

CLAIM NO. DOMHCV2021/1026

Appearances:

2021: November
2022: January 20

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Ltd.¹ Lord Hoffmann later on in this judgment, explained that this principle may serve to limit the extent to which a nuisance claim could be based on activities which offended the senses of occupiers of property as opposed to physically detrimental to the property².

- [4] Both parties filed affidavits in support of their cases. The parties also both made oral and written submissions for the court's consideration.
- [5] For the purposes of this application, it is not necessary to traverse all of the evidence adduced as it is trite law that when considering an application for an interlocutory injunction, it is no part of the court's function to seek to determine the facts. The evidence that is placed before the court has not been tested. In addition, injunctive proceedings are not meant to be mini trials.
- [6] Be that as it may, it is incumbent on the party against whom the injunctive relief is sought to place before the court as much evidence as possible to assist the court in its determination of whether or not to grant the relief.
- [7] None of the affiants have thus far been cross examined; therefore, the evidence before the court is uncontested. Counsel Mrs. Vidal Telemaque made reference to the often-quoted statement of Lord Diplock in the *locus classicus* **The America Cyanamid** case when he said, "... *It is no part of the court's function at this state of litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend, not to decide difficult questions of law which call for detailed argument and mature consideration.*"³
- [8] In the case at bar, the applicant has complained that her right to the quiet enjoyment of her home has been infringed by the respondent, who plays music in her restaurant and bar which is located opposite her home. The applicant complains that the music prevents her from resting, sleeping or duly enjoying her residence which is detrimental to her health. Counsel stated in her written submissions that it is her client's belief that, "... *if the respondent/respondent is not restrained, her health will*

¹[1997] UKHL 14; [1997] AC 655, 688C

²Ibid at pp705-707

³American Cyanamid Co –v- Ethicon Ltd (1975) AC 396 at page 406

deteriorate to the point where she may die sooner rather than later and that damages would not be an adequate remedy and she needs peace of mind as she embraces her twilight years”⁴

[9] The applicant’s son has also averred in his affidavit, that on his last visit to Dominica, he was disturbed by the music emanating from the respondent’s bar which prevented him from sleeping. This witness further stated in some detail that he ascertained for himself where the music was coming from and made a report to the police.

[10] The application for the interim injunction is opposed by the respondent who admits to playing music in her place of business but denies that the music is played at a level that would cause the applicant to be disturbed as claimed. It is the respondent’s contention that the playing of music as she does is necessary for the successful running of her establishment.

[11] The respondent also asserted that the applicant and her children are responsible for frequent acts of harassment against her. These acts include numerous untruthful reports to the police and of the applicant’s son threatening and terrorising her. The respondent in her affidavit also averred to the various reports to the police which she contends are unsubstantiated, she also spoke of previous proceedings in the magistrate’s court, of the actions and threats of the applicant’s children.

[12] The respondent also denies that it is her customer who parks his car and plays loud music from the vehicle, and that the person who the applicant complains about is a resident of the immediate area and she has no control over his actions. The respondent also asserts that she makes the extra effort to stop her customers from playing music in their cars when parked outside her place of business in an effort to preserve the peace.

The guiding principles for the granting of an interim injunction

[13] The court is reminded that the applicable principles to be applied when considering whether or not to grant an interim or interlocutory injunction are found in the **American Cyanamid Case**.⁵ Those principles can be stated as follows:

⁴ Paragraph 7 and 8 of the applicant/applicant’s written submissions

- a. The applicant/applicant must establish that she has a serious issue to be tried;
- b. That damages will not be an adequate remedy and if they are no injunction will be granted;
and
- c. The court is to consider in whose favour the balance of convenience lies. If the balance of convenience is equal, the court would strive to maintain the status quo.

[14] The primary issue is whether or not the applicant is entitled to the relief being sought. The law is well settled regarding what is to be considered in determining whether or not an interim injunction application should be granted. This is within the court's discretion and falls within the equitable jurisdiction of the court which the court exercises based on the facts presented to it.

[15] It is to be noted that the reality of the application at bar is that if the injunction is granted it would in effect give the applicant the relief she is seeking in her matter before the court, that is to prevent the respondent from playing music in her place of business. It is also to be noted that in any event the respondent is prohibited from playing music in her bar pursuant to the provisions of SRO 43 of 2021.

