BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 14 of 2008

BETWEEN:

TOOJAYS LIMITED	***Appellant***
AND	
WESTHAVEN LIMITED	***Respondent***

BEFORE: The Hon. Sherman Moore, Chief Justice (Ag.), The Hon. Sandra Mason and The Hon. Andrew Burgess, Justices of Appeal.

2010: 29 November

2011: 16 September

Mr. Bryan Weekes in association with Miss Joie Reece for the Appellant

Mr. Alrick Scott in association with Miss Yasmin Brewster for the Respondent

DECISION

INTRODUCTION

[1] **BURGESS JA:** ***Section 44 (b) of the Supreme Court of Judicature Act, Cap. 117A*** confers a discretionary power on the High Court to "grant a mandatory or other injunction". In its inherent jurisdiction, the High Court has discretionary power to discharge or not discharge an injunction so granted. The narrow question with which this appeal is concerned is whether it is appropriate in the circumstances of this case for this Court, to which appeal lie on a point of law from the High Court, to interfere with the exercise by **Goodridge J**., a High Court judge, of her discretion to discharge an interlocutory injunction granted by her.

[2] From as long ago as 1981, this Court in the case of ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd*** **(1981) Barb LR 11** accepted the principles laid down by **Lord Diplock** in the English House of Lords decision in ***American Cyanamid Co. v Ethicon Ltd [1975] AC 396*** as establishing the guidelines to be applied in determining whether or not to grant or to discharge an interlocutory injunction. Since 1981, cases in the High Court have been applying the ***American Cyanamid*** guidelines without any reference to this Court's interpretation of those guidelines in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11***. The result of this is that there is some confusion in the case law. This appeal also provides an opportunity for this Court to clarify some of the confusion.

THE FACTUAL BACKGROUND

[3] The factual background to this appeal is not complicated. The Respondent is the owner of a restaurant property situate at Holetown, St. James. On May 1, 1998, the Respondent entered into a lease agreement to let that property to the Appellant for a period of five years commencing May 15, 1998. The Respondent and the Appellant operated under this agreement for a period of almost four years.

[4] In 2002, the Appellant informed the Respondent that, in order to satisfy two potential investors, it, the Appellant, needed to offer these investors a 10 year lease minimum. The Respondent acceded to the Appellant's request and a second lease agreement was executed by the Respondent and the Appellant. In this second lease agreement, it was agreed that the Appellant "shall rent the above-mentioned building for a period of 10 years commencing May I, 1998 to terminate on April 30, 2008 with an option of renewal for an additional five years to terminate on April 30, 2013". This agreement is undated.

[5] The Appellant sent to the Respondent a letter dated January 28, 2008 in which it sought to exercise the option to renew the lease contained in the second lease agreement. However, the Respondent claimed that the option to renew was not properly exercised and refused to renew the lease.

[6] The Appellant then filed a writ in the High Court on May 6, 2008 claiming:

"(1) a declaration that the option for renewal contained in the second agreement was validly exercised by the Appellant;

(2) specific performance of the option to renew the lease in accordance with the terms contained in the second agreement with the effect that the Respondent does grant the Appellant a lease in writing to expire on the 30th day of April 2013."

[7] On June 1, 2008, at the expiration of the term under the first lease agreement, the Respondent retook possession of the demised premises. The Appellant thereafter, on June 3, 2008, obtained an interlocutory injunction *ex parte* by the order of **Goodridge J**., directing the Respondent to give immediate possession of the premises at Holetown, St. James to the Appellant in order for the Appellant's principal to access the Appellant's records. The order also enjoined the Respondent from entering into any lease arrangement with any party or in any way dealing with the demised property so as to part with possession of it until further order of the Court.

[8] On July 1, 2008, the Appellant filed an amended Writ, in which it claimed that the second lease agreement varied the terms of the first lease agreement. In these premises, the Appellant sought, in the alternative, damages for breach of contract.

[9] On July 3, 2008, the Respondent filed a summons to discharge the interlocutory injunction granted *ex parte* on June 3, 2008. The application was heard by **Goodridge J.** on July 4 and 25. She ordered that the injunction be discharged "since damages would be an adequate remedy if the plaintiff (now Appellant) succeeds at trial".

[10] The Appellant now appeals against the order of July 4, 2008 of **Goodridge J.** discharging the interlocutory injunction granted *ex parte* on June 3, 2008.

