

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

DOMHCV223/2018

BETWEEN

[1] DANIEL LANGLOIS

[2] PETIT COULIBRI GUEST COTTAGES INC

Claimants

AND

[1] JONATHAN LEHRER

[2] BOIS COTLETTE INC

Defendants

AND

[1] THE ATTORNEY GENERAL OF THE COMMONWEALTH
OF DOMINICA

Interveners

Appearances:

Lisa de Freitas of de Freitas de Freitas & Johnson for the Applicants

Rose Anne Charles with Kondowani Williams of Williams & Horsford for the Defendants

Tameka Hyacinth Burton Solicitor General with Jo-Anne Xavier Cuffy of the Attorney

General's Chambers for the Interveners

2018, December 21

2019. January 7

December 30

[1] **STEPHENSON J:** There are two applications before the court for determination. The application for the continuation of the injunction granted by this court on the 31 October 2018 and the application for access to the Defendant's property by the claimant.

[2] The procedure for obtaining such injunctions is set out in CPR 2000 Part 17. It is well recognized that the principles the principles laid down by Lord Diplock in the English House of Lords in the case of **American Cyanamid Co. v Ethicon Ltd¹** are the guidelines to be applied in an application for the grant or discharge of an interlocutory injunction. Our courts have adopted the *American Cyanamid* guidelines in deciding whether or not to grant or discharge an interlocutory injunction

[3] Such a remedy may be granted whether or not there has been a claim for a final remedy of that kind, and any order made, may be made unconditionally or upon such terms and conditions as the court or judge thinks just fit.

[4] The admonition of Lord Kerr in the case of **Cambridge Nutrition Limited –v- BBC²** is to be noted he said that

“... 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 straight 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 interim injunctions is to hold the balance as justly as possible in situations where the substantial issues can be resolved by the parties at a trial”

¹ 1975 AC 396 17

² [1990] 3 All E R 523 34 Ibid at page 534 paragraph j 35 Ibid at pages 406 to 409 18

[5] Having read the submissions and authorities cited and having listened to both counsel, I remind myself that at this interlocutory stage I am required to make no factual finding.

[6] The judgment of Lord Hoffman in the Privy Council Case of **National Commercial Bank of Jamaica Ltd v Olint Corpn. Ltd**³ in applying **American Cyanamid** provides excellent guidance to the court when called upon to make the decision as to whether not to grant, continue or discharge and interlocutory injunction. This court finds this case to be instructive and has provided effective guidance. Lord Hoffman had this to say

“...The purpose of an interlocutory injunction is to improve the chances of the court being able to do justice after the determination of the merits of a trial. The principle underlying prohibitory and mandatory injunctions is the same: the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Therefore arguments over whether an injunction should be classified as prohibitive or mandatory are barren: what matters is what the practical consequences of the injunction are likely to be. A box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction.”⁴

...

“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.”⁵

...

³ [2009] 1 WLR 1405

⁴ Ibid paragraph 16

⁵ Ibid paragraph 18

*What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, “a high degree of assurance that at the trial it will appear that the injunction was rightly grant”⁶*

[7] What is the order which is in place? The history of the injunctions granted in this claim starts with an injunction granted by this court on the 30th October 2018. That was the injunction which prevented the defendants from blocking the Morne Rouge Public Road.

[8] The first named claimant (“Langois”) is the owner of property located at Petit Coulibri in the parish of St Mark and the owner of the second named claimant Petit Coulibri Guest Houses. The property comprises 200 acres of land in the estates of Petit Coulibri and the Bois Colette Estates. (“The claimants”)

[9] The claimants are in the final stages of the construction of a hotel on their land and is said to have expended a large amount of money on the said project.

[10] The Jonathon Lehrer the first named defendant is the owner of Bois Cotlette Inc the second named defendant which is a property located on part of Bois Collette estate and comprises of 52.63 acres of land in the parish of St Mark. (“the defendants”)

[11] The access to the claimants’ property is via the Morne Rouge Public Road which runs from Soufriere to Bois Collette. This public road runs through the property registered to the defendants as is shown on the Certificate of Title issued to the first named defendant.