[16] It was argued by Counsel Yearwood Stewart on behalf of the applicant, that the balance of convenience favours the granting of the injunction. The evidence adduced thus far by the applicant is simply that the music is loud and it disturbs her, causing her to have to seek refuge at the residence of her daughter. That her mental and physical well-being is affected by the loud music emanating from the respondent's bar. There is really no other evidence adduced at this stage by the applicant to be considered by the court.

Does the applicant/applicant have a serious case to be tried?

[17] Counsel Dawn Yearwood Stewart acting on behalf of the applicant submitted that there is a serious issue to be tried and she stated the issue this way in her written submissions, *"The issue to be tried is whether the music emanating from the bar of the respondent constitutes a noise nuisance such that there is an interference with the applicant's use and enjoyment of the land."* Further, *"Whether or not*

⁵ibid

there is an actionable nuisance of the respondent which causes the health and wellbeing of the applicant to be affected.”⁶

[18] Counsel Laurina Vidal Telemaque agreed that there is a serious question to be tried in the matter. Counsel cited and relied on the court’s decision in **Series 5 Software –v- Clarke**⁷ where it was held *inter alia* that,

“The court was not precluded from considering the strength of each party’s case when deciding whether to grant an application for interlocutory relief, but should rarely attempt to resolve difficult issues of fact or law, and view as to the strength of the parties’ cases should be reached only where it was apparent from the affidavit evidence and any exhibited contemporary documents that one party’s case was much stronger than the others. It followed that the major factors relevant to the court’s discretion were (a) the extent to which damages were likely to be an adequate remedy for each party, and the ability of the other party to pay, (b) the balance of convenience, (c) the maintenance of the status quo and (d) any clear view the court was able to reach as to the relative strength of the parties’ cases.”⁸

The Status Quo

[19] This court pauses to note that whether or not the applicant succeeds in her application for the interlocutory injunction, the respondent is prohibited from playing music in her bar by law. The playing of music in bars is prohibited by statute.⁹ This legislation forms part of protocols put in place by Parliament and the Minister responsible for Health in response to the Covid-19 pandemic.

[20] It would appear to this court, that what the applicant is in fact doing is seeking the assistance of the court to enforce legislation to wit, SRO 43 of 2021. Counsel on both sides of this case made reference to the SRO that addressed the playing of music in bars. Having reviewed the law, that is, the provisions of the SRO 43 of 2021, it is clear that the playing of music in bars is prohibited by law. The Regulations clearly state that persons in breach of the regulation would be committing an offence.

⁶Paragraph 21 of the applicant/applicant’s written submissions

⁷ [1996] 1 ALL E R 853

⁸ Ibid Held point (1)

⁹ SRO 43 of 2021 amended Reg. 9 of SRO 26 of 2021 The Environmental Health Services (Covid 19) Regulations 2021

[21] Counsel Mrs. Vidal-Telemaque in her oral submissions to this court said that, *"If the SRO is in effect there would be no need for the injunction ... that the status quo would remain in effect because of the SRO."*¹⁰

[22] It is trite law that an order for an interim injunction is made to preserve the status quo until a named date or until further order. It is necessary for the court to balance convenience between the parties. In other words, what on the balance of convenience is the right order to be made? Does the balance of convenience lie in favour of this court granting the injunction? What is the injury likely to be caused to the applicant occasioned by the refusal of the injunction and would it outweigh the injury likely to be suffered by the respondent if the injunction is granted?

[23] *"...It is a fundamental principle ... that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong. ..."* Re: **Films Rover International Ltd – v- Canon Film Sales Ltd**¹¹. In considering the balance of convenience the court should also consider the adequacy of an award of damages and the risk of irreparable injury to a party if the injunction is granted or refused.

Undertaking for damages

[24] It is usual that a court will require an applicant for an interlocutory injunction to give an undertaking as to damages. By the undertaking the applicant can be made to compensate the respondent if it appears the interlocutory injunction was wrongly granted. The reason for this undertaking is to compensate the respondent who may have been unjustifiably prevented from doing something that the respondent was entitled to do. It is to be noted that in the case at bar the applicant's right to play music in her bar is now prohibited by law.

