

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2021/0085

BETWEEN:

EUSTACE HOBSON

Claimant/Respondent

and

DDM PROPERTIES LIMITED

1st Defendant/1st Ancillary Claimant/Applicant

TERNION ST. KITTS LIMITED

2nd Defendant/1st Ancillary Defendant

RODNEY FLEMMING

3rd Defendant/2nd Ancillary Claimant

and

THE DEVELOPMENT CONTROL AND PLANNING BOARD

2nd Ancillary Defendant

THE MINISTER WITH RESPONSIBILITY FOR SUSTAINABLE DEVELOPMENT

3rd Ancillary Defendant

THE ATTORNEY GENERAL OF ST. KITTS AND NEVIS

4th Ancillary Defendant

Appearances:

E. Anthony Ross KC with him and Midge Morton and Nadia Chiesa for the Applicant
Damian Kelsick KC with him Hadya Dolphin for the Respondent

2025: October 20;
December 17.

DECISION

- [1] **GILL, J:** A company seeks to enforce an undertaking for damages for an interim injunction wrongly granted.
- [2] On May 7, 2021, the claimant Eustace Hobson (“Hobson”) filed a claim form and statement of claim in trespass alleging instances of trespass on his property situate at Trinity Palmetto Point in the island of St. Christopher. The claim was brought against three defendants, including DDM Properties Limited (“DDM”) – a company incorporated under the Laws of St. Christopher and Nevis and the owner and possessor of land neighbouring and abutting Hobson’s property.
- [3] On October 28, 2021, Hobson obtained an interim injunction which prohibited DDM and the 3rd defendant from accessing DDM’s property, halting its coastal and marine works. The application for the injunction alleged a further trespass, that is, occurring after the filing of the original claim.
- [4] Therefore, on May 4, 2022, Hobson filed an amended claim to include the additional alleged trespass, coastal and marine works, including the creation of a temporary road.
- [5] On May 2, 2024, the interim injunction was discharged. Hobson consented to the discharge of the injunction on terms agreed with DDM.
- [6] Before trial, on September 26, 2024, DDM filed an application for inquiry into damages resulting from the interim injunction granted on October 28, 2021 and voluntarily discharged on May 2, 2024.
- [7] The court determined that the application for inquiry into damages would be heard following the trial of the claim for trespass.
- [8] At trial, Hobson abandoned his claim for damages arising from the alleged trespass related to the coastal and marine works, the land the subject of the interim injunction. At trial, this alleged trespass was referred to as T5. The reason for the discharge of the interim injunction is that the land allegedly trespassed upon is not Hobson’s property.

The application for inquiry into damages

- [9] DDM's application of September 26, 2024 asked the court to determine:
- i. Hobson's liability for damages resulting from the interim injunction; and
 - ii. The quantification of damages.
- [10] In grounding the application, DDM relied on the following:
- a. The injunction was obtained *ex parte* on October 28 2021, continued at an *inter partes* hearing on November 16, 2021 and voluntarily discharged on May 2, 2024, therefore being in place for 917 days;
 - b. DDM's damages crystallised at the time that the interim order was voluntarily discharged;
 - c. The interim injunction was wrongly granted because:
 - i. It was improperly obtained; and
 - ii. While the order was within the court's jurisdiction, it has since been demonstrated that it was unjustified or inappropriate on the facts.
- [11] As required by Rule 17.4(2) of the Civil Procedure Rules 2023, Hobson gave an undertaking to abide by any order the court may make as to damages if the court is of the opinion that DDM sustained damage resulting from the interim injunction.
- [12] DDM contends that it meets the test for an inquiry into damages in that the interim injunction was wrongly obtained and that DDM has an arguable case for damages resulting from the interim injunction.
- [13] Hobson opposes the application for inquiry into damages on the basis that DDM had no permission to use the land which belonged to the Crown. Hobson asserts that DDM had no legal right to use the road unless it received permission. Hobson accuses DDM of committing a criminal offence, and urges upon the court that it would be inequitable to order an inquiry into damages. Hobson asserts that if this court were to do so, it would be sanctioning what would have been the unlawful conduct of DDM in trespassing on Crown land, in breach of the planning laws of St. Kitts.

The legal test for an inquiry into damages

- [14] The court will order an inquiry into damages where it is established that the injunction ought not to have been given in the first instance.¹ Hobson does not dispute that the interim injunction was wrongly granted. Nevertheless, I will set out DDM's submissions in convincing the court to so find.

