

BARBADOS

Suit No: 441 of 2009

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

BETWEEN

HAROLD KEITH MELVILLE - PLAINTIFF
(as a trustee and a member of the BARBADOS
POLO CLUB suing on behalf of himself and all
other members of the Barbados Polo Club a
Members Club and unincorporated Association)

AND

PUMPFIELD LIMITED - DEFENDANT

Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court [in Chambers]

2009: March 12 and 13

Mr. Leslie Haynes, Q.C. in association with Ms. Karen Pereira for the
Plaintiff

Sir Richard Cheltenham Q.C. in association with Mr. Stephen Walcott
and Mr. Alrick Scott for the Defendant

DECISION

- [1] **Crane-Scott J:** This is an urgent *inter partes* application by the Plaintiff, Harold Keith Melville brought by Summons filed on March 10, 2009 seeking *inter alia*, interim mandatory and prohibitory injunctions as follows:

“(i) An injunction ordering the Defendant by itself, its servants, or agents or otherwise to remove from the door of the pump house attached to the well situate on the Defendant’s property (which property is described in the Schedule to the Summons), the lock and the metal box over it, or howsoever otherwise to perform such act or acts so as to enable the Barbados Polo Club to have free access to the pump and use of water from the said well;

(ii) An injunction to restrain the Defendant by itself, its servants, agents or otherwise from doing all or any acts which would prevent the free access of the Barbados Polo Club to the pump house, the pump and the use of the water from the well aforesaid pending the determination of this action or until further order....”

- [2] The application is supported by an affidavit sworn to by Harold Keith Melville (hereinafter referred to as the “Melville affidavit”) sworn to and filed on March 10, 2009. No affidavit was filed by or on behalf of

the Defendant and the facts before the Court as stated in the Melville affidavit are apparently not in dispute.

Background to the application:

- [3] The Plaintiff is a trustee and member of the Barbados Polo Club and sues on behalf of himself and all other members of the Barbados Polo Club which operates a polo playing field situate at Holders in the parish of St. James on which polo tournaments are conducted from time to time.
- [4] When the Barbados Polo Club first entered into possession of the playing field in 1966 as a yearly tenant, the owner of the Holders estate, Holders Limited had allowed the Polo Club to use water free of charge from a well situate on other lands in the Holders estate. To facilitate the Club's access to water, an arrangement was put in place between Holders Limited and the Polo Club whereby the Club was permitted to install a pump and the necessary pipes leading to the well and pay for the electricity used by the pump.
- [5] This arrangement between Holders Limited and the Club as the yearly tenant of the playing field, continued for several years until April 25, 1979 when Holders Limited subdivided the playing field off from the rest of its lands and conveyed it to the trustees of the Barbados Polo Club which thereupon became the owner in fee simple of the playing field.
- [6] Examination of the 1979 Conveyance of the playing field to the Plaintiff reveals that it contains no express grant or reservation in favour of the Plaintiff of any right, easement or privilege over the remaining lands of Holders Limited to access water from the well situated on the remaining lands of the Holders estate.

- [7] According to the Melville affidavit, after the Club bought the playing field from Holders Limited in 1979, it continued to use the water from the well free of charge. The pump continued to belong to the Club which remained responsible for its maintenance and the cost of electricity.
- [8] It also appears that following the conveyance in 1979, the Plaintiff, in its new legal capacity as the fee simple owner of the polo field, continued for a period of approximately 22 years without interruption to enjoy the use of rent free water from the nearby well situated on the remaining lands of the Holders estate.
- [9] It is not in dispute that in October 2001, Holders Limited conveyed the fee simple in the land on which the well stands to the Defendant, a BVI incorporated company which is registered in Barbados as an external company.
- [10] Thereafter in late 2001, Sir Charles Williams approached a trustee of the Polo Club and represented himself to be the owner of the lands on which the well was situate. He indicated that he had bought the land to protect the water supply for the Polo Club. Sir Charles also indicated that he wanted help with the loan payment and suggested a sum representing 50% of the loan interest payments as an amount which could be paid by the Club to assist with the payment.
- [11] Sir Charles subsequently wrote to the Club in 2002 indicating that the cost to the Club of using water from the well for the polo season was \$18,000 per annum and invited the Club to discuss the method of payment.
- [12] An Extra-ordinary General Meeting of the Polo Club was held on April 26, 2002 at which the matter was hotly debated. Following the