[25] Where the injunction is found to be wrongly granted an order can be made as to the damages sustained by the respondent and this order can be made by Court in the exercise of its discretion. In **Cheltenham and Gloucester Building Society –v- Ricketts**¹² it was held that the court had an

¹⁰ Oral submissions of counsel Vidal Telemaque

¹¹ [1987] 1 WLR 670 at 680

¹² [1993] 4 All E R 276

unlimited discretion which is exercisable in accordance with ordinary equitable principles, whether or not to enforce an undertaking as to damages given as the price for the grant of an interlocutory injunction, although where it was determined that the injunction should not have been granted the undertaking was likely to be enforced unless there were special circumstances for not enforcing it.

[26] The court therefore retains the discretion of whether or not to enforce an undertaking for damages. The quantum of possible damages is not ascertainable in advance and as this court understands it, it would be based on an inquiry and where the respondent is able to establish that it has indeed suffered damages owing to the injunction. In such circumstances an award would be made to compensate the respondent.

[27] The respondent in this case has suggested that the application for the interim injunction is part of the applicant's continued campaign against her business so to speak. This court wishes to say that no person should be allowed to use and unduly take advantage of the machinery of justice and the court system at the expense of another. Nobody should fall victim of a wrongly granted injunction.

[28] In the case at bar, it is the respondent's submission that if this interlocutory injunction is granted that her business will suffer. Counsel on behalf of the respondent Mrs. Vidal Telemaque submitted to this court that the applicant is a retired pensioner with no evidence as to her means and asks this court not to grant the injunction in that, should her client suffer loss, the applicant based on the evidence adduced thus far would not be able to pay any damages which can be found due and owing to her client.

[29] Where there is an undertaking for damages and there is proof of loss for the wrongful imposition of an interlocutory injunction the respondent is at liberty to enforce that undertaking given by the applicant.

[30] The undertaking as to damages is given to the court and not to the respondent. This therefore means that there is no automatic right to damages where the injunction is discharged. Re: **Peter Toussaint et al –v- Marine Johnson (Representative of the estate of Peter Michael Barnard**¹³.

¹³(SLU HCVAP2018/0024)

[31] It is for the party who has suffered loss and who seeks to enforce the undertaking to show that the damage he has sustained would not have been sustained were it not for the injunction.

[32] In **Re: Air Express Ltd –v- Asett**¹⁴ It was held that it would be the respondent's burden to show that the interim injunction was the cause of her loss.

[33] The respondent asserted that to grant the injunction as prayed by the applicant, will result in the loss of business for her, aggravating the financial loss already suffered due to the closure of the business as a result of the Covid 19 protocols.

[34] In her affidavit the respondent spoke of members of the police force visiting her premises on a number of occasions in connection with the noise complaint made by the applicant and that the police carried out some basic tests (not scientific) regarding the music being played including having her music system turned up to its loudest volume and that she was told that the music was not loud. The respondent says that the music played in her establishment could not possibly disturb the applicant as claimed.

[35] The respondent says that she will suffer great financial hardship if the injunction is granted as it would result in persons not patronizing her restaurant and that this would exacerbate the hardship already suffered due to the onset of the Covid pandemic and the restrictions imposed including the shutting down of her business earlier in the year.

[36] It is to be noted that in the case at bar; in any event, the respondent is prohibited by law from playing music in her bar. This court therefore finds some difficulty in finding that there is a probability of the respondent suffering loss as a result of any interlocutory injunction should the court be minded to grant same.

[37] In an application for an interlocutory injunction the court must consider whether it is just or expedient to accede to the application. All considerations appertaining to the justice of the matter become within the purview of the court. All the circumstances of the case must be weighed.

¹⁴[1979] 146 CLR 249

[38] What is clearly before the court is the competing interests of the parties to wit physical discomfort as opposed to financial loss. In the circumstances of this case, the balance of convenience lies in favour of the applicant as based on the averments before the court, the respondent can be adequately compensated in damages if the claim is ultimately unsuccessful and if upon the full ventilation of this matter it is found that it was wrong to order the injunction. The court has kept in mind the statutory prohibition for the playing of music in bars.

[39] The injunction is therefore granted to restrain the respondent whether by herself, her servants and or agents or otherwise howsoever from playing loud music in her place of business so as to disturb the applicant's peace and quiet enjoyment of her home.

[40] The costs of this application will be the costs in the cause.

M E Birnie Stephenson
High Court Judge

BY THE COURT

REGISTRAR