DDM's submissions

- [15] DDM submits that the interim injunction was wrongly granted because:
- a. There was material non-disclosure by Hobson; and
 - b. While the order may have been within the court's jurisdiction at the time it was ordered *ex parte*, it was subsequently demonstrated – and conceded – to have been too wide in its scope or unjustified or inappropriate on the facts.

Material non-disclosure in obtaining the interim injunction

- [16] Under this head, DDM alleges:
- i. Hobson failed to disclose key facts and documents; and
 - ii. Hobson failed to disclose that he was seeking the interim injunction over a public road.

Failure to disclose key facts and documents

- [17] It is well established that on an *ex parte* application, the applicant has a duty to make full and frank disclosure of all material facts. DDM submits that the applicant's duty of full and frank disclosure continues after the interim injunction is granted.²
- [18] DDM makes the following allegations:
- Hobson's property was incorrectly identified in the interim injunction as well as in the statement of claim and the amended statement of claim.

¹ *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148; [1971] 2 All ER 468. See also *FSL Services Ltd v MacDonald* [2001] EWCA Civ 1008; [2001] All ER (D) 231 (Jun)

² *Gee on Commercial Injunctions* (7th Ed) at [9-026]

- At the *ex parte* hearing on October 28, 2021 and again at the *inter partes* hearing on November 16, 2021, Hobson failed to disclose relevant documents that were or ought to have been under his control at the time. These documents were subsequently disclosed to DDM pursuant to standard disclosure in the proceedings.
- In his affidavit of October 28, 2021 in support of the *ex parte* application, Hobson also failed to draw the court's attention to several material facts.
- Hobson disclosed only certain court documents related to 1994 litigation that he commenced against another defendant.

Hobson failed to disclose that he was seeking the interim injunction over a public road

[19] The interim injunction restrained DDM from "entering, disturbing, or otherwise trespassing" on among other plots of land, "either of the roads on the southwestern coastal end of the Claimant's said properties". The roads on the seaside boundary of the Hobson property are public roads and are so described in the legal description of the Hobson property.

[20] DDM alleges:

- The draft order filed with the *ex parte* application materials on October 28, 2021, and subsequently served on counsel for DDM on October 29, 2021, did not include any reference to roads on Hobson's property. Based on the *ex parte* application materials served on DDM, it does not appear that Hobson disclosed to the court or, in the alternative, drew the court's attention to the fact that the area over which he sought the injunction included a public road.
- However, the interim injunction entered at 9:23 a.m. on October 29, 2021, according to the court stamp, expressly enjoined DDM from trespassing on "and more particularly either of the roads on the South Western coastal end of the Claimant's said properties".
- This addition of the roads specifically frustrated the plans of DDM to complete its coastal and marine works.

- At the *inter partes* hearing, Hobson's own evidence raised serious doubts about his position that a public road on the seaward side of his property did not exist.
- Hobson was or ought to have been aware that a "public road" has and continues to abut the seaward boundary of his Lamp-Shade Shaped Lot and extended across his L-Shaped Lot.
- DDM's access to and use of the public road did not constitute trespass on the Hobson property.
- At the *inter partes* hearing of DDM's application to discharge the interim injunction on November 16, 2021, Hobson failed to rectify any of the material non-disclosures cited above.

Material non-disclosure after the interim injunction was obtained

[21] DDM submits that Hobson failed to comply with the ongoing duty of disclosure after the interim injunction was reaffirmed by Ward J (as he then was) in November 2021.

[22] DDM alleges:

- On March 10, 2022, at a meeting attended by Hobson and his counsel, his engineer and land surveyors at the beachfront boundary of Hobson and DDM's respective properties, Hobson and/or his advisors conceded that DDM was not encroaching on his seaside boundaries and that he was not entitled to the interim injunction over the public road.
- This notwithstanding, Hobson took no steps to discharge the interim injunction which he specifically sought in respect of the alleged trespass until May 2, 2024, in the face of DDM's application to fortify the undertaking as to damages given on the interim injunction, which was listed for hearing on that same day, May 2, 2024.

[23] DDM submits that it has clearly established that there was material non-disclosure by Hobson.

