

IN THE COURT OF APPEAL OF BELIZE A.D. 2023

CIVIL APPEAL NO. 3 OF 2022

BETWEEN:

DANIEL DYKGRAAF

1st APPELLANT

BOBBY BRUCE HUNT

2nd APPELLANT

LL CAYE CAULKER COMPANY LIMITED

3rd APPELLANT

AND

NEIDY RODRIGUEZ

RESPONDENT

*As Administratrix Ad Colligenda Bona
Of the Estate of James Lynskey*

BEFORE THE HONOURABLE:

Madam Justice Hafiz Bertram
Madam Justice Woodstock-Riley
Mr Justice Foster

President
Justice of Appeal
Justice of Appeal

Appearances

Rt Hon D Barrow SC along with D Munoz for the appellants.
P Banner for the respondent.

Hearing: 31 October 2022

Promulgation: 27 January 2023

JUDGMENT

HAFIZ BERTRAM P

Introduction

[1] This is an appeal against the grant of an interim injunction by the learned trial judge, Madam Patricia Farnese ('the trial judge') delivered on 16 March 2022. Neidy Rodriguez, ('Ms Rodriguez'), the Respondent, is the Administratrix of the Estate of her late husband

James Lynskey ('the deceased') who was the majority shareholder and Director of The Split Holdings Limited ('The Split Company'). The Split Company, which is not a party to the claim before the court, is the title holder of the iconic Split Property which is a popular tourist attraction located on Parcel 950, Block 12, Caye Caulker, Registration section, Belize District, Belize which is approximately 1.4632 Acres in size ('the Split Property'). Several businesses operate on the said property and before the death of the deceased, he was managing all the businesses on the that Property. Ms. Rodriguez is now managing those businesses as Administratrix of the Estate and not in her personal capacity.

[2] The Appellants, Daniel Dykgraaf ('Mr Dykgraaf'), Bobby Bruce Hunt ('Mr Hunt') and LL Caye Caulker Company Limited ('The Caye Caulker Company') by Notice of Appeal dated 18 March 2022, appealed against the judgment of the trial judge in which she granted the interim injunction against them to deliver up possession, among other orders, of The Split Property upon which they entered when the deceased was in a comatose state in the hospital and they continued to do so after his death.

[3] Ms. Rodriguez, as Administratrix of the estate of the deceased issued a claim for trespass and sought possession of the Split Property and damages among other orders against the Appellants. She also sought the interim injunction granted herein until the determination of the claim. She claimed that the Estate, businesses and assets of the deceased have been unlawfully taken over by the Appellants and that they were unlawfully trespassing on the real property which falls within the estate of the deceased.

[4] The Appellants evidence is that they entered the Split Property on the basis of a loan granted to the deceased and the Split Company for US \$3 million for which there was default. A Charge was placed on the Split Property and Notice of Default served on the deceased (before his illness) and the Split Company. Mr. Dykgraaf later appointed himself as Receiver of the Split Property, after the death of Mr. Lynskey, the deceased. The Appellants on that basis entered the Split Property and took over the businesses thereon. At this time, Mr. Dykgraaf was an unsecured creditor as the Charge to secure the loan was not registered on the title of the Split Property at the Lands Registry and was not registered in the Companies Registry. Further, Mr. Dykgraaf who was Appointed Receiver upon default of the loan was

not entitled as Receiver to take possession of the Split Property unless he had obtained a court order to do so.

[5] The issue in the appeal is whether the trial judge correctly exercised her discretion to grant the interim injunction which included a freezing Order, against the Appellants. In the view of the Court, the trial judge correctly exercised her discretion to grant the interim injunction although she erred in treating the Split Property itself as part of the Estate of the deceased. The Court is of the view, that the *status quo ante* was correctly restored by the trial judge granting custody of the Split Property and the businesses, assets and funds belonging or located thereon, to Ms. Rodriguez, the Administratrix of the Estate of the deceased until the determination of the proceedings herein or further Order of the Court.

[6] The *status quo ante* the death of the deceased should be preserved so that the management of the businesses on the Split Property should continue as usual, as it was under the stewardship of the deceased. Ms. Rodriguez as Administratrix of the estate of the deceased, has *locus standi* to do so. The Appellants on the other hand should not have entered the Split Property when they did so and take over the businesses, assets and funds located on the Split Property without pursuing the legal remedies available to them for default of the loan. The Court therefore dismisses the Appeal.

Background

[7] By a Fixed Date Claim Form dated 14 February 2022, Ms. Rodriguez commenced the claim for trespass stating that the Estate, businesses and assets of the deceased have been unlawfully taken over by the Appellants and were being laid to waste, converted and dissipated with no accounting for same. Further, the Appellants were unlawfully trespassing on the Split property which falls within the estate of the deceased. As such, there was a compelling and urgent need for the grant of the orders sought in the claim to protect and preserve the assets of the estate of the deceased.

[8] Ms Rodriguez sought the following relief:

“1. On order as against the defendants that they vacate and deliver up possession to the Claimant of the property more particularly described as Parcel 950, Block 12, Caye

Caulker, Registration section, Belize District, Belize which is approximately 1.4632 Acres in size ('the Split Property').

2. An order as against the Defendants for delivery up of possession to the Claimant of all property and assets found on the Split Property at the time of their first possession and also now located on the Split property.

3. An order as against the Defendants for delivery up of possession to the Claimant of all monies and documents found on the Split Property at the time of their first possession and collected or generated by them, their offices and/or agents from the use by them of the Split Property since it was taken over by the Defendants in December 2021.