THE APPELLANT'S CASE

[11] The case for the Appellant is set out in the Notice of Appeal which discloses only one ground of appeal. It is that the "Learned Trial Judge erred in law in holding that in all the circumstances that the injunction should be discharged on the basis that damages are an adequate remedy to compensate the Appellant should it be successful at the trial of the matter when the substantive matter deals with the Appellant's application for, inter alia, specific performance of an option to renew a lease of real estate for a period of five years between the parties to the action".

[12] Before this Court, Counsel for the Appellant, Mr. Weekes, expanded on this ground. He argued that two legal consequences flowed from the fact that the matter before **Goodridge J.** was an application for an order of specific performance. The first is, as he formulated it, "in cases where specific performance is sought of an agreement damages are virtually never considered an adequate remedy". The second is that the principle stated in ***Halsbury's Laws of England Vol 24 4th Edn para 920*** that "pending proceedings for specific performance, the High Court will grant an injunction to restrain a vendor from dealing with property if there is a clear and undisputed contract" became applicable. According to Mr. Weekes, **Goodridge J.** fell into error in not having regard to these principles.

[13] Mr. Weekes argued that for the foregoing reason the trial Judge's exercise of her discretion was wrong. It is on this basis that the Appellant is urging this Court to interfere with the exercise by the trial Judge of the discretion to discharge the injunction.

THE RESPONDENT'S CASE

[14] The case for the Respondent has been presented by Mr. Scott, Counsel for the Respondent. He argued that an appellate court has a

limited function in an appeal from a grant or refusal of an interlocutory injunction and should only interfere with the exercise of the discretion of the trial judge where the trial judge has in some way misdirected himself or herself. Mr. Scott's argument continued that, in this case, the learned trial judge did not misdirect herself in holding that the Appellant could be adequately compensated by an award of damages were the Appellant to be successful at the trial. This being the case, he concluded that there is no basis for this Court to interfere with the exercise of the discretion to discharge the interlocutory injunction granted ex parte on June 3, 2008.

[15] Mr. Scott advanced an argument in the alternative. It is that, even if **Goodridge J.** was wrong in holding that the Appellant could be adequately compensated by an award of damages were the Appellant to be successful at the trial, this Court would still have to consider the balance of justice (convenience). Given the circumstances of this case, Mr. Scott contended, the relative strength of the parties cases must be taken into account in considering the balance of justice. If this is done, he submitted, the irresistible conclusion is that the Respondent has the stronger case and that the balance of justice favours not granting the discharge sought by the Appellant. For this reason, concluded Mr. Scott, this Court should not interfere with the exercise of the discretion by **Goodridge J.** to discharge the injunction.

THE ISSUES

[16] The case presented by both the Appellant and the Respondent accepts that the discharge of the injunction by **Goodridge J**. was done pursuant to a discretionary power which resided in her as a judge of the High Court. The logic of this acceptance leads to the conclusion that two principal issues are raised in this case.

[17] The first of these is whether there is any jurisdiction in this Court, an appellate court, to interfere with the discharge of an interlocutory injunction by **Goodridge J**., which is admittedly the exercise of a discretion that resides in her. The second is, assuming there is such a jurisdiction, whether there is any basis for this Court to interfere with the exercise by **Goodridge J.** of her discretion to discharge the interlocutory injunction in this case.

[18] These two issues are dealt with hereafter *seriatim*.

APPELLATE FUNCTION IN THE EXERCISE OF A DISCRETION

[19] In the English Court of Appeal decision of ***Phonographic Performance Ltd v AEI Redifusion Music Ltd [1999] 1 WLR 1507, 1523-D***, **Lord Wolf** outlined the appellate function in respect of an appeal to an appellate court against the exercise of a discretion by a trial court as follows:

> "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[20] This dictum underlines what is well settled in our law, namely, that an appellate court has a limited function in an appeal from the grant or refusal of an injunction granted under ***section 44 (b) of the Supreme Court of Judicature Act, Cap. 117A***. The reason for this is simple. An injunction is a discretionary order and the discretion whether or not to grant it is vested in the High Court alone. An appellate court therefore has no jurisdiction to exercise an independent original discretion of its own. As **de la Bastide CJ** said in the Trinidad and Tobago Court of Appeal decision in ***Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 562*** at ***568*****:** "It is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own".