Interim injunction too wide or unjustified or inappropriate

Interim injunction too wide in its scope

[24] In further submitting that the interim injunction was wrongly granted or sustained, DDM relies on the following:

- There was evidence at trial from Hobson's own expert that the interim injunction exceeded the south-western boundaries of Hobson's property. At a site visit on November 15, 2025, the court was specifically requested by counsel for DDM to observe that the boundary markers on the south-western side of Hobson's property were far inland from the water line, that is, Hobson's property did not have a land-water interface, as he alleged. The road over which the interim order extended was a public road, and not part of Hobson's property.
- In cross-examination the expert testified that he attended the said meeting on March 10, 2022, during which it was agreed that there was no encroachment – by DDM or otherwise – on the seaside boundaries of Hobson's property. The incidents alleged did not encroach on Hobson's property.
- The expert further testified that with respect to Hobson's claim of interference with his property's beachfront access, there was no such interference. In short, there was no encroachment by DDM's coastal and marine works on Hobson's property.

[25] On these facts, DDM contends that there can be no dispute that the interim injunction was too wide.

Interim injunction unjustified or inappropriate on the facts

[26] DDM submits that there was no or insufficient evidence of irreparable harm or permanent damage to Hobson's property before the court on the *ex parte* application and on DDM's application to discharge the interim injunction heard on November 16, 2021.

[27] DDM points out that most tellingly, after 5 days of evidence at trial, Hobson, in his closing submissions, unilaterally and without notice abandoned his claim for damages for the alleged trespass by DDM's coastal and marine works.

[28] DDM further alleges:

- Hobson's further evidence filed in opposition to the application to discharge the interim injunction made no reference to permanent or irreparable damage to Hobson's land if the injunction was not continued.
- When Hobson amended the statement of claim on May 4, 2022, more than 8 months after the interim injunction was granted, he did not add any allegation of permanent damage to the pleading.
- The unsubstantiated damage alleged by Hobson in obtaining and maintaining the interim injunction could be wholly compensated in damages.
- At all material times, Hobson sought only damages for the alleged trespasses and did not seek any permanent injunctive relief.
- Contrary to Hobson's claims of permanent damage on the *ex parte* application, he maintained prior to and during the litigation that any damage could be wholly compensated in damages.
- In both obtaining and continuing the interim injunction, Hobson improperly relied on hearsay evidence.

[29] For the reasons set out, DDM submits that it has clearly demonstrated that the interim injunction was wrongly granted.

Arguable case for damages resulting from the grant of the interim injunction

[30] DDM contends that it can also satisfy the second limb of the test to enforce Hobson's cross-undertaking, in that it has an arguable case that it suffered damage by reason of the granting of the interim injunction.

[31] DDM relies on the following to show the evidence of an arguable case for damages:

- The interim injunction was in place for 917 days, from October 28, 2021 until May 2, 2024.
- The damage suffered by DDM from the granting and maintenance of the interim injunction for more than 2 and a half years is detailed with supporting documents in affidavits of DDM's director, David Fletcher.

- The damage DDM suffered was the natural and foreseeable consequences of the interim injunction, and fall under 3 heads:
 - a. Losses related to the construction work stoppage and deterioration of incomplete construction work;
 - b. Losses of actual and projected profit; and
 - c. Anticipated costs to resume operations on the discharge of the interim injunction.
- On October 29, 2021, the interim injunction forced DDM to halt construction on the coastal and marine works commenced on August 4, 2021 as authorised by the Development Control and Planning Board on or around March 23, 2021, just 2 weeks before the November 16, 2021 projected completion date.
- As a result, DDM did not have a beach or waterfront area for its guests, a key attraction for a boutique resort in the Caribbean. Without these amenities or being able to complete its construction projects, DDM lost the 2021-2022 season (including the cancellation of confirmed bookings for this season due to the inability to complete the coastal and marine works), the 2022-2023 and 2023-2024 high seasons for tourism.
- While the interim order was in place, the construction work was in progress at the time that the interim injunction was ordered, has been seriously damaged and, in some cases, destroyed by elements and the passage of time. During bad weather, DDM was not able to protect the already constructed coastal and marine works which were destroyed and now have to be rebuilt. DDM was unable to use the public road to bring the necessary equipment to the site to carry out repairs.
- Due to the substantial financial losses suffered as a direct result of the interim injunction, DDM was forced to suspend the operations of its resort as of June 1, 2024 and lay off its staff for a period of time.
- As a result of the interim injunction, DDM operated at a loss for over 30 months.

[32] DDM submits that based on Fletcher's evidence – which has not been contested by Hobson – DDM has an arguable case that it suffered damage as a result of the interim injunction.