- meeting the Club drew cheques in favour of Sir. Charles Williams for \$18,000 for the year 2002. Payments to Sir Charles continued in the years 2003, 2004, 2005 and 2006. In the years 2007 and 2008 respectively, at his request, the Polo Club drew cheques for \$18,000 to Bromefield Properties Inc.
- [13] As appears from the Melville affidavit and the exhibits attached thereto, over the years since 2001, much correspondence passed between Sir Charles and the trustees of the Polo Club on the matter of the payment for the water.
- [14] In 2008, an Invoice (No. 252) was presented to the Polo Club by Sir, Charles by letter dated September 9, 2008 seeking the sum of \$22,000.00 as the increased cost of the supply of water from the well for the 2009 Polo season. Sir Charles also informed the Club that he was in the process of selling the property and would try to, but could not guarantee the Club's continued water supply.
- [15] After taking legal advice, the Club then informed Sir Charles by letter dated November 2008 that the Club was the beneficiary of an easement by prescription in respect of the water supply from the well on the lands on the Holders estate (the servient tenement) and informed him that as he had advised that he was in the process of selling the land, the Club would no longer assist him in carrying the cost of the land.
- [16] It is this stance by the Barbados Polo Club which evidently brought the brewing dispute between the Plaintiff and the Defendant to a head. As clearly appears from paragraphs 27 through 31 of the Melville affidavit and the associated exhibits at pages 44 to 49, an Invoice was generated on a letterhead ostensibly issued by the Defendant

- company. Formal demands for payment of the 2009 Invoice were then issued by the Defendant's legal representatives accompanied by the usual threats about the legal consequences which could result from non payment. The Defendant's demands for payment of its Invoice were duly responded to by the attorney-at-law for the Polo Club, the last such letter having been sent on February 11, 2009.
- [17] Eventually, as set out at paragraph 34 of the Melville affidavit, on Monday, March 2nd, 2009, officials of the Polo Club discovered that the pump house had been locked and a metal box installed around the padlock and its hasp, effectively preventing the Plaintiff from accessing the water in the well situated on the Defendant's property (the servient tenement.)
- [18] According to the Plaintiff, the Defendant's actions in cutting of the Plaintiff's access to the well and the pump house have placed the upcoming 2009 Holders Polo season organized by the Polo Club in jeopardy. Water is the lifeblood of the polo game particularly during the dry season as without irrigation the surface of the playing field becomes so hard that it damages the legs of the ponies. The tournaments are a revenue earner for the Polo Club and the three tournaments scheduled for Sunday 15, March, 2009 will, in all probability, have to be cancelled.
- [19] The Plaintiff filed a Writ and Statement of Claim on March 10, 2009 seeking relief in the form of a declaration of rights together with permanent injunctions to restore, what the Plaintiff asserts is, an easement by prescription in favour of the owner of the polo field (the dominant tenement) in respect of the water supply from the well on

the servient tenement, being lands formerly owned by Holders Limited, and which from 2001, are now owned by the Defendant.

- [20] The Plaintiff's Summons of March 10, 2009 seeks urgent interim relief to restore the *status quo ante* until the dispute surrounding the respective rights of the parties is finally resolved at the substantive trial.

The Submissions for and against the grant of interim relief:

- [21] At the hearing of the Summons, both parties produced voluminous legal submissions and authorities. Following lengthy oral argument the Court reserved its decision.

Exercise of the Court's Discretion:

- [22] Sections 44 and 45 of the **Supreme Court of Judicature Act, Cap. 117A** provide as follows:

“44. The High Court **may at any stage** of the proceedings

(a).....

