IN THE FULL COURT OF THE SUPREME COURT OF JUDICATURE

ON APPEAL FROM A JUDGE OF THE HIGH COURT APPELLATE JURISDICTION

2021-HC-DEM-CIV-FCA-2

BETWEEN:

1. DAVID JAMES

2. STUART JAMES

Appellants

-and-

MOEENUL HACK

Respondent

Before
Hon. Madam Justice Damone F. J. Younge
Hon. Mr. Justice Gino Peter Persaud

Appearances
Mr. N. Boston SC for the Appellants
Mr. R. Stoby SC with Ms. Jamela Ali SC for the Respondent

JUDGMENT DELIVERED: 6th October, 2022 (via electronic mail)

PERSAUD, J:

1. This is an appeal from the grant of an interlocutory injunction at first instance dated 14th December, 2021 restraining the Appellants/Defendants from further carrying on building

operations at Lot 23 Area B Liliendaal pending the hearing and determination of the substantive action.

2. There were no written submissions in the court below by the parties but written submissions were filed in this appeal.

3. An interim injunction is an order made for the duration of the litigation to protect a party's rights pending a final judicial determination. It is not a final resolution. In the case of *National Commercial Bank Jamaica Ltd. v Olint Corp Ltd*[1] Lord Hoffman stated that:

> *the purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.*

4. In approaching the issue as to whether the injunction should continue or be discharged, this Court is required to balance the competing rights of the parties and seek to minimise harm to both parties. Whether the court grants or refuses an application for an interim injunction it inevitably runs a risk of harming rights. Where the court grants a claimant an interim injunction in order to protect their rights, it runs the risk that if the claimant fails to establish their claim in final judgment, the court will have harmed the defendant's rights.[2]

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[1] (2009) UKPC 16

[2] Zuckerman on Civil Procedure, 4th ed., p.436

The Respondent/Claimant's case

5. The substance of the Respondent/Claimant's application for an injunction is set out in his Affidavit in support thereof. The gravamen of his complaint is as follows:
    a. There is a breach of by-laws 22(2) and 55 of the City's by-laws
    b. There is no provision for parking facilities for vehicles within the Appellants' lot
    c. There is a breach of a servitude on all the original transports for the area which provides that:

        "*no shop, trade, factory, manufacture, industry or business of an offensive noisome, noxious or dangerous nature shall be carried on on the said lot and no advertisement shall be erected or exhibited or exhibited thereon*."
    d. The Appellants' construction of several apartments with no provision for parking of multiple vehicles amounts to a business and is contrary to the restrictive covenants and servitudes.
    e. The construction constitutes a public nuisance
    f. There are serious issues to be tried which are breaches of the City's by-laws and servitudes on the transport and public nuisance

Issue

6. The sole issue for determination on this appeal is whether the interlocutory injunction should be discharged or allowed to remain in place pending the hearing and determination of the substantive action.

Law

7. The leading case on the principles surrounding the grant of interim injunctions is the celebrated *American Cyanamid Ltd. v Ethicon Ltd* (1974). The principles are probably universal and well-rehearsed if not committed to memory by civil law practitioners who can regurgitate them at the drop of a hat. A general rule laid down in this case is that on an application for an interim injunction, the court must not attempt to consider the 'merits'. Lord Diplock stated:

> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case.* [3]

8. Support for this refusal to consider the merits have been articulated as follows:
    a. It is procedurally efficient to postpone consideration of the merits until trial, when the parties can present their evidence fully and effectively
    b. The courts will spare themselves a heavy interlocutory workload and they will have more time to devote to hearing trials
    c. Until the factual case is fully prepared, and there is opportunity for cross examination, the court can at best merely scratch the surface of the issues; this is an unsafe basis for adjudication

[3] (1975) AC p. 409

d. Most applications for interim injunctions precede disclosure of the parties' relevant documents under the CPR; it is unfair to consider the merits of the case if one party is likely to be disadvantaged by the fact that disclosure has yet to take place
e. It is also unfair on other litigants who are waiting for a trial, if a party can jump the queue by obtaining a protracted hearing of an interlocutory point; this objection applies equally whether the point is one of law or fact or both. [4]

9. Many other subsequent cases have contributed to and built on the *American Cyanamid* jurisprudence. In the case of *Series 5 Software Ltd v Clarke* (1996) 1 All ER 853 at p. Justice Laddie seemed to favour a consideration of the merits at this stage save and except where there are complex issues of fact which require further examination at trial. He also formulated the following principles which complement those in *American Cyanamid*:
    a. The grant of an interlocutory injunction is a matter for discretion and depends on all the facts of the case
    b. There are no fixed rules as to when an injunction should or not be granted. The relief must be kept flexible.
    c. Because of the practice adopted on the hearing of applications for interlocutory relief, the court should rarely attempt to resolve complex issues of disputed fact or law
    d. Major factors the court can bear in mind are the extent to which damages are likely to be an adequate remedy for each party and the ability of the other party to pay; the balance of convenience; the maintenance of the status quo; and any clear view the court may reach as to the relative strength of the parties' cases.