Hobson's "permission issue"

[33] DDM accuses Hobson of attempting to evade an inquiry into damages by alleging that DDM did not have permission or authorisation to use Crown land to access its own property for the coastal and marine works. DDM submits:

- The "permission issue" is a red herring. The ancillary parties to the action (being the Government defendants) never protested any work being done by DDM at any time, and they were the only parties with standing to make such protests.
- Hobson has admitted that the interim injunction covered property that was outside the boundaries of his land, being the public road. Hobson has no standing to enjoin DDM from using the public road. That is the true issue, and falls squarely into the ambit of **Baird v Goldgar et al**³ which dealt with an injunction being obtained on lands over which the applicant had no ownership interest.
- After benefitting from the wrongly obtained interim injunction for 2 and a half years, Hobson cannot now avoid being held to his cross-undertaking by arguing that it was public land all along and DDM did not have permission to use it.
- In any event, there was no objection by the ancillary parties that DDM had used the public road without permission, and the knowledge of the use of the temporary road and the conduct of the government amounted to acquiescence and/or tacit approval of same.
- The court ought to disregard the "permission issue" raised by Hobson.

[34] DDM urges the court to grant its application for an order for inquiry into damages, and grant DDM its costs of the application.

Hobson's submissions

[35] Hobson addresses the court on the law relating to undertakings given on the grant of an interim injunction, starting with the following statement of principle by Lord Diplock in **Hoffmann-LaRoche v Secretary of State for Trade and Industry**:⁴

³ SKBHCv1993/0084, delivered May 15, 2018

⁴ [1974] 2 All ER 1128 at 1150 g

“The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts; but the court exacts the undertaking for the defendant’s benefit. **It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so**; but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an enquiry into damages at which principles to be applied are fixed and clear. The assessment is made on the same basis as damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant, that the plaintiff would *not* prevent the defendant from doing that which he was restrained from doing by the terms of the injunction. (See *Smith v Day* per Brett LJ.)” (*Emphasis added*)

[36] Hobson cites the case of **Universal Thermosensors Ltd v Hibben and others**⁵ as providing an example of the principles in action. He also quoted extensively from **Cheltenham & Gloucester Building Society v Ricketts**⁶ and paragraphs 38 and 39 of **Eliades v Lewis**⁷ and submits that the statements of principle extracted from those cases can be synopsized as follows:

- a. An undertaking as to damages is given as the price for an interim injunction;
- b. *Prima facie*, if an interim injunction is subsequently found to have been wrongly obtained, the party restrained has the right to seek damages pursuant to the undertaking;
- c. However, the court retains the discretion not to order an inquiry for damages, even if the injunction is subsequently found to have been wrongly granted, if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so;
- d. The court is bound to take into account all relevant facts disclosed during the trial;

⁵ [1992] 3 All ER 257

⁶ [1993] 4 All ER 276

⁷ [2005] EWHC 2966 (QB)

- e. In exercising its discretion, relevant factors include:
- i. The circumstances surrounding the obtaining of the order;
 - ii. The conduct of the claimant;
 - iii. The conduct of the defendant which is the subject matter of the claim to which the application is made;
 - iv. The merits of the claimant's claim; and
 - v. The legal right of the defendant to do the act which was restrained by the injunction.

[37] Hobson submits that the evidence at trial clearly established that the land in question was not a public road, but Crown land. He accepts that the reclaimed road did not form part of his property, and that he should not have sought the injunction.

Inequitable to order an inquiry

[38] Hobson submits that this matter ultimately comes down to the simple question as to whether, in light of his concession that the reclaimed land situated outside his boundaries was not his property, an inquiry should, in the usual course, be ordered.

[39] In urging the court not to order an inquiry, Hobson submits the following:

- In assessing this issue, it is irrelevant that the person restrained has suffered damage or the extent of any damage suffered, this being a question solely to be assessed once an inquiry has been ordered.
- In a normal boundary dispute, land which is the subject matter of an interim injunction belongs either to the person seeking the injunction ("Party A") or the person sought to be restrained ("Party B"), so that if the injunction turns out to have been wrongly granted (because the land did not belong to Party A), then Party B would be the owner and would have suffered loss from being deprived of the use of his property.
- That is not the situation in this case. The land in question, the road in front of Lot A, was not the property of Hobson or DDM.