4. Damages as against the Defendants for Trespass to the Split Property which forms a part of the Estate of Mr. James Lynskey.

5. A full accounting by the Defendants with respect to all funds found on, generated and/or collected using the Split Property since the said property was taken over in December 2021 including income generated from all the businesses located thereon and from rental property.

6. An order against the Defendants for delivery up of possession of all items and documents taken from the matrimonial home of Mr Lynskey and the Claimant, namely Parcel 829, Block 12, Caye Caulker Registration Section comprising 584.276 square meters along with a home on the said property which is known as The Georgia Peach located on Avenida Hicaco in Caye Caulker.

7. Damages for conversion.

8. Damages.

9. A permanent injunction restraining the Defendants, whether by themselves, their servants, agents or assigns or otherwise from trespassing on and/or occupying the Split Property.

10. Interest pursuant to ss. 166 and 167 of the Supreme Court of Judicature Act.

11. Costs.

12. Any further or other relief, including consequential relief, deemed just."

[9] The Claim was supported by the affidavit of Ms Rodriguez sworn on 14 February 2022 (Ms. Rodriguez first affidavit').

Without Notice Application for Interim Injunction

[10] By a 'Without Notice Application' dated 17 February 2022, for an Interim Injunction, Ms. Rodriguez applied to the Supreme Court pursuant to Parts 11 and 17, including Rules 17.1 17.2, 17.3, and 17.4 of the Supreme Court (Civil Procedure) Rules, 2005 and the inherent jurisdiction of the Court for the following Orders:

- “1. An Order that the hearing of this Application be abridged and be heard urgently.
2. An Order that the *status quo ante* be restored by the granting of immediate custody of the property, namely Parcel 950, Block 12, Caye Caulker ("the Split Property") and the businesses, assets and funds belonging thereto or located thereon (together referred to as the "Lynskey Estate" or the "Estate of Mr Lynskey") to the Applicant until the determination of the proceedings herein or further Order of the Court.
3. An Order authorizing the Applicant, whether by herself, her officers, agents, servants, assigns or howsoever, to immediately re-enter and take possession, control and occupation of Parcel 950, Block 12, Caye Caulker, including any businesses, assets, structures, erections and buildings thereon, and to immediately take possession, control, occupation, management, and operation of any and all assets and businesses thereon which form part of the Lynskey Estate, including but not limited to the bars, grills and/ or lounges formerly or currently being operated as "The Lazy Lizard Bar and Grill Ltd, "The Land of the Lazy Lizard Limited", and "El Portal Island Lounge and Tapas," regardless of the name(s) said businesses are currently being occupied, managed and operated under, until the determination of the proceedings herein or further Order of the Court.
4. An Order mandating the Respondents and their officers and agents to immediately vacate, surrender and give up possession of the Lynskey Estate to the Applicant until the determination of the proceedings herein or further Order of the Court.
5. An Order directing the Respondents, their officers, and agents to immediately provide information about the location of all assets removed from the Lynskey Estate since the property was taken over by them in December 2021.
6. An Order directing the Respondents, their officers, and agents to immediately provide a full accounting of all the funds from the Lynskey Estate taken, generated, spent, used, and handled since December 2021 up to the date of cessation of such taking, generating, spending, using, or handling.
7. An Order permitting the Applicant and/ or her officers or agents to again immediately re-enter the Property and businesses forming a part of the Lynskey Estate, including Parcel 950, Block 12, Caye Caulker to take exclusive custody and possession thereof and to inspect the Lynskey Estate and take an inventory thereof for filing with the Court.

8. An Order restraining the Respondents, whether by themselves, their agents, servants, assigns or howsoever, including but not limited to any corporate entity in which the Respondents either collectively or individually own shareholdings or hold directorships, until the determination of the Claim herein or further Order, from:
 - a. possessing, occupying, managing, operating, leasing, trespassing on, or otherwise disturbing the Applicant's possession, occupation, control and/or management of the Lynskey Estate including, but not limited to, Parcel 950, Block 12, Caye Caulker, or any of the structures and/ or businesses thereon.
 - b. taking custody of, detaining, removing, mutilating, destroying, or otherwise disturbing any documents relating to and/ or located at the Split Property and/ or any businesses thereon.
 - c. leasing, occupying, operating, controlling, or managing any businesses whatsoever at the Split Property.
 - d. applying for a license of any sort whatsoever to operate any business of any sort whatsoever at the Split Property.
 - e. converting, removing, or destroying any inventory whatsoever located at the Split Property or any businesses thereon.
9. Such further or other Order or Relief as the Court may deem just.
10. Costs of the Application.”

The grounds of the application for interim injunction

[11] Ms. Rodriguez’s husband, the deceased died in the United Mexican States on 25 January 2022. Prior to his death, he was non-responsive and was in a coma shortly after being released from a surgical procedure performed on him on the 4 of November 2021. Ms. Rodriguez is the sole beneficiary of the Estate of Mr Lynskey.

[12] Mr Dykgraaf acting through his agent, Mr. Hunt, upon learning of the deceased comatose state, and while both Ms. Rodriguez and the deceased were in Mexico, entered upon the The Split Property and businesses of the deceased and unlawfully took possession thereof along with all assets “(the property, businesses and assets referred to as "the Lynskey Estate").”

