

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2023/0459

BETWEEN:

[1] JON WHYTE

[2] ROSE-ANN KIM

[3] SYLVESTER BROWN

Applicants

and

[1] KWAME GALLOWAY

[2] SOCIAL SECURITY BOARD OF CONTROL

Respondents

APPEARANCES:

Mr. Justin Simon KC with Mr. Kwame Simon of counsel for the Applicants

Ms. Leandra Smith of counsel for the First Respondent

2024: January 19th
26th

DECISION

[1] **WILLIAMS, J.:** This is an application for an urgent interim injunction filed by the Applicants Jon Whyte, Rose-Ann Kim and Sylvester Browne on 15th December 2023. The Applicants seek the following interim relief:

1. The Respondents and all other persons or entities acting under the Respondents control or direction are restrained from reopening the bar and nightclub owned and operated by the First Respondent known as Galloway's 8 ball Sports Bar and located at WEST CENTRAL, Block: 11 2291 54 in the

Paynter's Development a residential community, until further Order of the Court or final determination of this matter.

2. The Applicants' file their substantive claim on or before 31 January 2024.

3. Costs of this application be costs in the cause.

[2] The Applicants and the First Respondent Kwame Galloway are residents of Paynter's Development a community in St. George, Antigua. The Second Respondent the Social Security Board of Control (a statutory body) is the original vendor of the lots in the area where the Applicants and the First Respondent reside.

[3] The Applicants complain that the First Respondent intends to operate a bar and nightclub in their neighbourhood which is a residential community. The Applicants allege that this is in breach of restrictive covenants which are in force in the area and further that the operation of the bar and nightclub will cause a nuisance through noise and the influx of strangers which may in turn lead to an increase in crime.

The Proceedings

[4] Upon the application being brought to the court's attention on Monday 18th December 2023, directions were immediately issued for the filing of documents to facilitate a hearing on 19th January 2024. Accordingly, the following documents are before the court:

1. Notice of Application filed on 15th December 2023;
2. Joint Affidavit of the Applicants with Exhibits filed on 15th December 2023;
3. First Respondent's Affidavit in Response filed on 8th January 2024;
4. Applicant's Affidavit in Reply filed on 15th January 2024;
5. First Respondent's Submissions filed on 17th January 2024;

6. First Respondent's Submissions filed on 17th January 2024.

- [5] At the hearing of 19th January 2024, oral submissions were made on behalf of the Applicants and the First Respondent. The Second Respondent although served has not participated in the proceedings. This matters not as it is clear that the interim relief may only be obtained against the First Respondent the alleged operator of the bar and nightclub.

Applicants' Evidence

- [6] In their joint affidavit the Applicants state that the First Respondent previously operated the bar and nightclub from 2021 to August 2022 when he ceased operations as a result of an enforcement notice issued by the Development Control Authority (DCA). The Applicants allege that during this period they were subjected to noise in the form of loud music, loud patrons of the bar and nightclub and loud vehicles. The Applicants also complain about the First Respondent's patrons littering and parking in the community's green area.
- [7] The Applicants further depose that the lots in the area are subject to restrictive covenants which would prohibit the use of the Applicant's property as a bar and nightclub. The First Respondent commenced proceedings (ANUHCV2023/0180) against the Second Respondent seeking the discharge of the said covenants. These proceedings were settled by a consent order dated 30th September 2023 between the parties whereby the Second Respondent discharged the restrictive covenants prohibiting commercial activities in relation to the First Respondent. The Applicants applied to intervene in those proceedings, but their application was dismissed by order of the High Court made on 5th December 2023. The Applicants therefore state that as a result, the First Respondent will now be able to recommence operations of the nightclub and bar.
- [8] The Applicants accordingly fear that they will suffer irreparable harm due to nuisance and the breach of covenant if the First Respondent is permitted to recommence operation of his bar and nightclub. They therefore seek an injunction

to restrain the reopening of the establishment pending the determination of these proceedings.

