

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2023/0001

BETWEEN:

VILLA CORNUCOPIA LIMITED

Appellant

and

ESTHER DEVELOPMENTS LIMITED

Respondent

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Trevor Ward

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Tom Roscoe and Mr. Simon Hall for the Appellant

Mr. John Carrington, KC with him Ms. Reisa L. Singh for the Respondent

2023: May 23;
December 8.

Interlocutory appeal - Interim injunction – Restrictive covenants – Whether the master applied a flawed approach of the American Cyanamid principles - Adequacy of damages as a remedy - Whether the master erred in failing to hold that the respondent did not provide an adequate undertaking as to damages - Whether the master erred in resolving the balance of convenience in favour of granting the interim injunction

Villa Cornucopia Limited (“the appellant”) is the owner of a parcel of land known as Parcel 15 Block 4739B (“Parcel 15”) in a subdivision in Virgin Gorda known as Little Trunk Bay (“the Estate”). Esther Developments Limited (“the respondent”) was the original developer of part of the Estate. When the respondent made a transfer of Parcel 15 in 1987, the original transferee at that time agreed to various covenants which were noted on the land register, including one in which she agreed, ‘[t]o use the site for residential purposes only and to erect thereon no building other than one single family dwelling house...’. Through a series of sales, Parcel 15 was sold to the appellant in January 2021. The appellant is a successor in title to the original transferee and was deemed to have had notice of the restrictive covenants on its title as to, inter alia, user of Parcel 15. Around February 2022, the appellant began operating an Inn on Parcel 15. The appellant also applied for a liquor licence to sell intoxicating liquor at the premises.

The respondent communicated to the appellant both verbally and by letters on behalf of the Little Trunk Bay Homeowners, before and after the appellant began operations, that these actions were breaches of the restrictive covenant as to user of the premises. Despite this, the appellant did not cease operations of the Inn.

On 14th November 2022, the respondent filed a claim against the appellant for a permanent injunction to restrain the appellant, whether acting by itself, its directors, employees, agents or otherwise howsoever from conducting the operations of an Inn on Parcel 15 or from otherwise using the property in a manner inconsistent with the restrictive covenants attached to the property. On the same date, the respondent filed a notice of application for an interim injunction to similarly restrain the appellant pending the determination of the claim.

The appellant opposed the application arguing that it was aware of the restrictive covenants, however after seeking legal advice, it was its understanding that the registered covenants were not enforceable. Therefore, the appellant asserted that it was not in breach of any covenant as the covenant sought to be enforced is not binding on it. The appellant further argued that other homeowners within the estate rented out their villas, accordingly, they have been used as a commercial operation and as such Little Trunk Bay is not a purely residential area.

The learned master, in his judgment dated 6th February 2023, granted the interim injunction and granted the respondent its costs in the claim. On 16th February 2023, the appellant filed a notice of appeal challenging the decision of the learned master.

Held: dismissing the appeal; affirming the judgment in the court below and ordering costs of the appeal to the respondent, to be assessed, if not agreed by the parties within 21 days that:

1. The judgment in *American Cyanamid v Ethicon Ltd* contains no more than a set of useful guidelines which a court may apply in many cases. There is no rigid four stage or 'box-ticking' approach by which a court is to exercise its discretion when considering whether to grant an injunction. The overarching principle is the statutory power of the court to grant interim injunctions when it is just and convenient to do so. In this case, the fact that the master's analysis of the adequacy of damages sequentially followed his assessment of the balance of convenience was not indicative of a misdirection or flawed approach or that he 'skipped a step'. Accordingly, the Court finds no merit in the submission that the master adopted a flawed approach in considering the principles under the *American Cyanamid* test.

Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap 80 of the Laws of the Virgin Islands applied; Rule 17.1(1)(b) of the **Eastern Caribbean Supreme Court Civil Procedure Rules, 2000** applied; ***American Cyanamid Co. v Ethicon Ltd*** [1975] AC 396 (HL) considered; ***N.W.L Ltd v Woods*** [1979] ICR 867 considered; ***Cambridge Nutrition Ltd v British Broadcasting Corp*** [1990] 3 All ER 523 considered; ***Apotex Fermentation Inc v Novopharm Ltd*** [1994] 7 W.W.R. 420 considered; ***National Commercial Bank Jamaica Ltd v Olint Corp'n Ltd.*** [2009] 1 WLR 1405 considered.

2. In the context of a negative covenant, damages might not always afford a sufficient or satisfactory remedy and therefore equity would need to interfere to prevent a mischief. The courts have generally paid less regard to the question of the amount of damage or injury likely to be suffered by the applicant and more to the negative bargain which the parties would have freely made. While the potential change of character of the neighbourhood is not a necessary determinant of whether there is a breach of the restrictive covenant, it is a factor which the master could properly consider in the exercise of his discretion. Moreover, even if this Court were to hold a contrary view, this is not sufficient to set aside the master's decision.

Doherty v James Clagston Allman and W.C. Dowden (1878) 3 App Cas 709 considered; **Halsbury's Laws of England** (2022) vol 87, Real Property and Registration considered; **Chatsworth Estates Company v Fewell** [1931] 1 Ch. 224 considered.

3. Before a court will grant an interlocutory injunction, the party seeking the order will almost always offer or be required to give to the court the 'usual undertaking as to damages'. The fact that a claimant is funded by a third party or is of limited means would not preclude the grant of an injunction in a proper case. Each case turns on its own facts. In this appeal, it is clear that the respondent's financial resources were relevant to the court's exercise of discretion to make an interlocutory injunction and that in fact it did adduce evidence of its financial capacity to meet the undertaking. The learned master was clearly satisfied with the terms of the proposed undertaking and had no doubt as to the financial security of the funder. The Court sees no basis to interfere with that finding of fact especially when there was no evidence of the appellant actively seeking fortification of that undertaking.

Allen and others v Jambo Holdings Ltd. and others [1980] 1 WLR 1252 considered; **Cambridge Credit Corporation Ltd (Receiver Appointed) v Surfers' Paradise Forests Ltd** [1977] Qd R 261 considered; **Frank Industries PTY Ltd v Nike Retail BV and others** [2018] EWCA Civ 497 applied.

4. The way in which courts apply the balance of convenience test varies from case to case. In cases of prohibitory injunctions enforcing negative covenants between parties, the courts have emphasised the need to enforce negative covenants expeditiously. However, in recent times the courts have prescribed a cautious approach. The court should take whichever course seems likely to cause the least irremediable prejudice and should seek to avoid irremediable damage and harm to either party while recognising that its decision, whether in favour or against the grant of an injunction, will inevitably involve some disadvantage to either party which damages cannot compensate. It is the extent of this uncompensable disadvantage which is a significant factor in determining the balance of convenience. The master's approach appears to be consistent with the case law. He clearly recognised that the dispute between the parties involved a negative covenant of some vintage which he was obliged to accord appropriate weight. However, the master did not stop there; he took into account other factors such as the appellant's bookings for November 2022 to February 2023 and concluded that the balance of convenience would not favour the grant

of an injunction during this period. The master was clearly seised of the potential impact on the appellant. Accordingly, the Court is not satisfied that the learned master's exercise of discretion and the conclusion which the master reached in granting the interim injunction is blatantly wrong.

