

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM No. DOMHCV2024/0040

BETWEEN:

EDISON JAMES

1st Claimant

WILMA JAMES

2nd Claimant

- and -

PHYSICAL PLANNING & DEVELOPMENT AUTHORITY

1st Defendant

ATTORNEY GENERAL OF THE COMMONWEALTH OF DOMINICA

2nd Defendant

APPEARANCES:

Ms Zahidha James, Counsel for the Claimants

Mrs Vanica Sobers-Joseph and Ms Karina David, State Attorneys for the Defendants

2024: November
December 10

RULING

Introduction

- [1] **JAWARA-ALAMI, J.:** This is as application dated and filed on 28th March 2024 wherein the Applicants/Claimants apply to this Honourable Court for a number of reliefs amongst which is an interim injunction halting the aggregate crushing plant project at Hatten Garden Marigot, pending the outcome of the Claimants' substantive claim for a permanent injunction filed by way of Judicial Review on 07th March 2024.

Submissions

- [2] The Applicants contend that the 1st Respondent is empowered under the **Physical Planning Act¹ No. 5 of 2002**, to prepare land use and development plans, granting of permission to develop land, and conducting environmental impact assessments. The Applicants also contend that in granting approval for the Project, the 1st Respondent has failed to comply with various provisions in the Act as well as provisions in its Notice of Approval. The Applicants further contend that not only was approval for the

¹ Act No. 5 of 2002 of the Revised Laws of the Commonwealth of Dominica, hereinafter referred to as the Act

Project irregularly granted, but that since said approval, the Project has been operating in a manner that defies the terms of its approval.

- [3] In opposing the application, the Defendants contend that neither the First nor Second Defendant operates the crushing site as described by the Applicants/ Claimants and there is no basis for an injunction against them as the operators are not parties to this claim or application. The Defendants also contend that the Applicants/Claimants have not given the requisite undertaking in damages for the grant of an interim injunction as required in **Civil Procedure Rules (Revised Edition) 2023² Rule 17.4(2)**.

The Issues

- [4] A sole issue has been formulated for the determination of this case and it is simply; **Whether this Honourable Court ought to grant the application for interlocutory injunction pending the hearing and determination of the substantive suit.**

The Law

- [5] In my view, this case is governed by **section 24(2) of the Eastern Caribbean Supreme Court (Dominica) Act³** and the conventional principles set out in the locus classicus case of the **American Cyanamid Co v Ethicon Ltd⁴**.
- [6] The jurisdiction to grant an injunction is governed by the above authorities and empower the judge to grant an injunction in all cases in which it appears to the judge to be just and convenient where the order is asked for before the trial or hearing of any cause or matter to prevent any threatened injury.
- [7] To obtain an interim injunction, like any equitable remedy, the court will have to be satisfied that:
- (1) the applicant has established a serious issue to be tried;
 - (2) damages are not an adequate remedy;
 - (3) the balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and

² Hereinafter referred to as CPR 2023

³ Chapter 4:02 of the 2017 Revised Laws of the Commonwealth of Dominica

⁴ [1975] AC 396, [1975] 1 All ER 504, HL

(4) the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted: **American Cyanamid Co v Ethicon Ltd** supra.

Discussion

- [8] Having perused the affidavits, the submissions and various exhibits, I will consider the criteria set out in the **American Cyanamide** case in turn against the submissions of the parties in this matter. Having said this, it is settled law that to satisfy the test in the case supra, the conditions set out above must all be met and so meeting one or two of the conditions will not be sufficient for the purpose of the Court exercising its discretion to grant an injunction.

Legal Right and Substantial issue to be tried

- [9] At this stage, the Applicants are not required to conclusively prove the claim but rather to show a good prima facie case with a probability of success.
- [10] What then has the Applicant put before this Honourable Court to prove that they have a prima facie case? The Applicants, in their affidavit in support of the application as well as the statement of claim have averred that they are in their 80's and are residents of Hatton Garden, Marigot in the Commonwealth of Dominica thereby demonstrating that they own their property. They seek an urgent interim injunction against an approval given by the 1st Respondent with respect to an Aggregate Crushing Plant/facility ("the Project) operating next door to the Applicants' residence and want the Project stopped immediately to preserve their health and general interference with the use and enjoyment of their property. They also claim that the Project is causing noise, vibration, and dust nuisance/pollution, the constant disruptions to their water supply and the excessive nuisance/pollution which is a clear health hazard to the Claimants. The Affidavit of Edison James filed on March 7th 2024, paragraphs 25 to 40, claim the non-compliance by Respondents with the relevant laws both before and after the approval.
- [11] The Respondents avers in their affidavit in opposition that the Hatten Gardens crushing site plays a central role in the construction of Dominica's first international airport, that this project is a significant step towards modernizing Dominica's transportation infrastructure, enhancing regional connectivity and placing the island on par with its Caribbean neighbours. The Respondent also claim that this location is important to streamline logistics, the close distance ensures that heavy and bulky materials can be transported quickly

and efficiently to the site at Wesley. This minimizes transportation times and reduces the need for extensive haulage operations, thereby conserving fuel and limiting wear on vehicles.