[13] Mr Dykgraaf acting through Mr Hunt and the Caye Caulker Company, since entering the deceased property and businesses, has taken over full control of the property, businesses

and assets of the Lynskey Estate and collected all income from his various businesses. They have also excluded Ms. Rodriguez from entering upon, having access to, and securing the businesses and property, both real and personal, of the deceased and have also taken over the said businesses and the management of his employees. As such, Ms. Rodriguez stated that the Respondents were in unlawful possession of those businesses, properties and assets forming a part of the Lynskey Estate.

[14] Atlantic Bank Ltd. located on Caye Caulker, upon learning of the death of Mr. Lynskey froze all personal and business accounts belonging to the Lynskey Estate, which in turn caused the most lucrative businesses in the estate to be unable to accept credit cards.

[15] Thereafter, the Respondents registered the Company, a new company under Chapter 250 of the Laws of Belize, which they are now using to collect credit card payments from the businesses of the Lynskey Estate and are dissipating those funds and converting those monies to their own use without any accounting for same.

[16] The application is urgent as Mr. Dygraaf and Mr. Hunt and their agents are laying waste to Mr Lynskey's estate, are trespassers, and raiders of Mr Lynskey's estate, properties, businesses, and assets.

[17] Further, the High Court had made a previous order in Action No. 1 of 2022 appointing Ms. Rodriguez and Ms Wendy Auxillou, Attorney-at-Law to a Committee to manage the business and affairs of the deceased after he was declared of unsound mind under the Unsoundness of Mind Act, Chapter 122 of the Laws of Belize but the agents of Mr. Dykgraaf, having been notified of the High Court's Order had refused to recognize the Court appointed Committee to manage the affairs of the deceased.

[18] The Appellants and their agents therefore continue to remain in unlawful possession and control of the property, businesses and assets forming a part of the Lynskey Estate to the exclusion of Ms. Rodriguez.

[19] On the 8 day of February, 2022, the lower Court in Claim No. 59 of 2022, ordered that Ms. Rodriguez be issued a Grant of Administration Ad Colligenda Bona for the purpose of immediately taking control of, collecting, receiving and preserving the assets of the deceased and for the purpose of doing any acts as may be necessary for the preservation of the said Estate, including but not limited to immediately, commencing and conducting legal proceedings, actions and/ or claims in the name of the Estate of the deceased in respect of all the property both real and personal, and assets of the said Estate of the deceased.

[20] Ms. Rodriguez stated that there was a serious question to be tried and the merits of her Application are very good as she is the only person entitled to possess, operate, and manage all assets of the Estate of the deceased; The application is urgent in view of the unlawful occupation of the Respondents of the deceased estate; The balance of convenience lies in favour of preserving and maintaining the integrity of the estate as (a) Ms. Rodriguez is the sole beneficiary of the deceased estate to manage the estate's properties, businesses and assets and (b) favours the restoration of the *status quo ante* pending the determination of the proceedings or further order of the court; Damages are inadequate or insufficient remedy; It is in the interests of justice that the relief sought here be granted to restore the status quo ante; Full and frank disclosure; and Ms. Rodriguez had given an undertaking in damages pursuant to Rule 17.4(2) of the Supreme Court (Civil Procedure) Rules, 2005.

[21] The Without Notice Application was supported by the Second Affidavit of Ms. Rodriguez sworn on 17 February 2022. This Application was amended and dated 1 March 2022. The Amended Application sought was for freezing Orders against the Caye Caulker Company "from withdrawing, spending, assigning, encumbering, using, transferring, disposing of, pledging, or otherwise alienating the funds held in its Bank Account at Atlantic Bank Limited or any other Belize located Bank Account in which it has deposited proceeds of sale from the businesses operated on the Split Property, until the return date, being no later than 28 days from the grant of the freezing order.

[22] Further for "The Atlantic Bank Limited or any other Bank in Belize served with notice of this Order shall be directed that any funds being held in the 3rd Respondent's Account (the Caye Caulker Company) shall be frozen by the said Bank and shall not be disbursed by the

Bank to the 3rd Respondent or any other person or entity until further Order is issued to the said Bank by the Court with respect to the funds and the said banks have liberty to apply.”

The Without Notice Order made on 2 March 2022 by the trial judge

[23] The Hon. Madam Justice Farnese heard the without notice application on 2 March 2022 and Ordered the following on the same day:

“THE ORDER

An application was made today, the 2nd day of March, 2022 by Counsel for the Claimant/Applicant to the Honourable Madam Justice Farnese who heard the application. The Honourable Madam Justice Farnese read the Affidavit listed in Schedule A and accepted the undertakings set out in Schedule B at the end of this Order. As a result of the application IT IS ORDERED that:

INTERIM INJUNCTION

1. An Order is granted that the hearing of this application shall be abridged and be heard urgently.
2. An Order is granted directing the Respondents, their officers, and agents to immediately provide information about the location of all assets removed from the property, namely Parcel 950, Block 12, Caye Caulker ("the Split Property") and the businesses, assets and funds belonging thereto or located thereon (together referred to as the "Lynskey Estate") since the property was taken over by them in December 2021.
3. An Order is granted directing the Respondents, their officers, and agents to immediately provide a full accounting of all the funds from the Lynskey Estate taken, generated, spent, used, and handled since December 2021 up to the date of cessation of such taking, generating, spending, using, or handling.
4. An Order is granted restraining the Respondents, whether by themselves, their agents, servants, assigns or howsoever, including but not limited to any corporate entity in which the Respondents either collectively or individually own shareholdings or hold directorships, until the determination of the Claim herein or further Order, from:
 - a. taking custody of, detaining, removing, mutilating, destroying, or otherwise disturbing any documents relating to and/ or located at the Split Property and/ or any businesses thereon.
 - b. converting, removing, or destroying any inventory, assets or funds whatsoever located at the Split Property or any businesses thereon.
5. The 3rd Respondent is hereby restrained, whether by itself, its servants, agents or assigns or otherwise from withdrawing, spending, assigning, encumbering, using, transferring, disposing of, pledging, or otherwise alienating the funds held in its Bank Account at Atlantic Bank Limited or any other Belize located Bank Account in which it

has deposited proceeds of sale from the businesses operated on the Split Property, until further Order being made on the Return Date.