[21] The general principle that an appellate court should only interfere with the exercise of a discretion by a High Court judge in limited circumstances is equally applicable to the specific case of a grant or discharge of an interlocutory injunction. This was made plain in the English House of Lords in ***Hadmor Productions Ltd v Hamilton [1983] 1 AC 191***, where **Lord Diplock** said at page 220:

> "Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[22] In the appeal before us, the Appellant accepts these principles but argues that this Court should interfere with the exercise by **Goodridge J**. of her discretion to discharge the interlocutory injunction in this case. The basis on which this Court is asked to interfere is that **Goodridge J.** acted upon wrong principles of law in the exercise of her discretion. The Respondent agrees that this is the only basis on which this Court can interfere with **Goodridge J.'s** exercise of her discretion to discharge the injunction.

[23] This Court must therefore now confront the second issue, namely, whether **Goodridge J.** acted upon wrong principles in the exercise of her discretion.

DID GOODRIDGE J. ACT UPON WRONG PRINCIPLES IN THE EXERCISE OF HER DISCRETION?

[24] In seeking to resolve this question, we are of the view that it is necessary to begin with a consideration of the general principles which apply in this case.

Governing Principles

[25] As was pointed out in **paragraph [2]** of this judgment, in the case of ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11***, this Court accepted the principles laid down by **Lord Diplock** in the English House of Lords decision in ***American Cyanamid Co. v Ethicon Ltd [1975] AC 396*** as establishing the guidelines to be applied on an application for the grant or discharge of an interlocutory injunction. Indeed, throughout the West Indies, courts have universally adopted the ***American Cyanamid*** guidelines in deciding whether or not to grant or discharge an interlocutory injunction as, for instance, in the Jamaican Court of Appeal in ***McDonald's Corporation v McDonald's Corporation Ltd (1996) 55 WIR 226*** and the Trinidad Court of Appeal in ***East Coast and Workover Services Ltd v Petroleum Co of Trinidad and Tobago Ltd (2001) 58 WIR 351***.

[26] It is evident from her judgment that the ***American Cyanamid*** guidelines are the principles which **Goodridge J.** invoked in this case in the exercise of her discretion in favour of discharging the interlocutory injunction. Thus, at **para [10]** of her judgment she stated:

> "The case of the *American Cyanamid Co. v Ethicon Ltd [1975] AC 396* HL, is the leading authority on the principles to be applied by a court when dealing with the grant (and discharge) of interlocutory injunctions."

[27] **Goodridge J.** continued at **para [11]**:

> "Those principles may be stated as follows:
>
> Firstly, is there a serious question to be tried? If the answer to that question is in the affirmative then the further following questions fall for consideration:
>
> (i) Would damages be an adequate remedy? And if not,
>
> (ii) Where does the balance of convenience lie."

Confusion in Approach to the American Cyanamid: Two-Stage or Three-Stage Inquiry?

[28] **Goodridge J.'s** statement of the ***American Cyanamid*** principles accords with the approach which treats the ***American Cyanamid*** principles as involving a three stage sequential enquiry. The first stage is whether there is a serious question to be tried. If the answer to this question is yes, then enquiry moves to the second stage which is a consideration of whether common law damages would be an adequate remedy. If the answer to this second question is no, then the enquiry becomes one of deciding where the balance of "convenience" lies. These stages are applied as separate, distinct and logical hurdles which the plaintiff must surmount sequentially. This approach, it may be added parenthetically, is more often than not adopted in our High Court as, for instance, was done by **Crane-Scott J** in the High Court decision in ***Coyle v James Doherty (Unreported) (Civil Case No. 1197 of 2007)***, a case cited to us by the Appellant.

[29] Counsel for the Appellant contended in effect that this approach, which was recently deprecated by **Lord Hoffman** in the Privy Council in the Jamaican case of ***National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] 1 WLR 1405*** at ***1410*** as a "type of box-ticking approach" which "does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction", is not warranted by the ***American Cyanamid*** principles. He argued, as this Court understands it, that the ***American Cyanamid*** guidelines involves, not a three-stage but a two-stage inquiry, namely, (i) was there a serious case to be tried, and (ii) where does the balance of justice (convenience) lie? He denies that there is any separate enquiry into the question whether damages would be an adequate remedy. The inquiry into adequacy of damages, he further argues, is an aspect of the complex inquiry into where the balance of justice (convenience) lies.