[12] It is the first named defendants’ actions on this Morne Rouge Public Road that is at the root of the issue before the court.

⁶ Ibid Paragraph 19

[13] It would appear that over the past four to five years the defendants have been causing interference with the unobstructed and free use of the public road culminating in October 2018 when on the 18th day of that month the first named defendant blocked the road by placing boulders across the road, digging a trench across the said road, erecting metal pipes and placing equipment and supplies on the road denying the claimants and their employees access to their property. The defendant also is said to have directed the claimants' employees to pass along the defendants' private road to access the claimants' property.

[14] The claimants have instituted proceedings against the defendants for their alleged unlawful acts of obstructing the road which has caused them injury loss and damage, tortious interference with their economic interests and they are also seeking a permanent injunction against the defendants from *inter alia* interfering with their use of the Morne Rouge Public Road.

[15] On the 30th October 2018 the claimants applied for and obtained an *ex parte* interim injunction against the defendants who were required to unblock the Morne Rouge Public Road and to do all things necessary to restore the said public road to its condition as it existed prior to the 24th October 2018 when the defendants allegedly blocked it.

[16] On 20th November 2018, the application for the continuation of the injunction was heard and on that date the court ordered *inter alia*

1. That the Attorney General is to be added to these proceedings as interveners ...
2. That the defendants are permitted to run underground ducts on the portion of land across the roadway.
3. The defendants understand that the claimants do not object to the running of the said underground ducts under the roadway subject of this litigation.
4. The defendants shall inform the claimant through their solicitors as to the exact location for the laying of the ducts.
5. That the defendants will schedule the works to be done to wit laying of the ducts for the running of wires sub terrain in two phases and shall inform the claimants through their solicitors at least 24 hours before the works are to commence.
6. The defendants agree that when the laying of the ducts is to take place vehicles will be allowed to pass on the defendants' land around the laying of the ducts.

7. The claimants agree that there shall be no heavy-duty traffic during this period of time.
8. The defendant agrees that the exercise of laying the ducts shall not be done more than over a 24-hour period. Should the exercise of laying the ducts require more time the defendants are to inform the claimants through their solicitors no later than 12 hours before.
9. The defendants shall also inform the Village council and the Soufriere Police Station of the time that they will be laying the said ducts.
10. That the defendant shall ensure that the pipes that are visible in DL6 are covered until a decision is made in this matter.
11. That the defendants are permitted to put Tarish on the roadway
12. The parties shall file an agreed list of issues for the court to consider on or before the 6th December 2018.

[17] The matter was heard again on the 21st December 2018 and the court entertained two applications at that hearing. Firstly, the application to continue the injunction and secondly, an application to access the defendants' property. Both sides have filed a number of lengthy affidavits with numerous exhibits in support of their positions in the matter. After some brief arguments by Counsel on both sides the court made a further order for the written submissions aforesaid.

Principles to be applied in considering the continuation of an interlocutory injunction

[18] It is trite law that when considering the issue of the extension of an interim injunction the court is to have consideration to the principles set out in the *Locus Classicus* **American Cyanamid Co. v Ethicon Ltd.** ⁷

- a. Is there a serious question to be tried? The issues raised in the submissions, as indeed in the statements of case, are of serious import. ...there is a serious issue to be tried. This satisfies the first test set out in *American Cyanamid*.
- b. Are damages an adequate remedy? In considering whether the second test, as laid down by Lord Diplock in *American Cyanamid*, has been satisfied, I believe it is fair to say that there is no threat, in this claim to the claimants losing their interest in their property. What

⁷[1975] 1 All ER 504.

is clear however is that what has been threatened, is the claimants right to access to their property which has in turn allegedly interfered with their productivity in terms of the completion of the building of their hotel.