Cayne and another v Global Natural Resources plc [1984] 1 All ER 225 considered; **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd.** [2009] 1 WLR 1405 applied; **Hampstead & Suburban Properties Ltd. v Diomedous** [1969] 1 Ch. 248 considered; **Digicel (Fiji) Ltd v Fiji Rugby Union and another** [2017] 2 LRC 97 considered; **Attorney General v Barker and another** [1990] 3 All ER 257 considered; **Michel Dufour and Others v Helenair Corporation Ltd** [1996] 52 WIR 188 applied.

JUDGMENT

- [1] **ELLIS JA:** This is an appeal by Villa Cornucopia Limited (“the appellant”) against the decision of the learned master dated 6th February 2023 by which he granted Esther Developments Limited (“the respondent”) an interim injunction against the appellant and ordered that costs of the application for interim injunctive relief be the respondent's costs in the claim.

Background

- [2] In 2021, the appellant purchased a parcel of land; Parcel 15 Block 4739B (“Parcel 15”), in a subdivision in Virgin Gorda known as Little Trunk Bay (“the Estate”). The respondent was the original developer of part of the Estate. When the respondent made a transfer of Parcel 15 in 1987, the original transferee at that time agreed to various covenants which were noted on the land register, including one in which she agreed ‘[t]o use the site for residential purposes only and to erect thereon no building other than one single family dwelling house...’.
- [3] The respondent is the original covenantee of the covenants recorded on the title to Parcel 15. The appellant is a successor in title to the original transferee. Parcel 15 is located in an area comprised of lands developed by the O’Neal brothers in the 1970s and 1980s. The O’Neal brothers sold 4 parcels directly to purchasers and imposed restrictive covenants on the titles of each such parcel. They then transferred the rest of the land to the respondent, which was their wholly owned and managed company. The respondent then sold the balance of the lands save for 2 parcels and imposed restrictive covenants in the transfer

documents of each parcel that it sold. For reasons unknown to the respondent, the Land Registry removed the covenants from certain of the parcels subsequently without informing the respondent. However, the covenants remained on the title to Parcel 15.

[4] Through a series of sales, Parcel 15 was sold to the appellant in January 2021. Prior to the sale of Parcel 15, and at the date of sale and transfer to the appellant, the incumbrances section of the Land Register in relation to Parcel 15 stated that '[t]ransfer together with the rights contained in the 1st Schedule hereto and subject to the covenants in the 2nd and 3rd Schedules hereto. See Inst# 506/1987'. The appellant was deemed to have had notice of the restrictive covenants on its title as to, inter alia, user of Parcel 15.

[5] Around February 2022, the appellant began operating an Inn on Parcel 15. The appellant also applied for a liquor licence to sell intoxicating liquor at the premises on 1st June 2022. The respondent communicated to the appellant that these actions were breaches of the restrictive covenant as to user of the premises both verbally and by letters on behalf of the Little Trunk Bay Homeowners on 30th September 2021 and 12th November 2021, before the appellant began operations, and on 25th February 2022 after the appellant began operations. Despite this, the appellant did not cease operations of the Inn.

The proceedings below

[6] On 14th November 2022, the respondent filed a claim against the appellant for a permanent injunction to restrain the appellant, whether acting by itself, its directors, employees, agents or otherwise howsoever from conducting the operations of an Inn on Parcel 15 or from otherwise using the property in a manner inconsistent with the restrictive covenants attached to the property. The respondent also claimed costs in those proceedings. On the same date, the respondent filed a notice of application for an interim injunction to similarly restrain the appellant pending the determination of the claim. In specific terms, the respondent sought relief as follows:

“1) An interim injunction restraining the [appellant] whether acting by itself and/or its servants and/or agents and/or any other person acting upon

the [appellant's] authority from using Parcel 15 Block 4739B Virgin Gorda South Registration Section located at Little Trunk Bay Estate, Virgin Gorda ('the Property') as an Inn or otherwise that for residential purposes or from erecting any building thereon other than a single family dwelling house and from using the Property otherwise than in accordance with the restrictive covenants recorded on the title to the Property in particular *'to use the site for residential purposes only and to erect thereon no building other than one single family dwelling house...'*;

2) Any further interim relief which the Court thinks is appropriate in the circumstances.

3) That the [appellant] bear the costs of this application.”¹

[7] The respondent contended that Parcel 15 was subject to a restrictive covenant which limits the appellant's use of the property 'for residential purposes only and to erect thereon no building other than one single family dwelling house'. Therefore, when the appellant began operating a commercial establishment, namely an Inn, on the property, thereby using it otherwise than for residential purposes only and the building thereon otherwise than as one single family dwelling house, it was in breach of the said covenant. The respondent further contended that it had a realistic prospect of success in the claim. It also asserted that damages were not an adequate remedy as unless restrained, the appellant's actions would alter the character of the neighbourhood and that any damage to the appellant by reason of the grant of an interim injunction could be quantified and paid by the respondent as it was able to meet such an award of damages.

[8] The appellant opposed the application arguing that it was aware of the restrictive covenants, however after seeking legal advice it was its understanding that the registered covenants were not enforceable. Therefore, the appellant asserted that it was not in breach of any covenant as the covenant sought to be enforced was not binding on it. The appellant further argued that other homeowners within the estate rented out their villas, accordingly, they have been used as a commercial operation and as such Little Trunk Bay was not a purely residential area. The only identified difference between the appellant's operations and the

¹ See Record of Appeal page 251.

other homeowners within the Estate was that it accepts separate bookings whilst all other villas accept only a single booking at one time.

- [9] In his judgment dated 6th February 2023, the learned master found that the evidence discloses serious issues to be tried, including whether as a matter of law the original covenantee retains the benefit of the covenant against subsequent owners; whether the burden of the covenant ran with the land; whether the appellant had notice of the covenant; and whether the subject property forms part of a scheme. The master also found that the balance of convenience favoured a compromise, i.e., the subject property was to be used in the manner that all other properties in the scheme were used before March 2022. The master further held that damages would not be an adequate remedy for the respondent; that in any event the appellant did not lead evidence of its ability to meet a claim in damages whereas the respondent did. The master therefore granted the interim injunction and granted the respondent its costs in the claim.

The appeal

- [10] On 16th February 2023, the appellant filed a notice of appeal challenging the decision of the learned master. The notice of appeal disclosed 8 grounds of appeal which the appellant condensed in its submissions into 3 main issues as follows:
- (i) whether the learned master erred in finding that damages would not be an adequate remedy for the respondent if he refused to grant the interim injunction and the respondent succeeded at trial;
 - (ii) whether the learned master erred in failing to hold that the respondent did not provide an adequate undertaking as to damages; and
 - (iii) whether the learned master erred in resolving the balance of convenience in favour of granting the interim injunction.