6. The Atlantic Bank Limited or any other Bank in Belize served with notice of this Order is hereby directed that any funds being held in the 3rd Respondent's Account shall be frozen by the said Bank and shall not be disbursed by the Bank to the 3rd Respondent or any other person or entity until further Order is issued to the said Bank by the Court with respect to the funds and the said banks have liberty to apply.

7. Costs in the cause.

DISCHARGE OF ORDER

8. The Respondents may apply either to set aside this Order, or for directions in respect thereof, on three clear days' notice first being given to the Applicant's legal representatives. If any evidence is to be relied upon in support of any such application, this must be served upon the Applicant's legal representatives at the time of the giving of the three clear days' notice.

RETURN DATE

9. There shall be an *inter partes* hearing before the Supreme Court with respect to the Application dated 17th February 2022 in respect of these proceedings at 9:00 o'clock a.m. on Thursday the 10th day of March, 2022 before Her Ladyship Madam Justice Farnese, being the Return Date (being not more than 28 days from the date of making this Order). This Order shall be in full force and effect until the hearing and determination of the Application by Her Ladyship Madam Justice Farnese on the Return Date and any further Order of the Court....”

Application to discharge the interim Order by the Appellants

[24] The Appellants, by an application dated 8 March 2022 sought an Order to discharge the Interim Injunction on several grounds including that the property and assets of The Split Holdings Limited and monies belonging to it and/or any other companies in their bank accounts and or accruing to them are not part of the corpus of the estate of James Lynskey. The Application for the discharge of the injunction was supported by the affidavit of Mr. Dykgraaf which shows the arrangement between himself and the deceased.

[25] The Appellants relied on the second Affidavit of Ms. Rodriguez which shows that the Split Holdings Limited (Split Company) is the registered proprietor of Parcel 950 Block 12 Caye Caulker Registration Section, as distinct from the late James Lynskey.

Application for continuation of the Injunction by Ms. Rodriguez

[26] On 9 March 2022, Ms. Rodriguez made an application for the Interim Orders granted by the Court on 2 March 2022 to be continued (along with the additional orders sought in the Application dated 17 February 2022) until the hearing and determination of the claim and further order of the Court. The judge at the oral hearing on 10 March stated that she will not consider that application. That she was revisiting her earlier ex-parte decision and would hear the matter inter partes. Also, she did not see the need to hear the discharge application.

[27] Ms. Rodriguez also filed a third affidavit sworn on 15 March 2022 and exhibited a copy of the Memorandum of Association and the Articles of Association of the Split Holdings Limited.

The inter partes Order dated 16 March 2022

[28] The trial judge discharged the ex-parte Order and granted a new Order without hearing the application for continuation by Ms. Rodriguez and the application for discharge by the Appellants. However, the interim order dated 16 March 2022 shows that the trial judge considered all the evidence and submissions which were before the court. The Order states:

“ ...UPON the inter partes hearing of the Applicant's Urgent Without Notice Application dated 17 February 2022 as amended by the Amended Urgent Without Notice Application for Interim Injunctions dated 1st March 2022.

AND UPON READING the Applicant's Urgent Without Notice Application dated 17 February 2022 as amended by the Amended Urgent Without Notice Application for Interim Injunctions, the Second Affidavit of Neidy Rodriguez dated 17 February 2022 and the Third Affidavit of Neidy Rodriguez dated 15 March 2022, the First Affidavit of Daniel Jay Dykgraaf dated 8 March 2022, the Applicant's Skeleton Arguments in Support of the Urgent Without Notice Application dated 1st March 2022, the Defendants Submissions in Support of the Application to Discharge the Injunction dated 14 March 2022.

AND UPON HEARING Pricilla J. Banner, along with Wendy Auxillou, Counsel for the Applicant and Dean O. Barrow SC, along with Darinka Muroz, Counsel for the Respondents.

AND UPON the Court vacating the Interim Injunction Order granted on 2nd March 2022 and continued on 10th March 2022.

IT IS HEREBY ORDERED as follows:

INTERIM INJUNCTION

1. An Order is granted that the status quo ante be restored by the granting of immediate custody of the property, namely Parcel 950, Block 12, Caye Caulker ("the Split Property"), and the businesses, assets and funds belonging thereto or located thereon (together referred to as the "Lynskey Estate) to the Applicant until further Order of the Court.

2. An Order is granted authorizing the Applicant, whether by herself, her officers, agents, servants, assigns or howsoever, to immediately re-enter and take possession, control and occupation of Parcel 950, Block 12, Caye Caulker, including any businesses, assets, structures, erections and buildings thereon, and to immediately take possession, control, occupation, management, and operation of any and all assets and businesses thereon which form part of the Lynskey Estate, including but not limited to the bars, grills and/ or lounges formerly or currently being operated as "The Lazy Lizard Bar and Grill Ltd," "The Land of the Lazy Lizard Limited", and "El Portal Island Lounge and Tapas, regardless of the name(s) said businesses are currently being occupied, managed and operated under, until further Order of the Court.