- [12] As has been said before the applicants herein at this stage does not have to show that he will be entitled to the reliefs, all they have to show is that they have a fair question to raise and he has an existing right. In this case instant the Applicants' rights cannot be disputed which makes it abundantly clear that there are serious substantial issues to be tried because an interlocutory injunction can only be issued to restrain a threatened wrong to a right, and not to restrain the lawful enjoyment of a legal right.
- [13] **The Applicants must then demonstrate that he/she stand to suffer irreparable loss that cannot be adequately compensated through damages.** The Applicants need to satisfy the court that the property needs to be preserved in its condition until the reliefs sought can be determined.
- [14] The governing principles is that if damages would be adequate and the Respondents can pay it, then the application should not be granted no matter how strong the applicant's case is. In the case at bar, the Claimants argue that halting the construction might prevent irreversible harm to the environment and community while the case is decided and submit that the Project is causing noise, vibration, dust nuisance/pollution as well as constant disruptions to the Claimants' water supply. The nuisance and pollution emanating from the Project, the Claimants' who are in their eighties argue, leaves them vulnerable to severe health issues including deafness and illnesses associated with dust and noise nuisance.
- [15] The Claimants also cite the hours of operation of the Project as being unreasonable and outside of the limits identified in the Notice of Approval. They also emphasise that they are entitled to the quiet use and enjoyment of their home without unreasonable interruptions.
- [16] The Respondents/Defendants have submitted that any delay in construction could lead to significant financial loss, economic repercussions, particularly for a project with substantial public or governmental investment and submits extensively that the construction of this airport represents not only a logistical advancement but also a transformative opportunity for national development, with anticipated benefits in tourism, trade, agriculture and overall economic growth.
- [17] The Respondents/Defendants further submit that construction of the international airport includes a new 2,850-meter runway which requires a large volume of high-quality materials to ensure structural integrity.

That the current aggregate crushing site serves as the primary source of aggregate materials required for the airport's construction, the quality and availability of these aggregates directly influence the safety, durability and longevity of the airport's foundational structures and structural integrity.

- [18] In short therefore, I am asked to decide upon private rights vs public interest and the courts have recognized this balance in cases like **Coventry v Lawrence**⁵, emphasizing that remedies must be proportionate to the harm caused. The **American Cyanamide Co.** case, has clearly stipulated that:

*"If damages in the measure recoverable at common law would be an adequate remedy, and the defendant would be in the financial position to pay then an interlocutory injunction should not be granted, however, strong the Applicant's claim appears to be. Damages, will not be adequate if the Respondent is unlikely to be able to pay; the wrong is irreparable; the damages are not pecuniary; and the damages would be difficult to assess"*⁶.

- [19] In short the question that behoves on me at this point is whether the Applicants will be adequately compensated by damages. The Claimants have alluded to health concerns; that this crushing site has caused such as deafness and possible respiratory problems, and has exhibited a medical report to that effect. It is settled that damages will not be sufficient for health problems caused by the crushing site as they may be irreparable. However, the medical evidence submitted is non-conclusive to this fact.

- [20] ***Conversely, if damages would be an adequate remedy for the defendant and the claimant would be able to pay them, an interim injunction should be granted***⁷. The Claimants have averred to the fact that they are in a position to give an undertaking in damages to the court. I doubt that the Claimants who are retired are in a position to adequately compensate a government project of this magnitude in damages.

- [21] The question therefore remains, whether the Claimants would suffer irreparable injury from the effects of the crushing site?

- [25] To this is say, that the Defendants can easily pay damages at common law to the Claimants as the State has a longer economic reach than the Claimants, in the sense that they can clean up the damage caused so far, reimburse medical bills and rebuild structural defects in the houses affected.

⁵ [2014] UKSC 13

⁶ [1975] AC 396, [1975] 1 All ER 504, HL

⁷ Halsbury's Laws of England Copyright (Volume 23 (2023))

The balance of convenience

- [26] On the balance of convenience, the court must consider the question as to who will be more at a disadvantage if the injunction is not granted. Thus, the burden of proof of who will suffer more inconvenience if the injunction is not granted lies with the applicant bringing this application. In **Francome v Mirror Group Newspapers Ltd**⁸ CA Sir John Donaldson MR stated that the 'balance of convenience' might more properly be called 'the balance of justice'.

"The question, which must be posed, is where does the balance of justice lie? An assessment of the balance of justice requires a comparative assessment of

(i) the quantum of the risk involved in granting or refusing the injunction and

(ii) the severity of the consequences that will flow from following either course⁹".

- [27] In consideration of the foregoing factors it is clear that the risk of halting a project that will benefit the populace far outweighs the inconvenience and damage caused to the Claimants. It is clear from the averments of the affidavit of the Defendants that the consequences of stopping the crushing at the said site will include *"Temporary or permanent disruption of the current operations of the crushing site and would hamper timely access to aggregate and create a ripple effect for the supply chain of raw and building materials for the International Airport Project. Without a steady flow of high-quality aggregate materials, construction would very likely be paralyzed, affecting critical timelines and escalating costs"*.