Appellant's submissions

- [11] In written submissions, the appellant recognised and accepted that appellate courts will only interfere with a trial judge's exercise of discretion in clear cases, i.e., the Court of Appeal will not disturb a decision unless it is shown that the exercise of the learned judge's discretion was plainly wrong. The appellant submitted the authority of **David Shimeld et al v Doubloon Beach Club Limited**,² which affirmed the principles in **Dufour and others v Helenair Corporation Ltd and others**,³ in support of this submission.
- [12] The appellant argued that contrary to the principles in **Shimeld** and **Dufour**, the learned master was repeatedly influenced by irrelevant factors and apparently failed to consider relevant ones and as a result his decision is plainly wrong and should be set aside.
- [13] The appellant relied on the decisions of the House of Lords in **American Cyanamid Co. v Ethicon Ltd**.⁴ and the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd (PC)**⁵ as authorities which provide the governing principles on the appropriate approach for interim injunctions. These authorities, the appellant submitted, outline a four-step approach to the consideration of whether to grant interim injunctions, as follows: (a) consider whether there is a serious issue to be tried (step 1); (b) if there is a serious issue to be tried, consider whether damages would be an adequate remedy for the applicant (step 2); (c) if damages would be an adequate remedy for the applicant, consider whether damages would be an adequate remedy for the respondent if the applicant can provide an adequate undertaking (step 3); and (d) where there is doubt as to the adequacy of damages, consider the balance of convenience (step 4).
- [14] This approach was not adhered to in the appellant's view. The appellant asserted that instead, the learned master's approach firstly accepted that there

² Saint Lucia Civil Appeal No. 33 of 2006 (delivered 23rd March 2007, unreported).

³ (1996) 52 WIR 188.

⁴ [1975] AC 396 (HL).

⁵ [2009] 1 WLR 1405; [2009] UKPC 16.

was a serious issue to be tried (step 1), then skipped to an assessment of the balance of convenience (step 4) without considering the adequacy of damages for the respondent (step 2) and then the appellant (step 3). The appellant stated that this flawed approach apparently contributed to the several errors in findings of law and fact challenged by the appellant.

[15] The appellant argued further that the learned master erred in finding that the appellant's actions of operating an Inn would constitute a breach of the promise of its predecessors in title which cannot be adequately compensated by an award of damages. The appellant submitted that any changes to the character of Parcel 15 would be irrelevant in a determination of whether the character of the neighbourhood had or would change. The appellant argued that similarly, an alleged breach by a defendant of promises made by its predecessors in title might assist in determining whether there are serious issues to be tried, but is totally irrelevant in considering the adequacy of damages.

[16] In oral submissions, Mr. Tom Roscoe, counsel for the appellant, sought to distinguish the nature of the restrictive covenant to which Parcel 15 is subject. He stated that describing the covenants as a 'single-residence covenant' is not an accurate label. He submitted that the covenant is split in two parts. Firstly, he dealt with the second part of the covenant which he referred to as the 'building restriction'. Mr. Roscoe said this part of the covenant limits the nature of the building that may be erected on the site, being a single family dwelling house, but says nothing about the use of the building. He stated that it is common ground that the appellant has not erected any new or different building on the site. For him, it is obvious that a building designed and erected as being suitable for a single family dwelling house may in fact be used for all manner of different purposes, including commercial purposes. Secondly, he referred to the first half of the covenant which limits how such buildings on the property may be used, and restricts the use to residential purposes. He then distinguished the language used in the covenant for Parcel 15 from other covenants which may specify, for example, that the use is limited to 'private residential purposes', or limited to 'residential purposes of a single family', or limited 'to be used as a single family dwelling house'.

- [17] The appellant also argued that its admittedly commercial operations could not change the character of the neighbourhood since all the other parcel owners were engaged in commercial operations and had been doing so for years. This meant that the residential character of the neighbourhood had already changed long before the appellant commenced its operations. The appellant asserted that the master appeared to place too much weight on the fact that the other homeowners take one booking per villa. For him, a single booking is not evidence that the other homeowners restrict reservations to a single family. Accordingly, since the appellant could not be responsible for changing the character of the neighbourhood in the circumstances, an award of damages was plainly an adequate remedy for the respondent. The appellant also asserted that the respondent's argument that damages would not be adequate because of its obligations to maintain the roadway would be more onerous, does not assist because there was no evidence before the master that the respondent had any obligations to maintain them. For the appellant, an award of damages would have been satisfactory, especially considering that on the respondent's case, any damages it received would likely be minimal and the learned master erred in finding otherwise.
- [18] Mr. Roscoe argued that the respondent, being the original covenantee, retains only two parcels at Little Trunk Bay, i.e., parcels 22 and 23. He stated that those parcels are the roads on the estate and the beach respectively. He argued that the fact that the respondent's parcels are not residential is crucially relevant to the nature and extent of the harm that the respondent might legitimately complain about suffering. For him, the situation would be quite different if it was a neighbouring residential occupier complaining about noise or disruption.
- [19] The appellant also submitted that even if the respondent was able to succeed on the issue of damages being an inadequate remedy for it, the learned master should have held that its undertaking as to damages would not sufficiently protect the appellant in the event that the appellant succeeds at trial. The appellant pointed out that, in his judgment, the master simply made reference to the competing submissions on the issue of the respondent's undertaking as to damages, without making any express finding on them. The master then

concluded that the appellant could not challenge the respondent's undertaking in damages because it did not lead any evidence of its ability to meet an order for damages. The appellant submitted that whether the appellant is able to satisfy an order for damages against it, is irrelevant to the questions raised regarding the respondent's ability to satisfy its own undertaking as to damages. It asserted that instead, the master should have concluded that the respondent's undertaking was insufficient because:

- (a) the effect of the injunction would not merely prevent the appellant from embarking on an activity; it would force it to terminate a business that it had been operating for almost a year, which would inevitably cause it to suffer loss;
- (b) there was no evidence that the respondent has any assets, except for the roadways and beach, which all the owners of parcel in the estate are entitled to use;
- (c) the Association which purported to indemnify the respondent was recently incorporated and has no known assets; and
- (d) in one of his affidavits in support of the injunction application, Dr. Robert Merrick, another parcel owner in the estate, stated that the Association authorised the taking out of a loan to support the undertaking. It was not clear who would be taking out the loan (i.e., Dr. Merrick, the Association or the respondent), however, what was clear was the absence of evidence that a loan had been obtained or that funds were available to satisfy an order for damages.

[20] The appellant insisted that in those circumstances the respondent had not provided an adequate undertaking as to damages and, therefore, the application for an interim injunction should have been refused.

[21] On the point of the learned master's finding in respect of the balance of convenience, the appellant submitted that on the authority of **American Cyanamid**, it is only where there is doubt as to the adequacy of the respective

remedies in damages available to either party that the question of the balance of convenience arises. The appellant argued that the master was heavily influenced by the restrictive covenant being noted on the appellant's land register and appearing to be enforceable, and further that the appellant is operating its villa in a different way from the other villa owners. The appellant submitted that because of this influence, the learned master took the wrong approach in assessing the balance of convenience. He stated that the master should have compared the effect the grant of the interim injunction would have on the appellant with the effect the continued operation of the Inn pending trial would have on the respondent.