First Respondent's Evidence

- [9] The First Respondent by affidavit filed on 8th January 2024 vehemently disputes that he is in breach of covenant and counters that there is no noise emanating from his premises. He points out that the Applicants have not disclosed any reports to the Police of any noise, nor have they provided any photographic or video evidence of any nuisances complained of.
- [10] Mr. Galloway also describes that he engaged a sound engineer to carry out tests at his premises. The sound engineer's report which is annexed to his affidavit essentially states that even if Mr. Galloway's sound system is operated inside the building at maximum volume, the sound "would not present any inconvenience or disturbance to the immediate surroundings."
- [11] The First Respondent further states that the character of the neighbourhood has changed over the past eighteen years and the area is no longer strictly residential. In this regard he points out that there is a superette (small supermarket), an auto body repair shop and a block of apartments in the area.
- [12] Mr. Galloway also challenges the Applicants' standing to bring this application. He states that he is an original purchaser from the Second Respondent. Thus, the covenants in his instrument of transfer are only enforceable as between him and the Second Respondent. He further alleges that the issues raised in this application are a regurgitation of claim no. ANUHCV2023/0180 and are therefore an abuse of process.

Applicants Affidavit in Reply

- [13] The Applicants filed an affidavit in reply on 15th January 2024 which disputes the First Respondent's assertion that the character of the neighbourhood has changed.

The Applicants also dispute that this claim is an abuse of process as the Applicants were never heard in claim no. ANUHCv2023/0180.

- [14] It is clear from the above summary that there are significant factual and legal disputes between the parties. I remind myself at this point that on an application for interim relief it is not my place to resolve significant issues of fact at this stage. Resolution of these issues is best left for trial.

Discussion/Analysis

- [15] The parties agree that the applicable principles in relation to interim injunctions are set out in the well-known case of **American Cyanamid Company v. Ethicon Limited**.¹ The relevant factors to be considered are:
1. Whether there is a serious issue to be tried?
 2. Where does the balance of convenience lie?
 3. Whether damages would be adequate?

Serious Issue to be tried

- [16] In **American Cyanamid v. Ethicon** the principle of a serious issue to be tried was stated as follows:

“There was no rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action. All that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried.”

- [17] In **Series 5 Software Ltd v Clarke** Laddie J stated:

“In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not to the strength of the claim but also to the strength of the defence, and then decide

¹ [1975] AC 396

what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At the other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.”²

- [18] The Applicants have not filed a claim at this stage,³ however it is clear from their affidavits in support and written submissions that they are alleging a breach of the restrictive covenants contained in the relevant instruments of transfer and private nuisance.

Breach of Covenant

- [19] The relevant restrictive covenants are found at clause 2 of the Schedule to the respective instruments of transfer:

“2 USER

- (a) The premises shall not be used for any other purpose than as a private dwelling
house with garage and outbuildings, if any, (approved by the Transferor(s)) and no trade, manufacture or business of any kind shall at any time be carried on the property except such professions as may be approved by the Transferor(s) nor shall anything be done thereon which may be or become a nuisance, injury, annoyance or disturbance to the Transferor(s) or the Purchaser or occupiers or any of them of the adjoining property;
- (b) No act or thing shall be done or suffered upon the said land and premises or any part thereof, which shall or may become a nuisance or damage to the Transferor(s) The successors in title or assigns or tenants or any of them, owners or occupier for the time being of the

² [1996] C.L.C 631

³ The Applicants were directed to file their claim by 26th January 2024

other land and hereditaments forming part of the Paynter's Development and belonging to the Transferor(s) and Purchaser from them adjoining or near the said land;"

[20] It is clear from the consent order in claim no. ANUHCv2023/0180 that Clause 2(a) has been waived by the Second Respondent in relation to the First Respondent. In oral submissions Mr. Simon KC for the Applicants stated that despite this, the Applicants would have the standing to enforce the covenants reproduced above against the First Respondent since the lots in the Paynter's Development form part of a building scheme.