[30] There is substantial support for the view advanced by Counsel for the Appellant in the decision of this Court in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11***. This case was an appeal from a decision of **Chase J (Ag)** dismissing the application of Williams, the plaintiff, for the grant of an interlocutory injunction to restrain the Canadian Bank of Commerce Trust Co. (Caribbean) Ltd. and others, the defendants, from erecting or continuing to erect any dwelling-houses in breach of a restrictive covenant enuring to the benefit of Williams. Williams appealed on the sole ground that **Chase J (Ag),** in refusing to grant the injunction, acted on wrong principles of law.

[31] The principles of law which **Chase J (Ag)** had invoked in the High Court in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1979) 36 WIR 111*** at ***pages 117-118*** were the ***American Cyanamid*** guidelines as summarized by ***Sir John Pennycuick's*** in ***Fellows & Son v Fisher [1975] 1 All ER 829*** at ***843*** as follows:

> "Lord Diplock's speech must be read in full. Very summarily, he laid down the following procedure as appropriate in principle: (1) Provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case. (2) The court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief. (3) 'As to that' the court should first consider whether, if the plaintiff succeeds he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory should normally be granted. (4) If damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason on this ground to refuse an interlocutory injunction. (5) Then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance, should otherwise be even, being preservation of the *status quo*. By the expression '*status quo'* I understand to be meant the position prevailing when the defendant embarked on the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief. (6) Finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence…."

[32] This summary of the ***American Cyanamid*** clearly proposes a two stage enquiry. The first is the initial threshold of serious question to be tried, and the second, consideration of where does the balance of justice (convenience) lie. It is worth emphasizing that consideration of adequacy of damages is not treated as a separate and distinct stage, but merely as a significant consideration in assessing the balance of convenience.

[33] On appeal, this Court did not in any way mitigate, limit or qualify the approach of **Chase J (Ag)** to the ***American Cyanamid***. On the contrary, this Court held (at ***(1981) Barb LR 11 page 18)*** that ***Chase J (Ag)*** "in finding that the balance of convenience lay in favour of refusing the relief cannot be said to have acted on any erroneous principle". On this basis, this Court dismissed the appeal and affirmed the approach of **Chase J (Ag)** to the ***American Cyanamid***.

[34] The upshot of the foregoing is that there is some confusion in the cases from our courts as to whether the ***American Cyanamid*** guidelines involve an enquiry of two or three stages. But, it must be quickly added that our courts are not singular in this respect: the confusion spreads across the Commonwealth. In Canada, two Canadian Supreme Court decisions in ***Manitoba (A-G) v Metropolitan Stores Ltd. [1987] 1 SCR 110 and RJR-MacDonald Inc v Canada (A-G) [1994] 1 SCR 311*** require a three-stage enquiry whereas the courts in Ontario and British Columbia insist that the enquiry is a two-stage enquiry: See, e.g., ***Kanda Tsushin Kogyo Co v Coveley (1997), 96 OAC 324 Ont CA; Peerless v British Columbia School Sports (1998), 157 DLR (4th) 345 BC CA***. In Australia, also, there is conflict in the cases. Thus, in ***Castlemaine Tooheys Ltd v South Australia (1986) 161 CLR 148*** at ***153***, **Mason ACJ** indicated the need for a three-stage enquiry whereas in ***McHattan, Geoffrey James v Australian Specialised Vehicle Systems Ltd [1996] FCA 481***, the Federal Court of Appeal adopted the two-stage approach applied by the Queensland Full Court in ***Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd [1991] 1 Qd R301***. In New Zealand, the High Court of New Zealand in ***Pollen-Plus Ltd v Znel Ltd [2010] NZHC 1917*** recently pointed to the confusion and applied the two-stage approach. Finally, here in the West Indies, the Jamaica Court of Appeal In ***McDonald's Corporation v McDonald's Corporation Ltd (1996) 55 WIR 226*** favoured the three- stage approach whereas the Trinidad Court of Appeal in ***East Coast and Workover Services Ltd v Petroleum Co of Trinidad and Tobago Ltd (2001) 58 WIR 351*** applied the two-stage approach.

Genesis of Confusion

[35] The genesis of the confusion in the case law traces its roots to the judgment of **Lord Diplock** in the ***American Cyanamid*** case itself. His judgment contains passages which appear to support both the two-stage approach and the three-stage approach.

[36] Initially, in outlining the ***American Cyanamid*** principles, **Lord Diplock** stated that the first question for the court is to decide whether the application should be entertained and that the test for so deciding was whether the court was "satisfied that the claim is not frivolous or vexatious: in other words, that there is a serious question to be tried". He then asserted that unless the answer to this question is in the

negative, "the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought". In the paragraph following this assertion that the second question is as to where the "balance of convenience" lies, **Lord Diplock** continued:

> "As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of application and the time of trial."