[4] Andrews on Civil Processes (2nd ed.) p. 209

10. In the case of *Guardian Media Groups plc v Associated Newspapers Ltd* (2000) Walker LJ in the Court of Appeal stated that the *American Cyanamid* principles have a degree of flexibility and they do not prevent the court from giving proper weight to any clear view which the court can form at the time of the application for interim relief and without the need for a mini trial on copious affidavit evidence as to the likely outcome at trial.[5]

11. Given the several principles cited above, it is my view that the overarching principle is that the Court must strive to reduce the risk of irreparable harm to the interests of the parties. Given that both pre-trial interference and forbearance can result in harm to the parties' interests, the court needs to follow a course most likely to achieve a just solution, which means that it must adopt the course most likely to protect, rather than harm, the parties' interests.[6]

12. In the *American Cyanamid* case Lord Diplock stated that the function of the interim injunction jurisdiction is to safeguard legal interests from irreparable harm pending litigation. He said to minimise the prospect of injustice, the plaintiff's need for interim protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights.

13. Lord Hoffman further stated in *National Commercial Bank Jamaica v Olint Corp* that the basic principle is that the court

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[5] Ibid at p. 211
[6] Ibid., p. 437

should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

14. In the case of *R v Secretary of State for Transport Ex p. Factortame Ltd (No. 2)*[7] Lord Bridge stated:

> *If, in the end, the claimant succeeds in a case where interim relief has been refused, he will have suffered an injustice. If, in the end, he fails in a case where interim relief has been granted, injustice will have been done to the other party. The objective that underlies the principles by which the discretion is to be guided must always be to ensure that the court shall choose the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised.*

15. In the case of *Hubbard v Vosper*[8], Megaw LJ highlighted the competing interests of the rights of the parties and the degree of irreparable harm and stated as follows:

> *One can readily imagine a case in which the plaintiff appears to have a 75 per cent chance of establishing his claim, but in which the damage to the defendant from the granting of the interlocutory injunction, if the 25 per cent defence proved to be right, would be so great compared with the triviality of the damage to the plaintiff if he is refused the injunction, that an interlocutory injunction should be refused.*

Analysis

16. The Respondent/Claimant seems to have delayed in approaching the court for injunctive relief. The NOA is dated 1st December,

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[7] (1991) 1 AC 603 at 659
[8] (1972) 2 QB 84

2021. The Appellants contend that they commenced construction in November, 2020. This delay is not explained by the Respondent/Claimant in his application for injunctive relief and must be taken into consideration. The Respondent/Claimant did not act with alacrity and urgency in approaching the court for injunctive relief.

17. Having considered the servitude which the Respondent contends the Appellants have breached, it does not appear from a plain reading of it that an apartment building falls squarely within its parameters. This is a prima facie view since at this stage there is no finding on the merits of the contention and the court will not embark on a mini trial. We are not convinced that there is a serious issue to be tried in respect of this issue.

18. In respect of the alleged breach of the two city by-laws there is insufficient evidence before us to offer any views on whether this is a serious issue to be tried. In any event, that issue is a question of fact and is eminently suited for trial.

19. Lord Diplock further stated that:

> *Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, then the question of balance of convenience arises…the extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at trial is always a significant factor in assessing where the balance of convenience lies.*[9]

20. The fourth defendant CHPA filed a defence in which they deny that there is no provision for parking facilities for vehicles within

[9] Ibid, at 408

the lot. They further deny that the apartment building would be contrary to the restrictive covenants and servitudes on the property as contended by the Respondent or that it would amount to a change of use from residential to business. They further deny the Respondent's contention that there was no consultation with residents and contend that they consulted with residents. CHPA further contended that they approved the Appellants' application to erect a three storeyed apartment building after taking all relevant matters into consideration including consultations, availability of space on the lot for five parking spaces and having satisfied themselves that the development was not likely to affect the character or amenity value of the surrounding residential area since it is similar in nature and that the building coverage and setbacks were in order. Finally, the CHPA contends that the Respondent/Claimant's claim ought to be dismissed.

21. Further, the contentions of public nuisance in the injunction application are of no moment since this is not pleaded as a cause of action in the statement of claim and no reliefs are prayed for in respect of public nuisance.

22. The Appellants have outlined the pecuniary harm they have suffered as a result of the grant of the interlocutory injunction. Construction has halted since December 2021 and the financial consequences include costs overrun, monthly mortgage repayments, increase in construction costs, security costs etc. These do not sound unreasonable or exaggerated but rather in line with the consequences associated with the halting of such a venture. It is therefore urgent that a final resolution of the rights of the parties be speedily determined.

Disposition

23. In light of the legal principles outlined above I am of the view that in all the circumstances of the case, the balance of convenience favours the Appellants' and the magnitude of irreparable harm to the Appellants/Defendants is substantially greater than any potential harm to the Respondent/Claimant. This is the overarching test and governing principles that I have used in discharging the interlocutory injunction.

24. Accordingly, the appeal is hereby allowed and the interlocutory injunction granted by Justice Simone Morris-Ramlall on 14th December, 2021 is hereby discharged. Costs in the sum of two hundred and fifty thousand dollars to be paid by the Respondent/Claimant by 17th November, 2022. The matter is remitted back to the trial judge for continuation of case management.

YOUNGE, J:

1. I have read the draft of my brother Justice Persaud and I agree with the reasons that he has advanced that the appeal be allowed and the interlocutory injunction discharged with costs to the Appellants in the sum stated above.