3. An Order is granted mandating the Respondents and their officers and agents to immediately vacate, surrender and give up possession of the Lynskey Estate to the Applicant until further Order of the Court.

4. An Order is granted directing the Respondents, their officers, and agents to immediately provide information about the location of all assets removed from the Lynskey Estate since the property was taken over by them in December 2021.

5. An Order is granted directing the Respondents, their officers, and agents to immediately provide a full accounting of all the funds from the Lynskey Estate taken, generated, spent, used, and handled since December 2021 up to the date of cessation of such taking, generating, spending, using, or handling.

6. An Order is granted permitting the Applicant and/or her officers or agents to again immediately re-enter the Property and businesses forming a part of the Lynskey Estate, including Parcel 950, Block 12, Caye Caulker to take exclusive custody and possession thereof and to inspect the Lynskey Estate and take an inventory thereof for filing with the Court.

7. An Order is granted restraining the Respondents, whether by themselves, their agents, servants, assigns or howsoever, including but not limited to any

corporate entity in which the Respondents either collectively or individually own shareholdings or hold directorships, until further Order, from:

- a. possessing, occupying, managing, operating, leasing, trespassing on, or otherwise disturbing the Applicant's possession, occupation, control and/ or management of the Lynskey Estate including, but not limited to, Parcel 950, Block 12, Caye Caulker, or any of the structures and/ or businesses thereon.
- b. taking custody of, detaining, removing, mutilating, destroying, or otherwise disturbing any documents relating to and/ or located at the Split Property and/ or any businesses thereon.
- c. leasing, occupying, operating, controlling, or managing any businesses whatsoever at the Split Property.
- d. applying for a license of any sort whatsoever to operate any business of any sort whatsoever at the Split Property.
- e. converting, removing, or destroying any inventory whatsoever located at the Split Property or any businesses thereon.

8. The 3rd Respondent is hereby restrained, whether by itself, its servants, agents or assigns or otherwise from withdrawing, spending, assigning, encumbering, using, transferring, disposing of, pledging, or otherwise alienating the funds held in its Bank Account at Atlantic Bank Limited or any other Belize located Bank Account in which it has deposited proceeds of sale from the businesses operated on the Split Property, until further Order of the Court.

9. The Atlantic Bank Limited or any other Bank in Belize served with notice of this Order is hereby directed that any funds being held in the 3rd Respondent's Account shall be frozen by the said Bank and shall not be disbursed by the Bank to the 3rd Respondent or any other person or entity until further notice of any Order is issued to the said Bank by the Court with respect to the funds and the said banks have liberty to apply.

10. Costs of the Application in the cause.”

The reasons for the decision by the trial judge to grant interim injunction

[29] The Without Notice Interim Injunction granted on 2 March 2022 was Discharged by the trial judge before the inter-partes hearing as shown by the transcript of proceedings. (page 1259). In relation to the inter-partes hearing, the trial judge gave an oral judgment on 16 March 2022. She later gave written reasons in support of her oral judgment on the interim injunction granted to Ms. Rodriguez, as Administratrix of the deceased Estate. In her written reasons, she stated that she reviewed the submissions of all parties, issued the oral

decision that vacated the *ex parte* injunction and ordered the interim injunction as shown in Ms. Rodriguez's amended application for the interim injunction.

[30] The trial judge in determining whether to grant the injunction considered the test in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 as endorsed in **Belize Telemedia Limited v Speednet Communications Limited** Civil Appeal No 27 of 2009. That is, (i) whether there is a serious issue to be tried; (ii) whether damages would be an appropriate remedy; and the balance of convenience. The trial judge stated:

“ Is there a serious issue to be tried?

[5] The claimant has established that there are serious issues to be tried and that she has a real prospect of obtaining a permanent injunction. She has established that this court has previously named her Administratrix Ad Colligenda Bona of the Estate of James Lynskey. Mr. Lynskey was the sole director and sole shareholder of Split Holdings Limited. Split Holdings Limited owns land, businesses, and assets located on Parcel 950, Block 12, Caye Caulker ("the Split Property"). As Administratrix, she alone is authorized to take control of the Split Holdings Limited and its assets, including the Split Property, as part of her obligations to settle Mr. Lynskey's estate.

[6] Mr. Dykgraaf admits that he has prevented Mrs. Rodriguez from taking control of Split Holdings Limited, but disputes that Split Holdings Limited is part of Mr. Lynskey's estate. Mr. Dykgraaf defends his right to be in possession of the Split Property on the grounds that he is acting as a lawful receiver in relation to a charge on the Split Property executed by Split Holdings Limited in 2019.

[7] The claimant argues that Mr. Dykgraaf is not entitled to act as a receiver because his charge is unregistered. Subsection 67(3) of the Registered Lands Act outlines that a "charge is completed by its registration." Even if he were permitted to avail himself of the rights of a receiver, he requires the court's permission to modify the rights granted by s. 75. Mr. Dykgraaf does not have the court's permission. Mr. Dykgraaf disagrees that s.75 only applies to registered charges and asserts that the agreement that created a charge on the Split Property expressly authorizes the receivership. He further maintains that he is an equitable mortgagee who is entitled to foreclose on the property when the mortgage goes into default. Split Holdings Limited's obligations to Mr. Dykgraaf arising from an alleged default of the loan agreement between the parties is a serious issue.