(b) **grant a mandatory or other injunction;**

(c)

where it appears to the Court to be just or convenient to do so for the purposes of the proceedings before it; and, if the case is one of urgency, the Court may grant a mandatory or other injunction before the commencement of the proceedings.”

“45. (1) Any.....injunction under section 44 **may be made either unconditionally or on such terms and conditions as the Court thinks just,** including, if an

injunction is granted before the commencement of the proceedings, a condition requiring proceedings to be commenced.”

[23] The Court has considered the evidence in this case along with the legal submissions of Counsel for both parties for and against the grant of the interlocutory orders which the Plaintiff seeks together with the applicable law.

[24] The Plaintiff’s application for both interim injunctions will be discussed below under the italicized sub-headings as follows:

The interim mandatory injunction:

[25] The Court has studied the authorities submitted by Counsel on both sides in relation to the grant of mandatory injunctions. The Court is aware that while as a general rule, Courts are far more reluctant to grant a mandatory injunction than they would be to grant a prohibitory injunction, the fundamental principle to be applied on interim applications for prohibitory and mandatory injunctions alike is that the Court should take whichever course appears to carry the *lower risk of injustice* if the Court should turn out at the substantive trial to have been wrong. [See *Films Rover International Ltd v. Cannon Film Sales Ltd* [1987] 1 W.L.R. 670 per Hoffman J.; *East Coast Drilling and Workover Services Ltd v. Petroleum Co of Trinidad and Tobago Ltd* (2000) 58 WIR 351 per de La Bastide C.J. Also **Bean on Injunctions 8th edition, paragraphs 3.33 to 3.37**]

[26] After assessing the strength of the Plaintiff’s case *vis-à-vis* that of the Defendant and balancing on the one hand, the severity of the risk of injustice to the Plaintiff if the interim injunctions are refused, against

the severity of the risk of injustice to the Defendant if the injunctions are granted and the *status quo ante* is restored until the substantive trial, on the other hand, the Court is satisfied that the balance lies in favour of the Plaintiff for the following reasons:

- a) the Court accepts that the facts set out in the Melville affidavit establish that following the acquisition in 1979 of the polo field, the trustees of the Polo Club, being the holders of an estate in fee simple in possession in the polo field (the dominant tenement), were in a position to legally acquire a right or interest in the form of an easement by prescription to access the water in the well situated on the adjoining lands (the servient tenement) retained by Holders Limited following the conveyance in 1979;
- b) the Court is also satisfied from the evidence that the Plaintiff enjoyed the access to the water in the nearby well for an uninterrupted period of 22 years between 1979 and 2001;
- c) This period of 22 years uninterrupted access to the water in the well situate on the lands retained by Holders Limited, was sufficiently long a period in law to permit the Plaintiff *prima facie* to obtain an easement by prescription over the servient tenement having regard to s. 35 of the ***Limitation and Prescription Act, Cap. 232***;
- d) the Court is also satisfied that the easement by prescription which the Plaintiff claims to have acquired, would have crystallized in or around the year 1999 and in any event, by the date on which the land on which the well was situated

(the servient tenement) was conveyed to the Defendant on October 25, 2001;

- e) Although (as argued by Counsel for the Defendant) an easement by prescription may be defeated in the manner envisaged in s. 35 of the *Limitation and Prescription Act*, the Court is mindful that the Defendant has filed no affidavits to counter the facts deposed to in the Melville affidavit.
- f) The case which was advanced by Counsel for the Defendant in an attempt to defeat the Plaintiff's claim to an easement by prescription, was founded upon his view of the law as set out in his written submissions. The Court is satisfied that the competing legal submissions of both parties raise serious legal issues which are more appropriately resolved at the substantive trial after all the pleadings would have been filed and closed, and all the evidence placed before the Court.
- g) In short, this Court cannot say that the Plaintiff's case is bound to fail, or that the Defendant's case is likely to succeed, and it is not for this Court at this early interlocutory stage to decide these serious legal issues which should properly go to a substantive trial.
- h) Although payments for accessing water from the well were made to the Defendant by the Plaintiff after the year 2001 and at a time when the Plaintiff would, on its case, have already obtained an easement of prescription, the legal effect of such payments on the Plaintiff's claim to an

easement by prescription, is also a matter which, in the view of the Court, is more appropriately determined at the substantive trial, when all the facts are known and following full legal argument;