[22] The appellant submitted that the interruption of its operations would cause greater inconvenience than any negative impact that its continued operation would have on the respondent. The appellant further took issue with the alleged negative impact on the respondent and submitted that in any event, such impact could not be established on the evidence.

[23] In support of this point, it relied on the pronouncements of Lord Diplock in **American Cyanamid**, who stated that '... to interrupt [the Defendant] in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of succeeding at trial'.⁶

[24] Accordingly, the appellant submitted that the master's conclusion on the fair compromise in allowing the property to be used in the manner in which all the other properties in the scheme were used is incorrect. In those circumstances, the balance of convenience was in favour of refusing the injunction and not granting it.

[25] For the above reasons, the appellant urged the Court to allow the appeal, set aside the decision of the learned master, dismiss the respondent's application

⁶ [1975] AC 396 (HL) at 408.

for an interim injunction and award the costs of the appeal and the application in the court below to the appellant.

Respondent's submissions

- [26] Mr. John Carrington KC, counsel for the respondent, set out foundationally that by virtue of section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**⁷ the court has jurisdiction to grant an interlocutory injunction when it is just and convenient to do so. He also relied on **Richard Wheeler Doherty v James Clagston Allman and W.C. Dowden**⁸ for the principle that once the court is satisfied that there is a claim with a real prospect of success that there is a breach of a restrictive covenant, the court leans towards the grant of an injunction. He insisted that the learned master applied the correct principles of law, considered the evidence before him, and did not take into account irrelevant considerations so that it cannot be said that in exercising his discretion in making his order he exceeded the generous ambit within which reasonable disagreement is possible.
- [27] It is worth noting here that in oral submissions, Mr. Roscoe challenged Mr. Carrington KC's application of the principle in **Doherty v Allman** to the present circumstances. Mr. Roscoe argued that the principle that courts tend to lean toward the grant of an injunction to restrain breach of negative covenants is one which applies when a court is considering a permanent injunction and not an interlocutory application for an interim injunction. In that regard, counsel relied on the case of **Planon Ltd v Gilligan**.⁹
- [28] Regarding the master's finding on the appellant's actions of running an Inn and its impact on the character of the property, Mr. Carrington KC argued that the master clearly accepted the respondent's evidence that '[m]ost of these properties have been owned by the same families for decades and the families spend significant periods of time at the homes and the homes are rented out only periodically when not in use by the family members. The rentals are always

⁷ Cap 80, Laws of the Virgin Islands.

⁸ (1878) 3 App Cas 709, 719-20; 729.

⁹ [2022] EWCA Civ 642.

to a single party of guests'. He stated that this was undisputed evidence before the master. In light of this, Mr. Carrington KC submitted that the master concluded, correctly, that the operation of an Inn where liquor is served is a commercial activity whereas short term rental of an entire house was not a commercial activity for the purpose of the covenants. He further submitted that the master's finding in this regard did not conflate the change of use of Parcel 15 with change of character of the neighbourhood but accepted that the former led to the latter, and in this sense no error of principle was committed.

[29] Mr. Carrington KC also submitted that when considering whether the appellant should be restrained from acting in breach of a covenant binding on it, the conduct of third parties is not relevant, even more so when the appellant admits the impugned conduct. He further argued that the change of character of the neighbourhood is not a necessary determinant of whether there was a breach of the restrictive covenant. Rather, it is a factor which the court could and did consider in the exercise of its discretion, but its absence does not mean that the breach of a restrictive covenant could not be arguably established on the facts. He relied on the case of **Doherty v Allman** in support of this point.

[30] As it relates to the adequacy of damages as a remedy for the respondent, Mr. Carrington KC argued that the master's finding that damages were not adequate was logical in light of his finding that there was a serious issue to be tried as to whether the appellant was in breach of the restrictive covenant. Furthermore, he stated, the appellant offered no evidence as to how damages would be an adequate remedy for the respondent if the injunction were refused and no evidence of the appellant's ability to meet any award of damages was provided. The respondent, however, provided such evidence of its ability to meet any award of damages based on its undertaking. He submitted that the learned master acted correctly in accordance with the **American Cyanamid** principles and committed no error in principle in this regard.

[31] Mr. Carrington KC argued further that the master's determination on the balance of convenience be impugned because in coming to his conclusion that the balance of convenience favoured the grant of the injunction, the master correctly

applied the legal test under **National Commercial Bank Jamaica Ltd v Olint Corpn**, correctly considered the status quo ante, the appellant's impugned acts, and the matters raised by the appellant as to the prejudice it would suffer from the grant of the injunction.

[32] In oral submissions, Mr. Carrington KC also submitted that the case of **John Trenberth Ltd v National Westminster Bank Ltd and another**¹⁰ is authority for the point that an injunction may be given even where the prejudice to be suffered is slight. He argued further that the covenants imposed on the land are geared at preserving a certain character of the land and if any activity is threatened or is being done that runs contrary to this, that in itself is a prejudice to the covenantee.

[33] Mr. Carrington KC concluded that the master's decision shows that he considered the correct principles of law and all the relevant factors and weighed the consequences of the grant of an injunction before concluding upon what he considered to be the course of least irremediable prejudice to both parties, especially the appellant. Accordingly, he submitted that the appeal should be dismissed with costs to the respondent.

Discussion

The applicable principles

[34] Section 24 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** gives the court jurisdiction to grant an interim injunction where it appears just and convenient to do so. Rule 17.1(1)(b) of the **Eastern Caribbean Supreme Court Civil Procedure Rules, 2000** ("CPR") also confers discretion upon the court to grant interim injunctive relief.

[35] The starting point for the grant of injunctive relief is the well-known test set out in **American Cyanamid** namely whether there is a serious question to be tried, whether damages would be an adequate remedy, and where the balance of convenience lies. The decision of the master was an exercise of discretion and

¹⁰ [1980] 1 EGLR 102.

this court will not overturn that decision unless it is demonstrated that the bases on which this discretion was exercised may be disturbed.¹¹

[36] The master accepted that there was a serious issue to be tried and that the evidence does disclose serious issues to be tried. At paragraph 18 of the judgment the master stated:

“Among the issues evident from the evidence are: whether as a matter of law the original covenantee retains the benefit of the covenant against subsequent owners; whether the burden of the covenant ran with the land; whether the Defendant had notice of the covenant; and whether the subject property forms part of a scheme. All of these are serious issues to be tried.”

[37] I am in agreement with the master’s finding above and find that the first limb of the test is satisfied.

[38] The appellant submitted that the master took a flawed approach in considering the principles under the **American Cyanamid** test by considering the balance of convenience before addressing the issue of adequacy of damages. At the core of this submission is the contention that judicial authorities commend a rigid four stage approach to the consideration of whether to grant interim injunctions. According to counsel for the appellant, having accepted that there was a serious issue to be tried (step 1), the learned master then skipped to an assessment of the balance of convenience (step 4) without considering adequacy of damages for the applicant (step 2) and then respondent (step 3). Counsel submitted that it is this flawed approach which contributed to the several errors in findings of law and fact.