- On the evidence led at the trial of this matter, it was clear that DDM had no permission to build the road, and no permission whatsoever to use it.
- Its use, *ipso facto*, of the road in these circumstances was, and would be, a trespass on Crown lands.
- In other words, the injunction, in the words of Nelson J in **Eliades**, did not restrain DDM from doing anything it had a lawful right to do.
- Further, DDM reclaimed land on the coastal boundary of Hobson's property without lawful authority and in so doing, altered the nature of that property from being abutting the ocean to being abutting a road. That this detrimentally affected Hobson's property cannot be denied.
- This was further compounded by the other callous and high handed trespasses by DDM and/or its agents.⁸
- In these circumstances, it would be inequitable to order an inquiry of the damages supposedly suffered by DDM.
- If this court were to do so, it would be sanctioning what would have been the unlawful conduct of DDM in breach of the planning laws of St. Kitts, without permission to use the road so unlawfully constructed.

[40] After the court heard the submissions of the parties, Learned King's Counsel for DDM, Mr. Ross, indicated that on that said day of the hearing, October 20, 2025, he received the transcript of the trial, and alleged that certain submissions by learned King's Counsel for Hobson, Mr. Kelsick, were contradictory to the evidence at trial. Mr. Kelsick KC indicated that he had not seen the transcript and invited the court to order the relevant submissions on the transcript. The court did not restrict the parties to the transcript, and ordered supplemental submissions on the application.

⁸ There was no finding of trespass against DDM at trial.

DDM's supplemental submissions

[41] DDM's reliance on the transcript of the trial concerns the cross-examination of Austin Jay Farier, the Director of the Department of Physical Planning.

[42] In response to a question posed by Mr. Ross KC in relation to the apparent delay in the approval of Application 451/20, the transcript reveals the following:

Q. Well, could you explain then how would you get an application in 2020, in December of 2020, and it hung around until November 2021 for approval?

A. Based upon my experience, My Lady, once the application meets all the required documents, then it gets approval. So, based on the situation, I think the review of the EIA came in November 11th, 2021, and therefore it met all the requirements and then it would have been approved November 12th, 2021.

[43] The transcript shows that Farier then confirmed that he did not receive the signed internal review of DDM's Environmental Impact Assessment ("EIA") until November 11, 2021. DDM points out that it was DDM's evidence – not contradicted by Farier – that the EIA was submitted shortly after receiving the conditional approval letter from the Board dated February 1, 2021, indicating that DDM would be required to undertake an EIA in order for final approval to be granted. The requested EIA was submitted to the Board months before DDM commenced the coastal and marine works, and Hobson sought the interim injunction. The EIA expressly referred to using the land referred to in T5 to access and to transport construction equipment to DDM's property.

[44] DDM contends that Hobson's submission that DDM did not have approval from Planning is directly contradicted by the evidence at trial.

Alleged criminality

[45] In response to Hobson's allegations that DDM was guilty of a criminal offence, DDM counters as follows:

- While repeated reference was made to DDM building a road on public land without approval, counsel for Hobson failed to point to any particular provision of the Act that was purportedly contravened by DDM.
- Part V of the Act deals with compliance and provides several escalating tools by which the Board can halt, correct or penalise development that has been carried out without the grant of development permission. These tools include service of a compliance notice which gives the offender 28 days to take corrective steps, and associated appeal rights; issuance of a stop order; orders for injunctive relief by the High Court; availability of direct action and cost recovery; and criminal penalties for non-compliance. The Act is administered and enforced by the Physical Planning Department.
- This submission by Hobson is inconsistent with the legislative framework for compliance and escalating sanctions. It is misleading to allege that DDM is guilty of a criminal offence.

Duty to return to court

[46] In answer to Hobson's submission that following the *inter partes* hearing of the interim injunction on November 16, 2021, Hobson had no further obligations of disclosure or to return to court, DDM repeats its earlier submissions and sets out the excerpt from Gee on Commercial Injunctions which reads:

Irrespective of whether the proceedings remain on an ex parte basis, there is a duty to return to the court if the basis on which it has granted relief no longer applies. This applies regardless of how long previously the relief was granted.

[47] DDM submits that once Hobson knew or ought to have known that the interim injunction exceeded the boundaries of his property and covered public land over which he had no standing or legal right to an injunction, he had a duty to inform the court of the change in circumstances. He failed to do that.