[37] Read in context, it is patent that, in this passage, **Lord Diplock** was not suggesting that adequacy of damages was a separate and distinct consideration in the exercise of the statutory power to grant an interlocutory injunction where it appears just and convenient so to do: it was merely a major consideration in determining where the balance of convenience lies. Put simply, **Lord Diplock** appears to be suggesting a two-stage enquiry, namely, is there a serious case to be tried? And, if yes, where does the balance of convenience lie?

[38] There is a subsequent passage in **Lord Diplock's** judgment, however, which appears to contradict the foregoing and to suggest that adequacy of damages constitutes a separate, distinct stage in the enquiry as to whether an interlocutory injunction should be granted. The passage reads:

> "It is 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.

This passage is the basis of the suggestion that the ***American Cyanamid*** guidelines involve a three-stage enquiry, namely, is there a serious case to be tried? If the answer to this is that there is a serious case to be tried, then, are damages an adequate remedy? And, if damages are not an adequate remedy, where does the balance of convenience lie?

Resolving the Confusion

[39] This Court is of the view that, on a proper analysis of the ***American Cyanamid*** case, **Lord Diplock** in the House of Lords could not have, and did not propound a three-stage enquiry. In our view, the starting point in any understanding of the ***American Cyanamid*** case is the recognition that that case is intended to establish a set of guidelines which apply in many cases in the exercise of the statutory power of the court to grant an injunction where "it appears to the court to be just or convenient to do so". Admittedly, **Lord Diplock** in the ***American Cyanamid*** case made no express reference to the statutory basis of the guidelines propounded by him. However, as **Kerr LJ** in ***Cayne v Global Natural Resources plc [1984] 1 All ER 225 at 234*** noted: "the grant of an injunction is ultimately a matter of statutory discretion" and in ***R v Secretary of State for Transport, ex parte Factortme [1991] 1 AC 603*** at ***671***, **Lord Goff** identified this discretion as "[a] broad discretion conferred on the courts by s. 37 of the 1981 Act [the U.K. Supreme Court Act]."

[40] Attention must therefore turn to the relevant statutory provision. This provision empowers the High Court to grant an interlocutory injunction in cases where it appears to the court "to be just or convenient so to do". As a matter of logic, the exercise of the power conferred by this provision inevitably involves two considerations. The first of these is whether a given case is one the court should entertain. The second is whether the case satisfies the statutory standard for the grant, namely, the standard of what is just or convenient. In strict exegesis, there is no third consideration warranted by the statutory provision and certainly, on the express words of the provision, no question of adequacy of damages. Adequacy of damages can only be a relevant consideration as an aspect of an inquiry into what is just or convenient.

[41] *Ex hypothesi*, then, the just or convenient statutory provision, which ultimately delimits the boundaries of the ***American Cyanamid*** guidelines, only contemplates a two-stage enquiry: it does not permit a three-stage enquiry. The passage in **Lord Diplock's** judgment which suggests a three-stage enquiry is difficult to reconcile with the logic of the just or convenient statutory provision which rests at the foundation of the ***American Cyanamid*** guidelines. The passages in his judgment suggesting a two-stage enquiry are more consistent with the logic of the statutory conferment. Indeed, in ***NWL Ltd v Woods [1979] 3 All ER 614*** at ***625,*** **Lord Diplock** seems to have accepted this reasoning when he stated that the ***American Cyanamid*** "…enjoins the judge on an application for an interlocutory injunction to direct his attention to the balance of convenience as soon as he has satisfied himself that there is a serious case to try…"

[42] In sum, taken in its statutory context, the ***American Cyanamid*** guidelines must be taken to have established a two-stage enquiry. The first stage involves a consideration of whether there is a serious case to be tried and at the second stage the balance of justice (convenience) is the governing consideration. This is the approach which this Court took in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11*** and which should guide our courts in applying the ***American Cyanamid*** guidelines.

Balance of Convenience or Balance of Justice?