[39] Having considered the wealth of judicial authorities which address this issue, there can be no doubt that the **American Cyanamid** case contains no more than a set of useful guidelines which a court may apply in many cases. In **N.W.L Ltd v Woods**¹² Lord Diplock stated the position in the following terms:

¹¹ GDAHCVAP2007/0008 O’Handley McKenzie v Dorris Mitchell et al (delivered 13th August 2007, unreported) at para 11.

¹² [1979] ICR 867 at 880.

“My Lords, when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396 to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid Co. v. Ethicon Ltd.*, which enjoins the judge upon an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious question to be tried, was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interests to proceed to trial.” (Emphasis added)

- [40] In **Cambridge Nutrition Ltd v British Broadcasting Corp**¹³ Kerr LJ provided the following useful guidance:

“It is important to bear in mind that the *American Cyanamid* case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. The *American Cyanamid* case is no more than a set of useful guidelines which apply in many cases. It must never be used as a rule of thumb, let alone as a strait-jacket. ...The *American Cyanamid* case provides an authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial. In my view, for reasons which require no further elaboration, the present case is not in that category. Neither side is interested in monetary compensation, and once the interlocutory decision has been given, little, if anything, will remain in practice.”

- [41] The Manitoba Court of Appeal in **Apotex Fermentation Inc v Novopharm Ltd**¹⁴ expressed the following which I find particularly useful:

“[14] ... Ordinarily, however, the three requirements which are usually necessary to support injunctive relief are to be considered, not as separate hurdles but as interrelated considerations. The approach which will normally be taken by the court in considering an interlocutory injunction is set forth in R.J. Sharpe, *Injunctions and Specific Performance* (2nd Ed. 1992) at pp. 2, 32, 34:

The terms 'irreparable harm', 'status quo' and 'balance of convenience' do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not

¹³ [1990] 3 All ER 523 at 534.

¹⁴ [1994] 7 W.W.R. 420 at 423-424; (1994) 95 Man. R. (2d) 241 (CA).

to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another... 'it is not necessary ... to follow the consecutive steps set out in the American Cyanamid judgment in an inflexible way; nor is it necessary to treat the relative strength of each party's case only as a last step in the process'.

The checklist of factors which the courts have developed - relative strength of the case, irreparable harm and balance of convenience - should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief."

- [42] The Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** in the clearest of terms made clear that 'a box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction'. Further, the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.
- [43] Ultimately, I can only reiterate that the overarching and indeed the only principle is the statutory power of the court to grant interim injunctions when it is **just or convenient** to do so. There is therefore no rigid four stage approach by which a court is to exercise its discretion.
- [44] Turning to the present case, I do not think that it is a reasonable inference from the terms in which the master expressed his judgment that he 'skipped a step'. It is clear that at paragraphs 33 to 39 of the judgment, the master specifically treated with the adequacy of damages and made certain findings following his analysis of the parties' cases. The fact that this analysis sequentially followed his assessment of the balance of convenience is not indicative of a misdirection or a flawed approach. Certainly, the appellant has not demonstrated how this approach contributed to any errors in his statements of law and findings of fact. Accordingly I find no merit in this submission.

Whether the master erred in finding that damages would not be an adequate remedy

[45] The master found that if injunctive relief was not granted, damages would not be an adequate remedy since the appellant would continue to operate an Inn in the face of covenants while the trial process took its course. Thus, such a change of character of the neighbourhood could not be adequately compensated by an order for damages.

[46] The master agreed with the respondent in its submissions that damages are not an adequate remedy because if the appellant were to continue to operate the Inn, there is a risk that the character of the neighbourhood will be changed. At paragraphs 35 to 36 of the judgment the learned master stated:

“[35] There is also the question of any changes to the character of the subject property. The evidence is that the Defendant has transformed the existing building into an Inn. If the Claimant is successful at trial such acts would be in breach of the promise of the Defendant’s predecessors in title. These covenants were created by the Claimant to ensure a particular character of the scheme it created, it asserts.

[36] I do not accept that such a change in character of the neighbourhood can be adequately compensated by an order for damages. If injunctive relief is not granted, the Defendant will continue to operate an Inn in the face of the covenants while the trial process takes its course. This in my view ought not to be permitted.”¹⁵

[47] The appellant asserted that the master’s reasoning was plainly wrong on multiple bases. First, it says that any ‘changes to the character’ of Parcel 15 would be irrelevant in a determination of whether the character of the neighbourhood had or would change. Counsel submitted that it is clear that in all cases where a claimant is seeking to enforce a restrictive covenant, the defendant would have allegedly changed or threatened to change its property. Counsel further submitted that while an alleged breach by a defendant of promises made by its predecessors in title might assist in determining whether there are serious issues to be tried, it is totally irrelevant in considering the adequacy of damages. Secondly, counsel submitted that despite accepting that almost all owners of parcels in the Estate are carrying on commercial activities

¹⁵ Record of Appeal pg 23.

in breach of the relevant covenant, the learned master failed to recognise that this was indicative of the fact that the residential character of the neighbourhood had already changed long before Villa Cornucopia commenced its operations. The appellant takes issue with the fact that the master appeared to place too much weight on the fact that the other homeowners take one booking per villa since a single booking is not evidence that the other homeowners restrict reservations to a single family. Counsel for the appellant concluded that Villa Cornucopia could not be responsible for changing the character of the neighbourhood which was not 'purely residential prior to the commencement of Villa Cornucopia's operations', and 'therefore an award of damages was plainly an adequate remedy for Esther Developments.'¹⁶

[48] The appellant's argument in my view ignores the fact that the hearing of an application for an interim injunction is not a trial on the merits.¹⁷ Rather, the interim injunction is an order made for the duration of the litigation or part of it, at the request of a litigant (whether claimant or defendant) in order to protect that party's rights until the court can finally adjudicate the dispute.¹⁸ There is little opportunity to test evidence and the full remit of pre-trial processes has not been engaged. It follows that the approach applied must be different because neither side's case can be said to have been 'proved' as at a final hearing. It is therefore not the role of a court in considering the grant of an interlocutory injunction to make final findings of fact.

[49] The Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd** held that the purpose of an interim injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. 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. The Board at paragraph 16 stated:

“... At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just

¹⁶ Appellant's Skeleton submissions filed on 16th February 2023 at paragraph 27.

¹⁷ *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396, 407G-408B.

¹⁸ Halsbury's Laws of England, Civil Procedure (2020) vol 11, paras 1-496; (2020) vol 12, paras 497-1206; (2020) vol 12A, paras 1207-1740, Power to grant interim injunction relief (Power to grant injunctions).

result ... Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.”

[50] The Board went on further at paragraphs 18 and 19 to state:

“18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19. ...[T]he underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.”

[51] Having reached the conclusion that there is a serious issue concerning the enforceability of the covenant which should be ventilated at trial, this was sufficient. The master was not obliged to make findings which are properly within the remit of the trial court after hearing and assessing the totality of the evidence.