Hobson's supplemental submissions

Duty of continuing disclosure

- [48] Hobson relies on the same author⁹ to reply to DDM on the issue of continuing disclosure. At paragraph 9-026, quoting from the decision of Saville J in **Commercial Bank of the Near East Plc v A**,¹⁰ it is stated:

*Although the case was not one in which the court had been misled or incomplete information had been given on the initial ex parte application, Saville J held that “**while the proceedings remain on an ex parte basis**”, the applicant has a duty to the court to bring to its attention any subsequent material changes in the situation, i.e. any new or altered facts or matters which, had they existed at the time of the application, should have been disclosed to the court. (Emphasis added)*

- [49] Hobson submits that this is a clear statement of principle that the obligation continues so long as the matter is on an *ex parte* basis.
- [50] Paragraph 9-028 starts with the same passage quoted by DDM, but continues as set out by Hobson. The entire paragraph reads:

*Irrespective of whether the proceedings remain on an ex parte basis, there is a duty to return to the court if the basis on which it has granted relief no longer applies. This applies regardless of how long previously the relief was granted. In relation to the claimant's financial position, if this deteriorates after the application relevant materially to the worth of the undertaking in damages given by the claimant to the court, **the deterioration must be disclosed to the respondent so that he can consider applying for the discharge of the relief.** (Emphasis added)*

- [51] Hobson submits that the emphasised words establish that the duty is to inform the respondent to the application, in this case DDM, of any change in circumstances so that DDM could consider whether to apply for a discharge.

Approval of Planning Board

- [52] Hobson attacks as being specious DDM's submission that the “EIA expressly referred to using the land referred to in T5 to access and transport construction

⁹ Commercial Injunctions by Steven Gee QC, (Sweet and Maxwell, 6th Ed.)

¹⁰ [1989] 2 Lloyd's Rep. 319

equipment” and that this reference in the EIA therefore directly contradicts Hobson’s submission that DDM did not have planning permission.

[53] Hobson points out that the only application for planning permission that was submitted by DDM relevant to this matter is Application No. 451/20, and this application did not seek any approval whatsoever for the carrying out of land reclamation on the coastal areas abutting Hobson’s properties.

[54] He asserts that nowhere in the EIA does it state that the works will be accessed via T5 and submits that it is noteworthy that no reference was given by DDM to where in the EIA this was stated.

[55] Even if there was such a reference, Hobson submits:

- a. by that time the road had been constructed by DDM (the *ex parte* injunction having been granted in October 2021);
- b. the only purpose of setting out the access to the project was to explain to the Development and Control Planning Board how works were to be carried out;
- c. the EIA did not address in any respect whatsoever the impacts of the construction of the road which DDM had undertaken without permission; and
- d. on no basis whatsoever could this reference be the foundation of an argument that planning permission to construct the road was given by such a reference when no application to construct the road was ever submitted.

Alleged criminality

[56] Hobson answers DDM’s submission, that he did not refer to any provision of the Development Control and Planning Act with respect to the alleged criminality and that Part V of the Act deals with compliance, as follows:

- This misapprehends the Act.

- Part V of the Act deals with compliance but it focuses on the works carried out by unauthorised persons, i.e.:
 - a. Service of compliance notices to stop and/or remedy any work being carried out (s.39)
 - b. Service of a stop order (s.44)
 - c. Obtaining injunctions (s. 45).
- These are entirely separate matters to the culpability of persons who undertake such unauthorised works.
- This is dealt with in section 85(1)(g) of the Act (to which counsel for Hobson referred to at the hearing of this application). This section states:

A person commits an offence if he or she –

...

(g) contravenes any other provisions of this Act or the regulations made under it.
- One such provision of the Act is section 20(1) which provides as follows:

*No person shall carry out any development of land except under and in accordance with the terms of a development permission granted in that behalf **prior to the commencement** of such development, on an application made in accordance with the regulations made under section 86, unless the development is permitted development authorised under subsection(2).* (Emphasis added)
- There can be no dispute that DDM breached this provision and therefore committed a criminal offence under section 85(1)(g) of the Act.

Discussion

- [57] By the compulsory undertaking under Rule 17.4(2) of the Civil Procedure Rules 2023, Hobson is to abide by any order as to damages caused by the granting or extension of the interim order. As stated by Nelson J in **Eliades v Lewis**,¹¹ “...the injunction must have been wrongly granted or wider in its scope than it should have been before the party against whom it was granted can recover damages”. Notwithstanding the parties’ contradictory positions on non-disclosure, it is not

¹¹ [2005] EWHC 2966 at para 38

disputed that the interim injunction was wrongly granted and therefore, DDM has a right to seek damages pursuant to the undertaking.