- c. The claimants seek to assert that they stand to suffer significant loss if they are not allowed to access their property. Is this a loss which could be compensated by an award of damages? Where viability of the enterprise is threatened, the issue then goes beyond mere damages. (See **Flowers, Foliage and Plants of Jamaica Ltd. and others v Jamaica Citizens Bank Ltd**).⁸ In the case at bar this court is taking into consideration the viability of the claimants' business and the loss which has been suffered and which is likely to be suffered should the injunction granted or not granted and whether or not damages would be an adequate remedy. It is noted that Lord Diplock in the American Cyanamid case asserts that "where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises"⁹. His Lordship went on to explain that "where other factors appear to be equally balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo".

[19] **Chadwick, J. in Nottingham Building Society v Eurodynamics Systems PIC and Others**¹⁰ stated:

"In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J. [in *Films Rover International and others v Cannon Films Cells Ltd.* [1986] 3 all E.R. 772 at page 780] Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate,

⁸ (1997) 34 J.L.R. 447.)

⁹ American Cyanamid case at page 51

¹⁰ [1993] 1 F.S.R. 468 at p. 474,

where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

[20] The passage was highly commended by the Court of Appeal in England in **Zocoll Group Ltd. v Mercury Communications Ltd**¹¹. In applying the principle of adopting the course which "is likely to involve the least risk of injustice if it turns out to be "wrong". This court is of the view that it is entitled to consider the effect that the order will have on both of the parties.

[21] Learned Counsel Ms de Freitas on behalf of the claimants submitted that the test as laid down in **American Cyanamid –v- Ethicon**¹² falls to be considered in the case at bar learned counsel recited the guidelines as follows:

"(i) The first step is for the applicant to show that there is a serious issue to be tried. In short the claim must have substance. The Applicant must show that he has a real prospect of succeeding in its claim for a permanent injunction at the final trial.

(ii) Once the applicant has established this, the Court considers whether: -

(a) If the application were successful at the final trial damages would be an adequate remedy; and

(b) If the respondent were successful at trial damages under a cross undertaking to pay damages by the applicant in return for an interim injunction would be an adequate remedy. If damages would be an adequate remedy and the applicant could be in a

¹¹ [1998] F.S.R. 354 at p. 366

¹² [1975] AC 396

financial position to meet the cross-undertaking there would be no reason to refuse the interim injunction.

(iii) If there is any doubt as to the adequacy of the remedy of damages to either or both of the parties, the court must consider the balance of convenience and the individual facts of the case. In weighing up the various factors, the fundamental objective of the court is to take the course which ultimately involves the least risk of injustice, should the court's decision to grant or refuse an injunction turn out to be wrong.

(iv) where the factors are evenly balanced, the courts have been inclined to preserve the status quo"¹³

[22] Ms de Freitas then went on to refer the Court to the guidelines for the grant of an interlocutory mandatory injunction and relied on guidelines adopted in the case¹⁴ **Zockoll Group Limited v Mercury**¹⁵ as restated and applied in our regional courts such as in the case of **James Bristol v Maxine Campbell et al**¹⁶ as follows:

"First, this being an interlocutory matter, the over-riding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffman J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive steps at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right; the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be 4 See Elisabeth Robertson v. Christina Washburn et al Claim No. BVIHCV 2011/0158 at para. 21. 5 see Parker v. Camden

¹³ Paragraph 13.1 of Counsel's submissions filed on the 7 January 2019

¹⁴ These principles were enunciated in Nottingham Building Society v Eurodynamics Systems Ltd [1993] FSR 468

¹⁵ [1997] EWCA 2317

¹⁶ GDAHCV2015/0209

*London Borough Council [1986] Ch 162 (CA). 10 circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted"*¹⁷.

Whether or not access should be given to the Claimants to have the diversion offered by the defendants assessed

[24] It is the claimants' contention the condition of the private diversion offered by the defendant ought to be considered, learned counsel Ms. de Freitas submitted that the condition of this diversion would assist the court in determining the elements of the tort and it would also go towards the intention and to a possible assessment of damages. Thus the need for the application for the claimants to be permitted to have the proposed diversion inspected by their expert witness and an opinion done.