[52] I do not consider, on the evidence, that the master erred in finding that damages would not be an adequate remedy at this stage. The master was not making any final decisions. Nothing he said would bind the trial judge.

[53] The appellant's submissions also fail to grasp that in the context of a negative covenant, an assessment of the adequacy of damages is not typical. First it is not essential that a litigant prove substantial damage. The learned authors in **Halsbury's Laws of England**¹⁹ noted that:

“A person who acquires land with notice of a restrictive covenant affecting its use may be restrained by injunction from using it in breach of the covenant.... It is not essential to prove substantial damage. The test for whether a covenant has been breached is an objective one, that

¹⁹ Halsbury's Laws of England, Real Property and Registration (2022) vol 87, Restrictive Covenants, Remedies for Breach of Restrictive Covenants.

is, whether a reasonable person having regard to the ordinary use of the property would be annoyed by the activity in question.”

[54] In **Doherty v Allman** the rationale and approach of the court was well explained at page 729 of the judgment:

“Wherever a consideration of a covenant, and examination into its words and meaning, reveal that the plain intention of the parties was that the lessee might have possession of the land, whatever it may be, on the express bargain that a particular structure was to be kept up, or a particular thing was not to be done, and that the lessor stipulated for that, and the lessee came in and took possession of the premises on the terms that he was to keep that bargain, there, as a general rule, the Court of Equity would not do its duty if it did not enforce the contract, because mere damages would not then afford a sufficient or adequate remedy. A very good instance of it was in the case (1) where it appeared clearly that the landlord of a house for some reason, no matter what, thought it desirable for him that the house should not be used as a ladies school, and accordingly he in express terms in the contract under which he let the house, bargained that it should not be used as a ladies school, and a tenant, or an assignee of the tenant, came in, and occupied the premises under the contract, and yet proceeded to use them as a ladies school. In such a case I say it would have been monstrous if a Court of Equity had for a moment hesitated, and had said that the using of the premises as a ladies school would do the landlord no harm. The answer would be plain, whether the damages were great or little, the very bargain, on which the premises were taken, was that the tenant or his assignees should not use them as a ladies school, and therefore he should of course be prevented from doing so.”

[55] The court clearly recognised that damages might not always afford a sufficient or satisfactory remedy and that equity would therefore need to interfere to prevent a mischief for which damages might never give a satisfactory compensation. The dictum of Lord Cairns L.C. in **Doherty v Allman** has been consistently applied in subsequent decisions,²⁰ and it has been determined that it can be equally applied to interlocutory applications.²¹ It has been suggested that the obvious rationale behind the rule in **Doherty v Allman** is the sanctity of contract and I concur with that view. Where an injunction is sought to restrain a

²⁰ The rule in *Doherty v Allman* has been followed for nearly a century and a half in cases where a violation of a negative covenant was sought to be restrained by an interlocutory injunction, such as *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, *Hampstead & Suburban Properties Ltd v Diomedous* [1968] 3 All ER 545, *A-G v Barker* [1990] 3 All ER 257, *Bingham v 7-Eleven Stores Pty Ltd* [2002] QSC 209 (affd [2003] QCA 402), *Nike European Operations Netherlands BV v Rosicky* [2007] EWHC 1967 (Ch), *Bulldog Rugby League Club Ltd v Williams* [2008] NSWSC 822 and *Araci v Fallon* [2011] EWCA Civ 668.

²¹ *Hampstead & Suburban Properties Ltd. v Diomedous* [1969] 1 Ch. 248.

violation of a negative covenant, courts have generally paid less regard to the question of the amount of damage or of injury likely to be suffered by the applicant and more to the negative bargain which the parties would have freely made. Lord Blackburn's speech in **Doherty v Allman** at pages 729 to 730 explains the view:

"I will take the question of the covenant in the contract first. Wherever a consideration of a covenant, and examination into its words and meaning, reveal that the plain intention of the parties was that the lessee might have possession of the land, whatever it may be, on the express bargain that a particular structure was to be kept up, or a particular thing was not to be done, and that the lessor stipulated for that, and the lessee came in and took possession of the premises on the terms that he was to keep that bargain, there, as a general rule, the Court of Equity would not do its duty if it did not enforce the contract, because mere damages would not then afford a sufficient or adequate remedy."

[56] The learned master was clearly seized of the peculiar factual context. This is revealed in his analysis at paragraphs 35 to 36 of the judgment.

[57] By way of illustration, in **Chatsworth Estates Company v Fewell**²² the court was considering a case where the plaintiffs sought to enforce a restrictive covenant against using a property 'otherwise than as a private dwelling-house'. The court held that although many flats had been erected and a few boarding houses and schools had come into existence in 'technical breach of the covenants', the covenants remained enforceable although a court may rule that a restrictive covenant has ceased to be enforceable through obsolescence. Farwell J indicated that in order to succeed on the ground that the character of the area had changed, the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all. The court further held that these acts and omissions did not prevent the plaintiffs from restraining the defendant from using his house as a guest house and granted the injunctive relief sought.

[58] Farwell J expressed at page 233 that '[d]amages are no remedy, because the object of the covenant is not to make persons pay for committing breaches but

²² [1931] 1 Ch 224.

to prevent those breaches.’ The Privy Council in **Singh v Rainbow Court Townhouses Ltd**²³ was content to adopt the approach of Farwell J in the **Chatsworth Estates** case.

[59] In my judgment, the potential change of character of the neighbourhood is not a necessary determinant of whether there was a breach of the restrictive covenant. Rather, it is a factor which the master could properly consider in the exercise of his discretion. Such a determination is clearly a matter that was within the proper exercise of his discretion. Moreover, even if this Court were to hold a contrary view, this is not sufficient to set aside his decision.

Whether the learned master erred in failing to hold that the respondent did not provide an adequate undertaking as to damages

[60] At paragraph 37 of his judgment, the learned master recorded the submissions made by the appellant to the effect that the undertaking as to damages offered by the respondent was insufficient because the respondent had not provided any evidence that it had assets capable of satisfying any order for damages. This submission was premised on the respondent’s indication that it is in a position to meet any order for damages because it had received authorisation from the Homeowners Association to borrow up to USD \$50,000.00 to satisfy any order for damages. It is apparent that the master was satisfied with this proposal, and at paragraphs 38 to 39 of his judgment he reasoned that since the appellant had not led any evidence of its own ability to meet any order for damages it did not fall to it to take issue with the respondent’s undertaking.

[61] The appellant, however, submitted that there was undisputed evidence before the master that Villa Cornucopia owns a parcel on which a substantial villa has been erected. The appellant further submitted that there is evidence that it was currently operating a commercial enterprise which indicated its ability to satisfy an award of damages, especially considering that even on the respondent’s case, any damages it received would likely be minimal.²⁴ Moreover, while there was evidence that the Homeowners Association authorised the taking out of a

²³ [2018] UKPC 19.

²⁴ Appellant’s Skeleton submissions filed on 16th February 2023 at paragraphs 30 and 31.

loan to support the undertaking, it was not clear who would be taking out the loan (i.e., Dr. Merrick, the Association or Esther Developments). Moreover, counsel for the appellant submitted that the Association which purported to indemnify the respondent was apparently recently incorporated and has no known assets. So that in the absence of evidence that a loan had been obtained or that funds were available to satisfy an order for damages, it could not be said that the respondent had provided an adequate undertaking as to damages and the injunction should have been refused on that basis.