[58] In my view, the parties' dispute as to the continuing duty to disclose on the part of Hobson is to be resolved in favour of DDM. Hobson submits that the duty is to inform the respondent, DDM, of any change in circumstances so that DDM could consider whether to apply for a discharge of the interim injunction. However, I note that in the excerpt relied upon from Gee (at paragraph 50 above), the disclosure to the respondent is in respect of the deterioration of the claimant's financial position. Therefore, Hobson had a duty to return to the court to disclose that the basis on which the interim order was granted did not apply. However, notwithstanding Hobson's duty, DDM was also at liberty, with the knowledge of the conclusions of the March 10, 2022 meeting, to apply to discharge the order, especially in light of its alleged losses.

[59] On the law and evidence, DDM has an arguable case that it suffered damage as a result of the interim injunction.

[60] Even where in the normal course of things, the test is satisfied, as stated by Lord Diplock in **Hoffmann-LaRoche v Secretary of State for Trade and Industry**,¹² the court retains the discretion not to enforce the undertaking if it is inequitable to do so. Having established that the interim injunction was wrongly granted, Hobson argues that it would be inequitable to enforce the undertaking because DDM's conduct was unlawful, amounting to trespass on Crown land and a criminal offence in contravention of the planning laws of St. Kitts.

[61] Hobson relies on the case of **Universal Thermosensors Ltd v Hibben and others**¹³ notwithstanding the court's decision to award damages to defendants who engaged in unlawful conduct. In fact, at the hearing of the application, learned counsel for DDM also referred to it for the court's consideration. In that

¹² [1974] 2 All ER 1128 at 1150 g

¹³ [1992] 3 All ER 257

case, the defendants, former employees of the plaintiff company which manufactured temperature measuring equipment, left their employment with the plaintiff and set up a competing business. Their employment contracts with the company did not restrict them from setting up a competing business. They dishonestly took with them copies of documents containing information about customers. The company instituted proceedings against them for loss of profits caused by the defendants' misuse of confidential information. In July 1990, the company obtained an interlocutory injunction restraining the defendants, *inter alia*, "from soliciting or entering into or fulfilling any contract with any customer of the plaintiff whose name was contained in any confidential document".¹⁴ This caused the defendants' business to collapse.

[62] Before trial, the company gave notice that it would not seek injunctive relief against the defendants. The defendants claimed damages pursuant to the company's undertaking to the court to pay damages on the granting of the injunction. The court ruled that the injunction was too wide because there was no justification to restrain the defendants' new business "from dealing after July 1990 with customers *it had already approached*". Sir Donald Nicholls V-C, in delivering the judgment, stated that he had in mind that the court retains a discretion whether or not to enforce the undertaking, citing Lord Diplock's statement in **Hoffmann-La Roche** (at paragraph 35 above).

[63] The company contended that the defendants did not have clean hands, that the defendants' conduct was so outrageous and dishonest that the court ought not to exercise its discretion in favour of awarding them damages under the undertaking. His Lordship rejected this argument and set out as follows:

"Undoubtedly, the defendants' conduct was outrageous and dishonest... Punishment of the defendants is not my function. If the defendants have suffered material loss by reason of excessive width in the terms of the injunction sought and obtained by the plaintiff in July 1990, in my view they are entitled to look to the plaintiff for damages pursuant to its undertaking. Plaintiffs, and those who advise them, know or ought to know that there is a risk in obtaining interlocutory injunctive

¹⁴ Ibid at 265 d

relief: the risk is that the plaintiff may have to pay compensation to the defendant if it turns out at the trial, **the effect of the injunction was to restrain a defendant from activities which it ought to have been at liberty to pursue.**"¹⁵ (*Emphasis added*)

[64] The highlighted portion of the court's decision is the impetus for Hobson's reliance on this case.

[65] Similarly, following on from his statement (quoted above at paragraph 57) in **Eliades**, in relation to a party against whom an injunction was wrongly granted and seeking damages, Nelson J continued:

"He must have been restrained by the terms of the injunction from doing something that he should have been entitled to do (*Hoffman La-Roche* at 361) or, 'the effect of the injunction was to restrain a defendant from activities it ought to have been at liberty to pursue' – *Universal Thermo Sensor* 857."