[25] The defendants have objected to the application for access to the land for assessment by Mr Gregoire the claimants' proposed expert. It is the defendants' view that a report or assessment as proposed would not assist the court in determining the issues that arise between the parties.¹⁸ This court understand the thrust of the defendants arguments to be that the condition of the private diversion as constructed by the defendants on their land is superior in design to the public road.

CONCLUSIONS

[26] The Court gratefully received and reviewed the written submissions from counsel for the parties in this matter, that all of the submissions have not been mentioned or re hashed, the Court intends no disrespect to counsel. The submissions were useful and helpful and have been fully considered by the Court

[27] Having read the extensive evidence already filed in the matter and having heard the submissions of Counsel, the Court is satisfied that the claim raises serious issues to be tried. It involves not only principles of tortious interference with economic interests where the claimants are contending that the defendants have used unlawful means to interfere with their economic interests and livelihood. This case also involves whether or not the defendants can create a private diversion from a public road to

¹⁷ Ibid paragraph 18 of the judgment of Dyer J

¹⁸ Re: Paragraph 14 of the defendants' affidavit of the 12 December 2018

take the place of the public road which is a road created by statute and whether or not the defendants are authorised to create a diversion from a public road.

[28] The defendants are claiming to have also suffered damages by the actions of the claimants and are seeking to establish a counterclaim of negligence and nuisance against the claimants. They have also pleaded trespass and fraudulent misrepresentation all of which have to be properly responded to and dealt with by the court. The defendants by way of countersuit are also seeking injunctions against the claimants.

[29] This will require the court to hear evidence, interpret legislation and expert reports in order to determine liability. Complex factual and legal issues arise which will require a critical analysis of the evidence which is to be presented at trial and an assessment of the relevant witnesses. In this Court's judgment, there is a strong case made out that there are serious issues to be tried.

[30] Having regard to the case that has thus far emerged it is this court's view that damages would not be an adequate remedy in the circumstances of this case, damages would not fully compensate the claimants for their potential losses. *Re: Bath North East Somerset District Council v Mowlem Plc*¹⁹. This Court is not satisfied that in the event that the claimant were to succeed in its claim at the trial that it could be compensated by an award of damages for the loss they would have sustained as a result of the defendant's actions which we are told by the government official he has no right to do²⁰.

[31] Further it is necessary that at this juncture takes into consideration the public interest in determining the balance of convenience and this court finds that in the case at bar the defendants have been unable to convincingly persuade the Court that the risk of injustice if this injunction is continued that is will not sufficiently outweigh the risk of injustice; having considered all the circumstances brought to the table this far the balance tips in favour of the grant of the injunction until further or other order of this court and until the hearing and outcome of this matter.

[32] In arriving at its decision, the court has considered that by its very nature, this relief will compel the defendant to cease and desist from interfering with the claimants, their employees, agents and or guests from traversing the Morne Rouge Public Road unheeded until the hearing and outcome of the case.

[33] On the evidence which has been adduced before this court as it regards the application for the injunction and its continuation and a brief review of the statements of case filed thus far in this matter this court has concluded that the balance of the case would be met by preserving the status quo, in the absence of the injunction, this court is of the considered view that the defendant will be at liberty to

¹⁹ [2015] 1 WLR 785

²⁰ See affidavit sworn to by Denise Edwards of the Ministry of Public Works and Ports filed on the 14th December 2018

once again block the road and based on the evidence adduced thus far this would mean that the claimant would be hampered in completing his Hotel project which as he has averred he has already expended millions of dollars.

[34] On the other hand if the injunction is granted this court notes the defendants' concerns regarding the damage to the historical buildings and ruins on their property which are being destroyed and damaged by the traffic through the road and also the defendants claim regarding their inability to secure their property.