[8] A further serious issue to be tried has emerged from the various filings by the parties in response to the application for injunction. Two documents with

different terms are purported to be the agreement that was signed by Mr. Dykgraaf and Mr. Lynskey on behalf of Split Holdings Limited. The authenticity of these agreements is a further serious issue that must be tried.

Are damages an adequate remedy?

(9) I find that damages are not an adequate remedy. This action involves control and the right to direct profit from very valuable property. It is true that the property and businesses are not at risk of flight. Nonetheless, the property has become part of an estate. The Administratrix must be given the opportunity to conduct a full inventory of the assets to carry out her responsibilities to manage the estate. The claimant has established that this cannot be achieved without the Administratrix being in possession and control.

(10) I would also add that in disputes involving the possession of land, courts have long recognized that damages may not [be] appropriate and have awarded specific performance especially where land has unique characteristics or value. The Split Property undoubtedly falls within that description.

In whose favor does the balance of convenience lie?

[11] The balance of convenience weighs in the claimant's favor. As the Administratrix, she has been given the authority by this court to stand in the place of Mr. Lynksey who was unquestionably in lawful possession of that property when the defendants entered. The court is balancing the rights of clear title holder with a party's whose claim is unproven at this point.

[12] While the claimant would like me to perceive the defendants' conduct as deliberately in disregard of the law, my decision to award the injunction is not an endorsement of that perception. I have heard the Mr. Dykgraaf when he said that Mr. Lynksey was served with notice that he was in default on the debt and I have been given no reason to doubt Mr. Dykgraaf's assertion that Mr. Lynskey knew these actions were coming. No actions, however, were taken while Mr. Lynksey was in a position to respond. As such, the court does not know what his response would have been to the defendants taking possession and control of the Split Property.

[13] Without Mr. Lynskey's consent, the defendants were required to pursue remedies through lawful means. Despite my specific request, I was provided no judicial authority that establishes that an unregistered charge is to be treated like a registered charge, that a receiver can take possession of land without the court's consent, or that one can foreclose on land subject to an equitable mortgage without the court's approval. To not grant the injunction in light of these facts would be an endorsement of actions that are not consistent with the operation of the rule of law. While ultimately, the defendants may be entitled to everything that they took, they must avail themselves of the established legal avenues to proclaim that entitlement."

The Appeal

[31] By a Notice of Appeal filed on 18 March 2022, the Appellants sought for the interim injunction, in the Order dated 16 March 2022, to be discharged. The grounds of appeal were that the trial judge erred in law and/ or misdirected herself as to the law and facts by:

- 1) failing to appreciate and apply the principle that a company is an entity separate and distinct from its shareholders; that company assets and property are not the assets and property of the shareholders or members of the company;
- 2) Holding the assets and property of the Split Holdings Limited belong to the Split Holdings Limited, and at the same time holding that such property and assets belong to the estate of the deceased because he was the sole shareholder in the Split Holdings Limited company.
- 3) Holding that Ms. Rodriguez is entitled to have and exercise control over the assets and property of The Split Holdings Limited in her capacity as Administratrix Ad Colligenda Bona of the estate of the deceased.
- 4) Holding that Ms. Rodriguez does have locus standi, as administratrix to sue the respondent's for wrongs done to or suffered by the Split Holdings Limited company as a consequence of the actions of the Appellants.
- 5) In holding that Ms. Rodriguez have a cause of action against them;
- 6) By premising her orders in terms of the first and second recitals appearing therein notwithstanding that:
 - (a) The judge had earlier determined that she was limiting herself to only an inter parties hearing of the original ex-parte application for interim injunction;
 - (b) The trial judge had earlier determined that she would not hear the appellant's application to discharge the interim injunction order dated March 2nd 2022, which application was filed and before the court; nor Ms. Rodriguez application to continue the interim injunction orders which application was also filed and before the court;
The trial judge thereby proceeded without first deciding the application to discharge the injunction, to hear arguments on a new, different interim order which she granted. In so proceeding she confused herself, fell into error and violated their right to fair hearing of their discharge application.
- 7) By failing to:
 - (a) Indicate whether the new interim injunction orders were granted on the basis of any undertaking by Ms. Rodriguez to pay damages should the appellant's sustain any as a result of a later finding that the injunction orders were wrongly made;....

- 8) By making her determination that the balance of convenience favoured the granting of the new Interim injunction bearing in mind that such a determination amounted impermissibly to give Ms. Rodriguez judgment in the case without permitting the Appellant the right of trial.
- 9) By the determination by the judge that there was a good arguable case for Ms. Rodriguez when the lack of standing, in contradistinction to the proper plaintiff Position of the Split Holdings Limited Company, to bring any claim against the appellants in connection with assets and property belonging to the company, meant that Ms. Rodriguez had no case at all;
- 10) By the determination of the trial judge that there was a real risk of dissipation when the assets and property belonging to the estate of the deceased consistent of the sole issue and outstanding share in the Split Holdings Limited, which is incapable of dissipation.
- 11) By failing to consider the evidence by the Appellants of material non-disclosure and misrepresentation by Ms. Rodriguez in making the ex-parte application.
- 12) By not holding that refusal of the new interim injunction orders was obligatory, having regard to the law, clear facts and circumstances of the case; by not holding that a grant of the new injunction would be unsustainable in law.
- 13) By not finding that any decision to grant would be against the weight of the evidence.
- 14) failing to appreciate and apply the principle that a company is an entity separate and distinct from its shareholders; that company assets and property are not the assets and property of the shareholders or members of the company;

Grounds 1 to 5 & 14: The issue of locus standi

[32] The grounds relating to a Company being a separate entity from its shareholder are inextricably linked to the issue of *locus standi* and can be disposed of under that umbrella.