- [28] The Defendants also cite economic reasons as a risk factor and submit that an injunction will significantly affect the construction of the airport, and the material and other financial interest of the State. That it will also expose the Government of Dominica, the international airport contractor and third parties who rely on the progress of this airport, to serious economic loss and may even lead to the termination of the international airport. Clearly, public interest is one of the paramount and relevant considerations for granting an interim injunction in this case instant and the case of **The Associated British Ports v Transport and General Workers' Union**¹⁰ has held that in considering whether to grant an injunction on the balance of convenience a relevant factor is the public interest. The public interest considerations would justify the refusal to grant a temporary injunction and public interest should prevail over the private rights: see **Kennaway v Thompson**¹¹.

⁸ [1984] 2 All ER 408 at 413, [1984] 1 WLR 892

⁹ Ibid

¹⁰ [1989] 3 All ER 822, [1989] ICR 557, HL

¹¹ [1981] QB 88 at 93

[29] The plethora of authorities in this area have cautioned the Courts to be slow in granting injunction against government projects which are meant for the interest of the public at large as against the private proprietary interest or otherwise for a few individuals and have held that courts should be reluctant to restrain the public body from doing what the law allows it to do or to execute its core mandate or function. The main rationale for this is rooted in the fact that the courts cannot as matter of law grant an injunction which will have the effect of suspending the operation of legislation: **R v Secretary of State for Transport ex.p Factortame Ltd**¹².

[30] In the case of **Belize Alliance of Conservation Non- Governmental Organizations v Department of the Environment of Belize and Anor**¹³. Their Lordships concluded that “*the grant of an injunction at this stage would entail a greater risk of ultimate injustice than its refusal*” because this was a case between a private sector operator who was clearly associated with the Government of Belize and as such there are public interest of real importance on both sides of the arguments. Their lordships also concluded that “*this was not a case in which the absence of an undertaking in damages, it would be right to halt a major project which is of real importance to the economy of Belize*”.

[31] I am guided by the foregoing authorities and I so hold.

[32] In light of the above reasoning and in weighing the benefit to the Claimants and the Defendants, I am minded to agree with the Defendants that it stands to loose more if an interlocutory injunction is issued stopping the alleged acts of the Defendants.

Undertaking as to damages

[33] It is trite that generally once the balance of convenience is in favour of refusing the injunction, the adequacy of damages does not arise and I need not consider same.

Finally, the courts should consider the conduct of the parties and it must be right to put matters in status quo.

[34] The balance of convenience lies in the preservation of the status quo. In **National Commercial Bank Jamaica Ltd vs. Olin Corporation Ltd**¹⁴ the Privy Council held that:

¹² [1990] 2 AC 85

¹³ (2003) UKPC 63

¹⁴ [2009] 1 WLR, [2009] UKPC 16

"In deciding at the interlocutory state whether granting or withholding an injunction is more likely to produce a just result the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Maintaining the status quo therefore would produce the effect envisaged in the foregoing authority".

- [35] The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.
- [36] In this case instant, maintaining the status quo by allowing the crushing site operators to continue their work serves the justice of the case because of the public interests highlighted above. Nonetheless, the court cannot shut its eyes to the plight of the claimants and will ensure that in maintaining the status quo more harm is not caused to the claimants or the neighbours pending the hearing and determination of the main suit.
- [37] Based on the foregoing reasoning and in the exercise of my discretion I am minded to take the course that would minimise the risk of injustice.
- [38] In taking this course I note that the Physical Planning Notice of Approval¹⁵ of the Claimant which contains conditions dealing with waste management, emission control in particular the minimising of dust at the site by carrying out watering for dust control three (3) times per day. I am of the view that these conditions must be adhered to strictly to allow for the status quo to be maintained pending trial. Furthermore, I find that the hours of operation are clearly unreasonable in that it allows for operations from Monday to Saturday between the hours of 7.00 to 23.00 hours which cannot possibly in consonance with the law. For this reason, therefore, I will vary the hours of operation from Monday to Friday between 8.00am to 6.00pm.
- [39] In the circumstances therefore, having found that the Applicants have not met all the conditions prescribed for the granting of an interlocutory injunction, **I hereby order as follows;**
1. The application for interim injunctive relief is not granted;
 2. The Defendants shall adhere strictly to the conditions stipulated in the Physical Planning Notice of Approval in particular; the minimising of dust at the site by carrying out watering for dust

¹⁵ Claimants Exhibit EJ1

control three (3) times per day and limiting the hours of operation from Monday to Friday between 8.00am to 6.00pm; and

3. The third party operators Montreal Management Corporation Development Ltd (MMCD) and China Railway No. 5 Engineering Group Caribbean Ltd (CRC) operating the crushing site shall be joined as parties to this suit pursuant to CPR Rule 19.2.3 and shall be served with all processes in this suit from hereon.

Justice Zainab Jawara-Alami
High Court Judge

BY THE COURT

REGISTRAR