[21] This is a correct statement of the law as the enforceability of restrictive covenants by adjoining property owners and/or their successors-in-title within a building scheme is a well-known exception to the doctrine of privity of contract. The pre-requisites of a building scheme may be summarized as follows:

1. There must be a common vendor.
2. That previously to selling the lands which the plaintiff and the defendants derive title the vendor laid out his estate or a defined portion thereof for sale in lots subject to restrictions intended to be imposed on all the lots though varying in details as to particular lots which are consistent and consistent only with some general scheme of development.⁴
3. There must be reciprocity of obligation between the purchasers of the various lots.
4. There must be an intention to impose a scheme of mutually enforceable restrictions in the interest of all the purchasers and their successors, which must be known to them.⁵

⁴ Elliston v. Reacher [1908] 2 Ch. 374

⁵ Emile Elias v. Pine Groves [1993] 1 WLR 305, 310

5. The area affected by the scheme should be clearly defined. It is not sufficient that the common vendor has himself defined the area. It must be clearly known to the purchasers. Neither is it sufficient that the particular claimant and the defendant are within an area affected by an alleged scheme if there is uncertainty as to the full geographical reach of the scheme, as it must be certain which purchasers of which plots are entitled to enjoy mutual enforcement.⁶

[22] An examination of the Land Registers and transfer instruments exhibited thus far seems to prove that the Applicants and First Respondent derived title from the Second Respondent. The covenants in respect to user of the land contained in the relevant instruments also seem to be identical. However, in order to establish that a building scheme exists or was intended, the area of the scheme must be clearly defined.

[23] In the instant case the Applicants have not provided any evidence as to the extent of the alleged scheme. This evidence would usually consist of a plan which demarcates all the lots which are said to form part of the scheme. In the absence of such evidence, it is not possible to definitively state at this stage of the proceedings that a scheme exists. Accordingly, in the exercise of my discretion I would decline to grant an injunction to restrain the alleged breach of covenant.

Nuisance

[24] I now go on to consider the Applicants allegations of nuisance. Ellis J. (as she then was) summarized the applicable principles of private nuisance in **Elton Scatliffe v. Dwite Flax** as follows:

“The law of private nuisance is aimed at protecting the owner or occupier of land from substantial interferences with his enjoyment thereof. In considering a claim in nuisance, a court is required to strike a balance between the right of a defendant to use his land as he wishes and the right

⁶ Laurenciango v. Kay Anthony Antigua High Court decided 12th April 2017

of a claimant to be protected from interference with the enjoyment of his land.”⁷

[25] In **Vanderpant v Mayfair Hotel Co Ltd.** (relied upon by the First Respondent)

Luxmoore J stated:

“Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people.”⁸

[26] Finally, it should be noted that a Defendant will not be found liable in nuisance if the user of his land is found to be reasonable. This largely depends on the activities being complained of and the locality. What might be a nuisance in one area may not be considered a nuisance in another.⁹

[27] In this case the Applicants are complaining of a bar and nightclub which will operate in a residential area. They allege that when the business previously operated up to August 2022 they were subject to noise and an influx of strangers to the area. The First Respondent disputes this by alleging that his business did not cause noise as complained of and further that the character of the area has changed with businesses now operating in the area.

⁷ BVIHCV2010/0053 decided 26th October 2017 at paragraph 12

⁸ [1930] 1 Ch. 138

⁹ Lawrence v. Fen Tigers [2014] UKSC 13 at paragraph 60

[28] These are issues of fact which are to be decided at trial of the substantive claim. However, an examination of the Applicants evidence especially that of Mr. Jon Whyte¹⁰ contains allegations which in my view disclose an arguable case that the enjoyment of his property might be affected by the recommencement of operations at the First Respondent's establishment. I therefore hold that there is a serious issue to be tried in terms of nuisance.

Balance of Convenience

[29] The issue of the balance of convenience now falls to be considered. In this regard I will adopt the guidance of the Privy Council in **National Commercial Bank v. Olint** where the Board stated as follows:

“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.”¹¹

[30] In this case I took into account the uncontroverted evidence that the First Respondent's business has not been in operation since August 2022. The First Respondent alleges that he has expended monies in securing the relevant licences and permissions to enable him to re-open his business. He also mentioned an upcoming pool tournament in February where his business will be one of the host venues.

¹⁰ Applicant's Joint Affidavit of 15th December 2023 at paragraph 7(i)

¹¹ [2009] UKPC 16 at paragraph 18

[31] On the other hand, I must have regard to the rights of the Applicants who undoubtedly have a right to enjoy their properties without disturbance. A bar or nightclub by its very nature will lead to some degree of noise and some degree of disturbance. It is almost impossible for persons to gather where alcohol is being served and music is being played without there being some degree of noise. The Applicants have given cogent evidence that past gatherings on the First Respondent's premises have interfered with the enjoyment of their property. I am also mindful of the fact that in terms of location the Paynter's Development is not within the built-up areas of St. John's or a touristic area such as English Harbour.