- i) After considering the risk of injustice to both parties of granting the interim mandatory injunction sought, the Court has determined that if the order were made at this interlocutory stage, the Defendant would be liable to suffer less injury and loss than would the Plaintiff if it were subsequently found following the trial that the Plaintiff has no case.
- j) On the one hand, the Defendant would merely have been deprived of the annual fee for the water, while on the other hand, if the *status quo ante* is not maintained and the Plaintiff is subsequently found to be entitled to the easement by prescription, the Polo Club would have lost income for the many years which it would take to have the matter finally determined before the Courts. Additionally, as Counsel for the Plaintiff pointed out, the activities of the Polo Club, the staging of polo tournaments and the social interaction of the Club members would in the interim have come to a screeching halt;
- k) the balance lies in the Plaintiff's favour;
- l) in the result, to avoid the risk of serious injustice to the Plaintiff, the *status quo ante* in this case should be restored pending the trial and the interim mandatory injunction should issue as prayed.

The interim prohibitory injunction:

- [27] The Court has had regard to the Diplock guidelines which govern the grant of interim prohibitory injunctions, first laid down in the case of *American Cyanamid Co v. Ethicon Ltd [1975] A.C. 396* and which have been followed in numerous cases since then.
- [28] Applying the guidelines, the Court is satisfied that the interim prohibitory injunction sought by the Plaintiff at paragraph (ii) of the Summons should issue in this case for the following reasons:
- a) The Court is satisfied, and it was also conceded by Counsel for the Defendant that the first question to be addressed, namely, whether there is a serious issue to be tried, should be answered in the affirmative;
 - b) Turning to the second question to be considered, namely, whether damages are an adequate remedy, the Court has examined the question and found on the one hand that damages are an adequate remedy for the Defendant, which if successful at the trial only stands to lose the annual fee for use of the water.
 - c) On the other hand, the Court is satisfied that damages may not provide an adequate remedy for the Plaintiff since in addition to the obvious financial loss which will be sustained due to its inability to carry on its income generating activities, the Polo Club will undergo the general disruption of its activities and the loss of social interaction among the Club members which is loss which might not be so easily compensated by an award of damages following the trial.

d) As there is some doubt whether damages will provide an adequate remedy for the Plaintiff in this case, the Court has of necessity, proceeded to consider the third question recommended by the Diplock guidelines, namely, where does the balance of convenience in this matter lie? Having taken all the circumstances of this case into account, the Court is satisfied that in this case, the balance of convenience lies with the Plaintiff, and accordingly, the interim prohibitory injunction sought by the Plaintiff at paragraph (ii) of the Summons should issue.

Disposal:

[29] In the result, the Court being satisfied that it is just and convenient in the particular circumstances of this case that the interim relief sought by the Plaintiff should be granted, hereby makes the following orders:

- a) in terms of paragraph (i) of the Summons, “ *The Defendant by itself, its directors, servants, or agents or otherwise is hereby ordered to **immediately** remove from the door of the pump house attached to the well situate on the defendant’s property (which property is described in the Schedule to the Summons), the lock and the metal box over it, or howsoever otherwise and to perform such act or acts so as to enable the Barbados Polo Club to have free access to the pump and use of water from the said well; and*
- b) in terms of paragraph (ii) of the Summons: *(ii) The Defendant by itself, its directors, servants, agents or otherwise are hereby restrained from doing all or any acts which would prevent the free access of the Barbados Polo Club to the pump house, the pump*

and the use of the water from the well aforesaid pending the determination of this action or until further order;

- c) the above orders are subject to the Plaintiff giving the usual undertaking in damages;
- d) The award of costs on the application is reserved for argument;
- e) There shall be liberty to apply.

**Maureen Crane-Scott,
Judge of the High Court**