Company is a separate legal entity from its shareholder

[33] The trial judge in her written decision found that there is a serious issue to be tried, damages is not an adequate remedy and the balance of convenience lies in favour of granting the injunction. In making these findings, it seems that the trial judge treated the real property, the Split Property as part to the Estate of the deceased.

[34] Learned senior counsel, Mr. Barrow argued for the Appellants that the trial judge erred in law and misdirected herself as to the law and facts. That the Split Company which owns the Split Property is a separate legal entity from its shareholder and does not form part of the Estate of the deceased and by extension Ms. Rodriguez, as Administratrix of the Estate of the deceased has *no locus standi* to bring a claim on behalf of Split Company. Ms. Banner accepted that the Split Company is a separate legal entity and is not part of the Estate of the deceased.

[35] The sole real property of the Split Company is Parcel 950, the Split Property. It is trite law that a Company is a separate legal entity from its shareholder. Therefore, the Split Company, the legal title holder, can sue in relation to wrongdoings to the Company. See the case of **Rushbrooke UK Ltd v Designs Concept Ltd.** [2022] EWHC 1110 (Ch) which reaffirms the rule in **Foss v Harbottle** that a company and its shareholders are separate entities and only the company can sue for wrongs suffered by it. (The Split Company was not a party to the claim at the time of the application for the injunction, but has since been joined).

[36] There is no dispute as well that the shares of the Split Company, by the law of succession passes to Ms. Rodriguez as the beneficiary of the deceased. However, the assets of the Split Company do not comprise part of the Estate and are not the assets of Ms. Rodriguez, the sole beneficiary of the shares. In the case of **Macura v Northern Assurance Company Ltd. and Others** [1925] AC 619, Lord Buckmaster stated:

“... no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus asset when the companies wound up...”

The case of **Macura** distinguished between a testator as the owner of shares in a Company and the Company itself as the owner of the assets and real estate of the Company.

[37] The trial judge treated the Split Property as part of estate of the deceased as shown at paragraphs 5, 9, 10 and 11 of the written judgment when she considered the test of serious issue to be tried, adequacy of damages and balance of convenience. She found that Ms. Rodriguez, as *“Administratrix, she alone is authorized to take control of the Split Holdings*

Limited and its assets, including the Split Property, as part of her obligations to settle Mr. Lynskey's estate"(para 5); the property has become part of an estate – (para 9); "...that in disputes involving the possession of land, courts have long recognized that damages may not [be] appropriate and have awarded specific performance especially where land has unique characteristics or value" – (para 10); The court is balancing the rights of clear title holder with a party's whose claim is unproven at this point – (para 11).

[38] In my view, the trial judge erred in including the Split Property as part of the Estate of the deceased. The Split Company has title to the Split Property and it is a separate legal entity. Further, the trial judge erred in treating the deceased as a clear title holder to the Split Property and alluding to a remedy of specific performance. It is my view, that the nature of the claim was not clearly put to the trial judge as the pleadings suggest that the Split Property forms part of the estate of the deceased.

The nature of the claim

[39] The Claim brought by Ms. Rodriguez is not on behalf of the Split Company and not as a shareholder. She brought the claim as the Administratrix of the estate of the deceased who was in actual possession of the Split Property and businesses and assets thereon and who was in receipt of the income therefrom. Learned counsel, Ms. Banner argued that the Appellants have mis-described the claim as shown in the Fixed Date Claim Form since Ms. Rodriguez is not seeking any legal title or interest in the Split Property.

[40] Ms. Banner further argued that the relief sought is for trespass and since the deceased was in actual physical possession of the property. Ms. Rodriguez as his representative is standing in his shoes to pursue trespass without the need for the Split Company to be before the court. See Megarry & Wade – page 87 – "*Possession by itself gives a good title against all the world except someone having a better legal right to possession.*" If the occupiers possession is disturbed, for example by trespass or nuisance, he can sue on his strength of his possession and does not have to prove his title. As such, Ms. Banner argued that Ms. Rodriguez is permitted to sue on the strength of her possession standing in the shoes of the deceased.

[41] The pleadings for possession and trespass are not of the best and hence may have misled the trial judge in treating the Split Property as part of the estate of the deceased. I do

not think the trial judge merely used the wrong choice of words in expressing herself. The pleadings are deficient. The deceased was managing the businesses of the Split Company located on the Split Property and after his death, Ms. Rodriguez, the Administratrix of his Estate has stepped into his shoes, so to speak, to continue the businesses.

[42] At the time the injunction was granted, the Split Company was not a party to the claim. It has since been joined but this Court has no evidence of any change in circumstances of the case. On the one hand, the legal position is that the Split Company can pursue legal proceedings against wrongdoers to the Company but that was not done in this case when the interim injunction was sought. On the other hand, there was sufficient evidence before the court to show that Ms Rodriguez, as Administratrix, was entitled to possession of the Split Property to continue management of the businesses on that property. I am satisfied that the claim before the court is not for title to the Split Property. As such, I am of the view that Ms. Rodriguez, as Administratrix has *locus standi* to pursue the claim for possession and trespass based on the deceased actual possession and management of the businesses on the Split Property.