[32] I have also taken into account that what the Applicants seek is a quia timet injunction. In other words an injunction which is preventative in nature. In order to obtain such an injunction, the Applicants must satisfy the court that there is a high likelihood that the harm which they seek to prevent will occur unless restrained by the court.¹² In this case the Applicants have provided evidence that the previous operations of the bar interfered with the enjoyment of their property.

[33] The Applicant on the other hand has not provided any evidence which demonstrates that he has taken steps to mitigate the effects that his establishment may have on his neighbours. Further I cannot give much weight to the sound engineer's report exhibited to the First Respondent's affidavit as the sound engineer has not been appointed as an expert in accordance with CPR Part 32. It therefore is highly likely that the First Respondent intends to operate exactly as he did before.

[34] Accordingly, I find that in this case the balance of convenience weighs more in favour of the Applicants. If it later turns out that an injunction was wrongly granted, in my view it will be relatively easy to calculate how much the First Respondent has spent on licences and permits. It should also be relatively easy to calculate any lost profits provided the First Respondent was keeping accurate records when he previously

¹² Hooper v. Rogers [1975] Ch. 75

operated. Thus, any prejudice to the First Respondent will be mitigated by an order for an early trial of this matter and the Applicants' undertaking in damages.

Adequacy of Damages

[35] I do not believe that in this case damages would be an adequate remedy for the Applicants. The First Respondent relies on the cases of **Shelfer v. City of London Electric Lighting**¹³ and **Jaggard v. Sawyer**.¹⁴ These cases provide guidance as to when it is appropriate to award damages in lieu of an injunction. According to these authorities the court may grant damages in lieu of an injunction where:

1. The injury to the plaintiff's legal rights is small;
2. And is one which is capable of being estimated in money;
3. And is one which can be adequately compensated by a small money payment;
4. And the case is one which it would be oppressive to the Defendant to grant an injunction.

[36] In the present case even with an order for an early trial it would take a few months to go through the case management processes such as disclosure, filing of witness statements and any interlocutory applications which may be made. In the meantime, the Applicants' enjoyment of their property would most likely be hindered by the noise caused by the First Respondent's business. I do not consider the likely discomfort to be small or capable of being compensated by a small money payment as outlined in *Shelfer*. In the present circumstances I doubt that an award of damages would be sufficient to compensate the Applicants for the likely discomfort they may suffer awaiting trial.

Delay

¹³ [1897] 1 Ch. 287

¹⁴ [1995] 1 WLR 269

[37] For the sake of completeness, I must address the issue of delay on the part of the Applicants which was raised by the First Respondent. Learned counsel for the First Respondent points out that the Applicants did not commence proceedings during the period 2021 to 2022 whilst the bar was in operation. They have only commenced this application after the High Court refused their application to intervene in claim no. ANUHCV2023/0180.

[38] I reject this argument in its totality. The First Respondent by his own admission ceased operations once served with an enforcement notice by the DCA. If the country's planning authority intervenes to put a stop to an alleged nuisance there is no need for the Applicants to invoke the court's jurisdiction. The Applicants were therefore justified in approaching the court once it became clear that Second Respondent and the DCA were no longer going to prohibit the First Respondent's operations. This would have been only apparent in late 2023 after the consent order in Claim No. AHUCHCV2023/0180 was made. The Applicants have therefore acted expeditiously.

ORDER

[39] In the circumstances the court therefore orders as follows:

1. The First Respondent and all other persons or entities acting under his control or direction are restrained from reopening the bar and nightclub known as Galloway's 8 ball Sports Bar and located at WEST CENTRAL, Block: 11 2291 54 in the Paynter's Development until further Order of the Court or final determination of this matter.
2. An early trial of this matter is hereby ordered pursuant to CPR Rule 17.8 and case management of this claim is scheduled for 15th March 2024 before this court.
3. Costs of this application to be the costs in the cause.
4. The Applicants to have the carriage of this order.

Rene Williams
High Court Judge

By The Court

Registrar