[66] Therefore, the question arises as to whether DDM had a legal right to do what the injunction restrained or did the interim injunction restrain DDM from activities it ought to have been at liberty to pursue. Each case turns on its own facts.

[67] Hobson accuses DDM of unlawful conduct – trespassing on Crown land and committing an offence by carrying out works on Crown land without the requisite permission. The proper authority to pursue these allegations is the Crown itself. Hobson has no standing to institute such actions against DDM. DDM has not been prosecuted or sued by the relevant authorities. Notwithstanding Hobson's allegations, it is not within the purview of this court in these proceedings to find that DDM is guilty of a criminal offence or that it is liable in trespass to Crown land. I am mindful that, as guided by His Lordship in **Universal Thermosensors**, punishment of DDM is not my function. However, in my view, on the facts available to the court at this time, that is, the point at which the discretion to order an inquiry into damages is to be exercised, the court is certainly in a position to determine whether the interim injunction restrained DDM from something it would have been entitled to do or ought to have been at liberty to pursue.

¹⁵ Ibid at page 273 f-h

[68] The interim order, as it relates to this matter, restrained DDM and the 3rd defendant as follows:

“The 1st and 3rd Defendants are hereby restrained and an injunction is hereby granted restraining them, their employees, servants, directors, agents, related entities from entering, disturbing or otherwise trespassing on plots of land situate at Trinity Palmetto Point in the island of St. Christopher described in:

- a) A Deed of Conveyance dated August 19, 1987 registered in Liber F Volume 7 at Folios 1917 to 1920 of the Registry of Deeds for the island of St. Christopher; and*
- b) A Certificate of Title dated July 2, 1992 registered in Book R2 Folio 15 of the Register of Titles for the island of St. Christopher;*

and more particularly either of the roads on the South-Western coastal end of the Claimant’s said properties...”

[69] The evidence at trial revealed that the road in issue was a public road on which DDM constructed land for use in carrying out its coastal and marine works. This reclaimed land belonged to the Crown. Hobson accuses DDM of building this temporary road without permission in contravention of the provisions of the Development Control and Planning Act. At the hearing, learned King’s Counsel for Hobson referred to section 85.

[70] Having received the transcript of the trial, learned counsel for DDM, in supplemental submissions, sought to establish that DDM had the requisite approval from the Planning Board to use the land to access and transport construction equipment to DDM’s property. This is in relation to DDM’s Application No. 451/20. The evidence at trial revealed that the Application was received in 2020, but the EIA review came in November 2021. The Application met all the requirements and it was approved on November 12, 2021. DDM submits that the EIA expressly referred to using the land in T5 to access and transport construction equipment. DDM alleges that Hobson’s submission that it did not have planning approval is directly contradicted by the evidence at trial.

[71] On a careful review of the documentation in this matter, I am satisfied that as submitted by learned counsel for Hobson, DDM's Application 451/20 did not seek, nor was DDM granted approval for the carrying out of land reclamation on the coastal areas abutting Hobson's properties. Further, it is not stated in the EIA that the works would be accessed via T5.

[72] The evidence shows that DDM was aware that permission was required and did request approval through its Counsel by letter dated March 17, 2022 , headed 'URGENT', to the Permanent Secretary, Ministry of Sustainable Development, asking permission to use the said road. However, there is no evidence that such approval was granted.

Conclusion

[73] The court must make a determination as to the exercise of its discretion on the facts now known. By virtue of section 20(1) of the Development Control and Planning Act, DDM required permission to carry out development of the land in question. On the facts available to the court, no such permission was granted. In carrying out its coastal and marine works, DDM proceeded to develop and use the land without permission. This is an offence under the Act. Although Hobson had no standing to bring an action against DDM, DDM had no authority to carry out works on Crown, or any other land in the Federation without permission. Therefore, in my respectful view, DDM was not entitled use the road or land in question to carry out its works. DDM was not "restrained by the terms of the injunction from doing something that [it] should have been entitled to do", or "restrained from activities which it ought to have been at liberty to pursue".

[74] In these circumstances, I am of the view that it would be inequitable to order an inquiry into damages and accordingly exercise my discretion not to do so.

Order

[75] Based on the foregoing, it is hereby ordered as follows:

- 1) The application for an order for an inquiry into damages is dismissed.
- 2) DDM shall pay costs of the application to Hobson in the sum of \$2,500.00.

[76] I thank Counsel for the parties for their useful submissions.

Tamara Gill
High Court Judge

By the Court

Registrar