion 134 also in Uaboe District. The defendant lives in land portion 125.
3. The plaintiff claims that since 2015 she has been using the access way which goes past the defendant's land portions 125 and 126 and the defendant blocked the access way by building a concrete slab on or about 18 April 2023 to place her water tank thereon.
4. The summons for interlocutory injunction was set down for hearing on 10 May 2023 and the defendant attended court and asked for time to consult a lawyer. Miss J Olsson filed memorandum of appearance on 24 May 2023 and on 26 May 2023 an order was made to file the statement of defence and affidavit in reply by 6 June 2023 and for the plaintiff to file reply to defence and the defendant's affidavit by 12 June 2023 and the matter was adjourned to 19 June 2023 for hearing.
5. On 19 June 2023 Miss Olsson appeared for the defendant and sought an adjournment for 7 days to comply with the orders made on 26 May 2023. This application was objected to by Mr Aingimea and I refused to grant any further time and the matter proceeded to hearing.

GENERAL PRINCIPLE FOR GRANT OF INTERIM INTERLOCUTORY INJUNCTION

6. It is stated in the Supreme Court Practice 1997 Volume 1 at page 503 as follows:

“The usual practice of an interlocutory injunction is to preserve the *status quo* until the rights of the parties have been determined in the action.... The principle to be applied in an application for interlocutory injunctions have been authoritatively explained by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 396; [1975] 1 All E.R. 504 H.L. They may be summarized as follows:

- 1) The plaintiff must establish that he has a good arguable case to the right he seeks to protect;
- 2) The Court must not attempt to decide the claim on affidavit; it is enough if the plaintiff shows that there is a serious question to be tried;
- 3) If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.

PLAINTIFF'S CASE

7. It is the plaintiff's case that she has been using the access way since late 2015 without any interruption from the defendant until the building of the slab for the water tank. The plaintiff acknowledges that a public road was declared by the Minister for Infrastructure on 1 May 2020 which was declared to provide access to other land portions including land portion 134. Although the declaration was made by the Minister, this road is not in use as the landowners have refused to allow the public to have access thereto.
8. That as a result of the defendant's obstruction of the access way, the plaintiff and the occupants of land portion 134 have been deprived access in an emergency situation to the police or ambulance vehicles as well as water tank to deliver water.
9. No documents were filed on behalf of the defendant as stated above despite an order and Miss Olsson's response was confined to the material filed by the plaintiff and the legal issues that arose.
10. Miss Olsson submitted that s.24 of the Naoero Road Act 2017 speaks of usage for more than 10 years whilst the defendant has been using the road for about 8 years.
11. She further submitted that the plaintiff allowed the defendant to use the access way by way of a customary practice and that the defendant has not acquired any rights.
12. It is not in dispute that an order for ex parte interim injunction was made against the defendant in respect of the same access way in the matter of *Shorona Cain v Greta Harris* in Civil Case No. 8 of 2023. The order reads as follows:
 - 1) The defendant shall forthwith remove the slab constructed on the access way on land portion 126 Uaboe District, which is currently used by the plaintiff and members of the public as an access way under Naoero Road Act 2017.
 - 2) No further construction shall be carried out by the defendant, her servants and/or her agents on the said access way.
 - 3) This order is to remain in force until the determination of this matter.

CONSIDERATION

13. S.24 of the Naoero Road Act 2017 provides as follows:

PART 6 – TRACKS, COMMON DRIVEWAYS OR ACCESS WAYS

24. The proprietors and occupiers of adjoining and surrounding lands:
 - a) who have tracks, common driveways or access ways; and

- b) the tracks, common driveways or access ways have been in usage for more than 10 years; or
- c) the person using such tracks, common driveways or access ways have by virtue of usage have acquired a prescriptive right to the use of such tracks, common driveways or access ways;

shall not unreasonably obstruct such tracks, common driveways or access ways without providing an alternative access.

- 14. S.24(a) and (b) is conjunctive and the usage of the access way has to be for more than 10 years and the two provisions have to be read together as the word “and” appears at the end of s.24(a).
- 15. The word “or” appears at the end of s.24(b) and the provisions of s.24(c) is disjunctive. All that the plaintiff has to do to establish is that she has “by virtue of usage” acquired a “prescriptive right” to the use of the access way. No time limit is prescribed or stipulated.
- 16. I discussed the significance of the interpretation of the use of the words “and” and “or” in *Spanner v Republic* where I stated at [10], [11], [12], [13], [14] and [15] as follows:

[10] S.79 states:

- 1) Any person who is convicted of an offence under s.69(2) is liable to:
 - a) for a first offence:
 - i) mandatory suspension of his or her driver’s license for 6 months; and
 - ii) a maximum fine of \$1000.00; or
 - iii) imprisonment for 6 months.

[11] The correctness of the sentencing by the magistrate depends on the interpretation to be placed on the words “and” and “or”. In s.79(1)(a) the word “and” appears at the end of subparagraph (i). It is common ground that for the offence of driving under the influence of liquor under s.69(2) the suspension of the driver’s licence is mandatory for a period of 6 months for a first offender. The magistrate imposed a suspension of 6 months, but, in addition thereto he also imposed a sentence of 5 months imprisonment which was suspended for 12 months and a fine of \$600.00 in default imprisonment. [I shall discuss the exact default imprisonment term later].

[12] After the suspension of the driver’s licence the magistrate should have considered whether to impose a fine or a term of imprisonment as the word “or” appears at the end of s.79(a)(ii) which means that it is disjunctive, however, the magistrate interpreted the word “or” as being

conjunctive, and therefore, resulting in the imposition of a sentence of both imprisonment and a fine.

[13] In Statutory Interpretation in Australia¹ it is stated at page 21 as follows:

[2.12] Modification of conjunction ‘and’ ‘or’.

A particular and common example of the approach referred to in the preceding paragraph arises in relation to the use of the words ‘and’ and ‘or’. In ordinary parlance the word ‘and’ is used conjunctively and the word ‘or’ disjunctively.

[14] It is also stated in Stroud’s Judicial Dictionary of Words and Phrases² at page 2019 as:

OR.“Or” is prima facie an alternative word (Litt. S.723; per Parke B., *Elliot v Turner*, 15 L.J. C.P.49).


[15] It is further stated at page 2020 as:

The word “or” is, prima facie, in the absence of some restraining context, to be read as disjunctive and not as “id est” (*Re Diplock* [1941] Ch.253 at 260-261).

17. From my above discussions, it is quite apparent that the plaintiff may have acquired a prescriptive right to the use of the access way. I say ‘may’ guardedly as I am currently in the process of determining the same issues in Case No. 8 of 2023. I am satisfied that the plaintiff has made out established a good arguable claim and I grant an order for interim injunction against the defendant as I did in Case No. 8 of 2023 and for clarity it is as follows:

- 1) The defendant shall forthwith remove the slab constructed on the access way on land portion 126 Uaboe District, which is currently used by the plaintiff and members of the public as an access way under Naoero Road Act 2017.
- 2) No further construction shall be carried out by the defendant, her servants and/or her agents on the said access way.
- 3) This order is to remain in force until the determination of this matter.

DATED this 21 day of June 2023


Mohammed Shafiullah Khan
Acting Chief Justice



¹ 3rd Edition DC Pearce and RS Geddes

² 8th Edition Vol 2 Sweet and Maxwell