[35] Without delving into the facts of the case and the evidence adduced by parties it is clear that both parties have invested into their individual business with great passion. It is clear that both businesses will do well for not only the owners but the persons employed there and the village and surrounding areas.

[36] It is also clear to this court that the defendants seem to want to suggest an alternative route that would provide access to the claimants' property and alleviate their concerns about the destruction to the historical relics on their land and also the provision of their produce. **Therefore, it is in this court's view imperative that the parties meet in a serious effort to settle this matter.** (emphasis mine)

[37] It is noted that the application for permission to enter the defendant's property for the assessment to be carried out on the offered diversion by the parties remains outstanding.

[38] The defendants have attempted to provide an alternative route and claim to have received planning permissions for same but at the same time they resist any attempt by the defendant to have engineers on the defendants behalf review the proposed road, this is counterproductive and does not advance the case in the spirit of compromise.

[39] This court is of the view that if the defendants are indeed serious about offering the diversion as a suitable and viable alternative to the main road as is then they ought not to have a problem with said alternative route being examined as to its viability. This court is of the view that this issue ought to be revisited when the master gives trial directions down the road.

The way forward

[40] It is noted that there has been a number of amendments made to the statements of case filed thus far in this case and the parties have managed to produce an already voluminous file. It is also noted that the last relevant document filed appears to be an application by the claimant for an extension of time to file an amended answer and defence to the amended defence and counterclaim filed in February 2019. This application has not yet been dealt with by the court.

[41] It is necessary that every effort should now be made to carefully manage this case. This court reiterates its view that every effort should be made by the parties to mediate and settle this matter soonest. It would be in the best interest of justice and of the parties that in pursuance of achieving the overriding objective of CPR that there should be put in place the available alternative to this court in an attempt to deal with this matter justly.

[42] It is noted that rule 1.2 of the C.P.R. provides that: - 'The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under 'these rules.' (emphasis mine) and Rule 1.1(2) provides that dealing with a case justly includes:-

- (a) ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;
- (b) saving expense;
- (c) dealing with it in ways which take into consideration-
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

[43] In the circumstances of this case and in view of the foregoing this court will make the following order:

- a. Pending the hearing and determination of the claim or further order of this Court, the Defendants whether by themselves or their agents or employees are prohibited from preventing the claimants whether by themselves or their agents employees and guests from accessing the Morne Rouge Public Road in its entirety
- b. The defendants are invited reconsider allowing the duly qualified engineer to enter his property with a view of reviewing the alternative route presented by the defendant's herein to assess its viability and safety.
- c. This matter is stayed pending the parties attending and duly participating in mediation.
- d. The parties shall attend court on the January 2020 for a mediation order to be made in this matter.

- e. Failure by the parties to settle this matter at mediation this matter is to be set down by the court office for the hearing of the application for leave to file reply and defence to counterclaim out of time and for case management at the January sitting of the master.
- f. The costs of this Application shall be agreed or dealt with by the Judge who tries the substantive action if necessary.

Apologies for the lengthy delay in delivering this decision:

[44] It is necessary for this to be said, that earlier this year after the decision was reserved this court as currently constituted was forced to take sick leave and during that period the civil court room with the current files in it was sealed shut due to the presence of mold which situation still remains unresolved. As a result of this situation a number of files including this one were not accessible and time has passed and with the assistance of counsel in scanning documents and with the eventual availability of the file the ruling was able to be completed after many months and the court apologises for this. The extensive delay was unavoidable. This situation was further exacerbated by lack of full access to a computer experienced by the Civil Court Clerk in order for this ruling to be duly edited and prepared for delivery.

[45] The court wishes to extend its thanks to counsel for their assistance rendered to this court through their submissions and for their understanding in the time that it has taken to complete this ruling.

[46] The question of costs to be assessed upon completion of these proceedings.

**M E Birnie Stephenson
High Court Judge**

SEAL

BY THE COURT

REGISTRAR