Whether errors made by trial judge sufficient to discharge the injunction

[43] It is my view that the errors made by the trial judge as a result of treating the Split Property as falling within the Estate of the deceased are not so aberrant to cause this Court to set aside the interim injunction. The reason being, the Appellants cannot show a better right to be in possession of the Split Property than the Administratrix of the Estate of the deceased. Mr Lynskey, the deceased, was in actual possession of the Split Property and managing the businesses located thereon, prior to his death.

[44] The trial judge in determining whether to grant the injunction correctly stated the test as shown in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and endorsed in **Belize Telemedia Limited v Speednet Communications Limited** Civil Appeal No 27 of 2009. That is, (i) whether there is a serious issue to be tried; (ii) whether damages would be an appropriate remedy; and the balance of convenience.

Serious issues to be tried and adequacy of damages

[45] I am of the view that there are serious issues to be tried in the claim for possession and trespass. There is default of the loan agreement and a dispute as to the actual amount owing to Mr. Dykgraaf. Default notices were served on the deceased and the Split Company. However, the Appellants did not avail themselves to remedies available to them. At the interim stage of granting the injunction, the Appellants could not show that they had a legal right to take possession of the Split Property and take over management of the businesses thereon.

[46] Further, it is my view that damages is not an adequate remedy in the circumstances of this case where the Appellants failed to pursue legal remedies available to them. As acknowledged by learned senior counsel, Mr. Barrow, they should not have entered the Split Property and take over the businesses thereon, at the time they did so.

Balance of convenience

[47] The choice of words used by the trial judge in looking at the balance of convenience was, “*The court is balancing the rights of clear title holder with a party's whose claim is unproven at this point.*” In my view, that statement is misconceived and was made on the understanding that the Split Property forms part of the Estate of the deceased. Ms. Rodriguez is the representative of the deceased estate and as discussed before she is not seeking title to the Split Property. To be fair to the trial judge, she did say, “*The balance of convenience weighs in the claimant's favor. As the Administratrix, she has been given the authority by this court to stand in the place of Mr. Lynksey who was unquestionably in lawful possession of that property when the defendants entered.*” I agree. The trial judge ultimately properly exercised her discretion to grant the injunction. The balance of convenience lies in the favour of the Administratrix of the Estate of the deceased to stay in possession and continue the operation of the businesses and protect the assets until the determination of the merits of the claim. This would be in the interest of the Appellants as well in the event they are able to establish their claims to the monies they argue are owed. Learned senior counsel, Mr. Barrow had given an undertaking that in the event the injunction is discharged, the Appellants will not interfere with the management of the businesses. However, I can foresee difficulties with the operation of the businesses if the injunction is discharged. Ms. Rodriguez as Administratrix of the Estate of the deceased would have no legal authority to collect rent, obtain trade licenses, hire employees, terminate employees for wrongdoings and other matters relevant to the businesses.

It is in the interest of all the parties that the businesses continue to operate as usual on the Split Property.

Status quo ante the death of the deceased, Mr. Lynskey

[48] Learned senior counsel, Mr. Barrow made a very forceful argument before this Court that it is the Split Company that should have brought the claim for wrong doings against it. As discussed above, I agree that the Company is a separate legal entity and this is not in dispute. Nevertheless, I have determined above that Ms. Rodriguez as Administratrix has *locus standi* because the nature of the claim is solely for possession and trespass and not for legal title of the Split Property. For argument sake, even if I am wrong and it is the Split Company that should have brought the claim, should the injunction be discharged on that basis? I think not, as Mr. Dykgraaf is an unsecured creditor. The Charge to secure the loan was not registered on the title of the Split Property at the Lands Registry and was not registered in the Companies Registry. Further, Mr. Dykgraaf who was Appointed Receiver upon default of the loan was not entitled as Receiver to take possession of the Split Property without an order of the court. In such a situation, it is my view that it is in the interest of justice that the *status quo ante* the death of the deceased, Mr. Lynskey should be maintained. This can only be done through Ms. Rodriguez, the Administratrix of the Estate of the deceased.

Undertaking as to damages point

[49] An undertaking in damages should ordinarily be given by an Applicant when seeking an interim injunction so that if the Respondent succeeds at trial and should not have been restrained, then he is entitled to damages. The Appellants complaint is that the trial judge failed to indicate whether the new interim injunction orders were granted on the basis of any undertaking by Ms. Rodriguez to pay damages, should the Appellants' sustain any as a result of a later finding that the injunction orders were wrongly made. In my view, the omission to state so in the Order granting the interim Injunction is not fatal. Ms. Rodriguez had given an undertaking in her affidavit to pay damages.

Other grounds of Appeal

[50] I am of the view that it is not necessary to consider the other grounds of appeal. The grounds considered are sufficient to dispose of the appeal.

The Order

[51] For the reasons stated above, I would propose that the Court makes the following Order:

- (1) The Appeal is dismissed.
- (2) The Interim Injunction granted on the 16 March 2022 in the court below is to continue until a further order of the court.
- (3) Costs in the cause.

HAFIZ BERTRAM P

WOODSTOCK-RILEY JA

[52] I have read the draft judgment of the President and concur.

WOODSTOCK-RILEY JA

FOSTER JA

[53] I have also read the draft judgment of the learned President and I likewise concur.

FOSTER JA