[62] While I accept that one party's ability to satisfy an order for damages would have little relevance in determining the adequacy of the other side's undertaking, I find little merit in this ground of appeal. The **American Cyanamid** decision made clear that before a court will grant an interlocutory injunction, the party seeking the order will almost always offer or be required to give to the court the 'usual undertaking as to damages'. The 'usual undertaking as to damages' if given to the court in relation to any interlocutory order made by it, is an undertaking to submit to such order (if any) as the court may consider to be just for the payment of compensation, (to be assessed by the court or as it may direct), to any person, (whether or not that person is a party), affected by the operation of the order or undertaking or any continuation (with or without variation) of the order or undertaking; and to pay the compensation to the person affected by the operation of the order or undertaking.

[63] Of course, the fact that a claimant is funded by a third party or of limited means would not preclude the grant of an injunction in a proper case with an undertaking in damages being given even though it is likely to prove of very little worth.²⁵ It is entirely open to a court to overlook the inability of a claimant to provide the appropriate undertakings where the consequences of being denied an interlocutory injunction are serious. In other words, each case turns on its own facts. Lord Denning MR in **Allen and others v Jambo Holdings Ltd. and others**²⁶ expressed the position in the following terms:

²⁵ *Allen and others v Jambo Holdings Ltd. and others* [1980] 1 WLR 1252.

²⁶ [1980] 1 WLR 1252 at 1256-1257.

“It is said whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a *Mareva* injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.”

- [64] The lack of worth of a potential undertaking was considered in the matter of **Cambridge Credit Corporation Ltd (Receiver Appointed) v Surfers' Paradise Forests Ltd**²⁷ where Dunn J considered an undertaking as to damages by an impecunious plaintiff. At page 264 of the judgment, the court held that:

“The lack of worth in the undertaking is therefore in my opinion a **potent factor** to take into account when deciding whether to make an order which must be based upon a **provisional opinion** concerning the questions of fact and law argued before me... In my opinion an undertaking **may be illusory for reasons** other than the shadowy nature of the claim. It may be illusory if it is and is known to be words without substance, in which case it is difficult to my mind to see how it be given in good conscience.” (Emphasis added)

- [65] Justice Dunn held that it is the duty of the court to protect a respondent in such circumstances. Where there are doubts raised about a claimant's resources, the court has the discretion to require either security or payment of money into court to fortify the undertaking or (as an alternative) an undertaking from a more financially secure person or body.
- [66] In this appeal it is clear that the respondent's financial resources were relevant to the court's exercise of discretion to make an interlocutory injunction and that in fact it did adduce evidence of its financial capacity to meet the undertaking. The learned master was clearly satisfied of the terms of the proposed undertaking and had no doubt as to the financial security of the funder. I can

²⁷ [1977] Qd R 261.

see no basis to interfere with that finding of fact. This is especially so when there is no evidence of the appellant actively seeking fortification of that undertaking.

[67] In considering this ground of appeal, I am guided by the dictum in **Frank Industries PTY Ltd v Nike Retail BV and others**²⁸ where the Court of Appeal at paragraph 17 stated the following:

“17. We are not hearing an application for an interim injunction but an appeal. The question is not whether we would have made the same order as the judge, but whether the judge was wrong to make the order that he did. I do not consider that these alleged failings and the judge's treatment of the evidence are such as would entitle an appeal court to intervene. Even where a trial judge evaluates evidence given in writing without the benefit of live evidence an appeal court should generally respect his evaluation.”

[68] Accordingly, I do not consider that there is any flaw in the master's reasoning in so far as it concerns the undertaking as to damages. It cannot be said that the judgment is plainly wrong and there is no reason to disturb the finding on this issue.

Whether the learned master erred in resolving the balance of convenience in favour of granting the interim injunction.

[69] The appellant's contention was that there was no need for the learned master to have considered the balance of convenience because there was clear evidence that damages would have been an adequate remedy for the respondent. For the reasons already indicated I do not agree with that submission.

[70] The appellant further contended that in any event, the master should have also decided this issue in favour of refusing the injunction.

[71] The appellant averred that in considering this issue, the master was heavily influenced by the fact that: (a) the covenant is noted on Villa Cornucopia's land register and appears to be enforceable; and the fact that (b) Villa Cornucopia is operating its villa in a different way from the other villa owners. Counsel for the

²⁸ [2018] EWCA Civ 497.

appellant submitted that in assessing the balance of convenience, this was the wrong approach. According to counsel, the master should have compared the effect the grant of the interim injunction would have on Villa Cornucopia with the effect the continued operation of the Inn pending trial would have on the respondent. Had the master done so, the appellant submitted that he would have found that the balance of convenience strongly favoured the refusal of the injunction because the only prejudice the respondent claimed it would suffer in the interim pending trial is the alleged change in the character of the neighbourhood and 'a more onerous obligation' to maintain the roadways. This in circumstances where other villas accommodate the same or a larger number of guests and offer the same or additional facilities. Whereas the evidence was that Villa Cornucopia had been operating an Inn for a year and so the interruption of its operations would cause greater inconvenience to it than any negative impact that its continued operation would have on the respondent, which impact, in any event, could not be established on the evidence.

[72] In **Cayne and another v Global Natural Resources plc**.²⁹ May LJ explained the balance of convenience in terms with which I am in full agreement:

“...the balance that one is seeking to make is more fundamental, more weighty than mere ‘convenience’. I think that it is quite clear...that, although the phrase may well be substantially less elegant, the ‘balance of the risk of doing injustice’ better describes the process involved.”

[73] Following the guidance from the Privy Council in the **National Commercial Bank Jamaica Ltd v Olint Corpn**, a court should therefore seek to avoid irreparable damage and harm to either party while recognising its decision, whether in favour or against the grant of an injunction, will inevitably involve some disadvantage to one or the other side which damages cannot compensate. It is the extent of this uncompensable disadvantage which is a significant factor in determining the balance of convenience.

[74] The master would have had to have regard to the peculiar legal context of this case. This is clear, because the way in which courts apply the balance of

²⁹ [1984] 1 All ER 225 at 237.

convenience test varies from case to case. For example, the fact that an injunction would cause disproportionate harm to a start-up business, has been held to be a determinative factor³⁰ whereas the fact that an injunction, against unlawful use of information, may drive a start-up into liquidation, was regarded as of no consequence.³¹

[75] Since the **American Cyanamid** decision, the courts at all levels have formulated a number of special categories of cases in which any one of the stages may be given scant weight or ignored. One such category is that of prohibitory injunctions enforcing negative covenants between parties. This is well illustrated in the case of **Hampstead & Suburban Properties Ltd. v Diomedous**³² in which a licence between the landlords of leasehold premises, the tenant and the defendant, (expressed to be supplemental to the lease), provided for the assignment of the lease to the defendant with a change of the user clause enabling the premises to be used as a licensed restaurant. The defendant covenanted to pay additional rent, not to permit music or musical instruments to be played within the premises in such a manner as to be audible to the extent of causing a 'nuisance or annoyance' to neighbours including occupiers of the landlords' flats above the premises and, if any complaints were received by the landlords from the occupiers, forthwith to discontinue the playing at the landlord's request until such time as 'effective soundproofing' was completed.

[76] The lease was assigned, music began to be played, and the landlords received complaints from their tenants occupying flats above. In order to avert an application for an injunction the defendant undertook to suspend the playing of music until soundproofing had been completed. The soundproofing was not completed and the music continued unabated. The landlords issued a writ and applied for interlocutory injunctions, in the terms of the licence, to restrain the defendant from playing music and musical instruments so as to cause nuisance or annoyance to neighbours, including the occupiers of the landlords' flats, and

³⁰ Lock International Plc v Beswick and others [1989] 3 All ER 373.

³¹ Roger Bullivant Ltd and others v Ellis and others [1987] ICR 464, CA.

³² [1969] 1 Ch. 248.

to discontinue playing until such time as effective soundproofing had been completed. The landlords adduced evidence that occupiers of the flats had been unable to sleep because of the music. The defendant adduced no evidence but contended that injunctions should not be granted pending trial of the action since the covenants were too uncertain, that there was no evidence that the landlords had suffered damage, that they had suffered no serious damage so that any loss until trial could be dealt with by damages, and that the balance of convenience favoured a discretionary refusal in that the defendant was profiting by the playing.

[77] Megarry J (in a judgment which has since been consistently followed)³³ held that where a covenantor was in clear breach of an express prohibition, the court, in the absence of special circumstances, would grant an interlocutory injunction enjoining him from breaking his negative bargain, for there was no reason why he should be freed from his obligations until the trial of the action. Accordingly, as the defendant had acted in prompt and flagrant breach of his covenants and undertaking and there was no substance in the contentions that the landlords had suffered no damage or that the transaction was tainted with lack of enforceability, and the defendant's claim based on the balance of convenience was without merit, the interlocutory injunctions would be granted.

[78] Importantly, the learned judge applied the dictum of Lord Cairns L.C. in **Doherty v Allman** and determined that it equally applied to interlocutory applications. At page 259 of the judgment Megarry J observed:

“Thirdly, there is *Doherty v. Allman*. I accept, of course, that Lord Cairns' words were uttered in a case where what was in issue was a perpetual injunction and not an interlocutory injunction. Indeed, the words seem to be obiter, for no negative covenant was present in that case. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation

³³ Digicel (Fiji) Ltd v Fiji Rugby Union and another [2017] 2 LRC 97; Araci v Fallon [2011] EWCA Civ 668 ; Shephard and others v Turner and Another [2006] EWCA Civ 8.

falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairns' statement come into its own. Indeed, Lord Cairns' express reference to "the balance of convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligations until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is."

[79] Megarry J then went on to make the following critical finding:

"Finally, there is the balance of convenience. To say that the inconvenience to the plaintiffs is "nil," and that to them the case is "essentially trivial," seems to me as much an exaggeration as to say that the loss to the defendant will be "incalculable." I have already dealt with the injury to the plaintiffs, and I need say no more about it. The defendant's claim is, in essence, that he will suffer an "incalculable loss" if he is not permitted to continue his plain breach of the obligations which he so recently entered into and voluntarily undertook when he became an assignee of the lease. Stripped of the persuasions of Mr. Weeks's advocacy, the proposition is: "I am making handsome profits by doing what I covenanted and undertook not to do: therefore it would be wrong for the court to stop me." I can conceive of few propositions calculated to appeal less to equity."³⁴

[80] Applying the rule enunciated by Lord Cairns LC in **Doherty v Allman**, the courts have therefore emphasised the need to enforce negative covenants expeditiously. However, in recent times the courts have prescribed a cautious approach. In **Digicel (Fiji) Ltd v Fiji Rugby Union and another**³⁵ the English Supreme Court made the following observation:

"In my opinion, the rule in *Doherty v Allman* has to be applied with caution. Lord Cairns LC conceived the rule as a basis for restraining those who promise not to do something and act in clear violation of their promise. Such a rule has its value, and a court of equity will assist the party affected by a blatant violation of the negative covenant."

[81] The Supreme Court appeared to endorse the more refined approach which was observed in **Attorney General v Barker and another**³⁶ where a member of the

³⁴ *Doherty v Allen* [1969] 1 Ch. 248 at 260.

³⁵ [2017] 2 LRC 97 at 129-130, para 108.

³⁶ [1990] 3 All ER 257.

Royal household had by his contract of employment undertaken not to publish any information concerning a member of the family which came to his knowledge during his employment. Lord Donaldson MR had to consider the rule in **Doherty v Allman**. In the course of his judgment, Lord Donaldson described the case as a 'simple case of someone who has entered into a negative covenant for a consideration where the covenant is not limited territorially and is not limited in time', and observed that 'in such circumstances the courts habitually enforce the covenant provided only that the covenant itself cannot be attacked for obscurity, illegality or on public policy grounds such as that it is in restraint of trade'.³⁷

[82] In this appeal, I believe the critical indication of the learned master's approach is set out at paragraph 32 of his judgment where he found:

“[32] In my view balancing the claimant's right to enforce a covenant in its favour and the Defendant's right to use the subject property a fair compromise is that the subject property be used in the manner that all other properties in the scheme was used before March 2022.”

[83] In my judgment, the master's approach appears to be consistent with the case law. He clearly recognised that the dispute between the parties involved a negative covenant of some vintage which he was obliged to accord appropriate weight. However, the master's analysis did not stop there as he clearly took the view that the appellant already had bookings between 25th November 2022 to 28th February 2023 and that the balance of convenience would not favour the grant of an injunction during this period. The master was of the view however that the appellant should be restricted in its use of the subject property after this period only to the extent that its use was consistent with all other users. The master indicated that he took into account that the appellant has been operating as an Inn for less than one year whereas the covenant sought to be enforced had been in existence for over thirty years. Clearly seized of the potential impact on the appellant, at paragraph 31 the master stated:

“[31] The Defendant is not being restricted from renting the subject property. It is being restricted from turning the subject property

³⁷ Ibid at 260.

into a purely commercial operation and changing the character to something other than a single-family dwelling house.”

[84] I remind myself of the dicta of Floissac, CJ in **Michel Dufour and Others v Helenair Corporation Ltd.**³⁸ where he observed:

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.

[85] I am not satisfied that the learned master’s exercise of discretion in this appeal runs afoul of any of these criteria. Consequently, I am of the considered view that the conclusion which the master reached in granting the interim injunction was open to him on the facts, and I find no basis to interfere with it.

[86] Accordingly, I would make the following orders:

- (i) The appeal is dismissed.
- (i) The judgment of the master in the court below is affirmed.
- (ii) The respondent will have its costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

I concur.
Trevor Ward
Justice of Appeal

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar

³⁸ [1996] 52 WIR 188.