[43] Before applying the ***American Cyanamid*** guidelines as just outlined to the case before us, this Court thinks it important to venture its comments on what **Lord Diplock** calls the "balance of convenience". The expression "balance of convenience" does not fully reflect the standard imposed by the statutory provision which confers the power on courts to grant or refuse an interlocutory injunction. The express statutory standard is what is "just or convenient". This Court is of the view that a serious danger inheres in divorcing the ***American Cyanamid*** guidelines from their statutory context. It is the risk of interpreting the "balance of convenience" concept in the guidelines so narrowly as to obscure the fact that ultimately the exercise of the discretion to grant or refuse an injunction is statutory and that it is to be

exercised, in the words of the statute, in the interests of what is "just or convenient".

[44] This Court in ***M4 Investments Inc v Clico Holdings (B'dos) Ltd (2006) 68 WIR 65*** at ***para 49, page 86*** hinted its disquiet at the use of the expression "balance of convenience". **de la Bastide CJ** in the Trinidad and Tobago Court of Appeal decision in ***East Coast and Workover Services Ltd v Petroleum Co of Trinidad and Tobago Ltd (2001) 58 WIR 351*** at ***358*** was more explicit where he said:

> "The phrase 'balance of convenience' was used in the past to describe this next phase of the inquiry, but it does not adequately encapsulate the factors which govern the exercise of the discretion to grant or refuse an interlocutory injunction. A more modern approach, which was adopted in *Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362*, is to pose the question: where does the greater risk of injustice lie, in granting or in refusing the injunction? If I may venture respectfully to suggest it, one criticism of this phrasing is that it does not make it clear that one has to assess and compare not only the quantum of the risk that injustice may occur, but also the extent of the injustice that may occur. The risk of injustice may be greater if an injunction is granted when the case for the plaintiff is not a strong one, but the consequences of refusing the injunction may be far more disastrous for the plaintiff than the consequences to the defendant of wrongly granting it."

[45] The reservations of **de la Bastide CJ** with the expression "balance of convenience" are echoed in a number of English Court of Appeal decisions. For instance, in ***Cayne v Global Natural Resources plc [1984] 1 All ER 225*** at ***237,*** **May LJ** said of the "balance of convenience":

> "That is the phrase which, of course, is always used in this type of application. It is, if I may say so, a useful shorthand, but in truth, as Lord Diplock made clear in the *NWL* case, the balance that one is seeking to make is more fundamental, more weighty, than mere 'convenience'. I think that it is quite clear….that, although the phrase may be substantially less elegant, the 'balance of the risk of doing an injustice' better describes the process involved. Again, I need only refer to a brief passage from the speech of Lord Diplock in the *NWL case [1979] 3 All ER 614 at 625*…"

[46] Again, **Sir John Donaldson MR** in the English Court of Appeal case of ***Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892…,*** said of the "balance of convenience":

> "Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."

[47] And finally, **Lord Donaldson** in ***Att-Gen v Barker [1990] 3 All ER 257*** at ***260***, in applying the ***American Cyanamid*** guidelines said of the "balance of convenience":

> "…we are concerned with where the balance of justice lies: 'convenience' is the word used in the report but that may be misleading."

[48] This Court shares the view that the expression "balance of justice" best reflects the statutory discretion which guides the grant or refusal of an interlocutory injunction, namely, discretion to do what is just or convenient. In our opinion, the ***American Cyanamid*** guidelines must be seen as nothing more than a judicial attempt to weave statutory language into the fabric of that ethereal urge, the desire for justice, which, from time in memoriam, our courts have been trying to incarnate in our legal system through the jurisprudence of equity. "Convenience", we may add, has never occupied any separate conceptual space in our legal system. "Convenience" has always been held in our legal system to be embraced in the concept of "justice", or as it is systemically called, "equity". One manifestation of this is, for instance, the equitable maxim that equity does not act in vain. Another is the development of the *quia timet* injunction to restrain a threatened wrong although there is no cause of action at law until the wrong is committed.

[49] In the recent English House of Lords case of ***Stone & Rolls Ltd (In Liquidation) v Moore Stephen (A Firm) [2009] 1 AC 1391*** at ***1438***, **Lord Phillips** cited with approval **McLachlin J** in the Canadian decision of ***Hall v Herbert (1993) 101 DLR (4th) 129*** at ***165***, where she noted that "the law must aspire to be a unified institution, the parts of which….must be in essential harmony". Courts in the common law system have always interpreted legislation to achieve this harmony. In fact, as Tracy Robinson, Senior Lecturer in Law at the University of the West Indies, observed in her seminal article "***Gender, Nation and the Common Law Constitution" (2008) 28 Oxford Journal of Legal Studies 735***, the quest for this essential harmony is also evident even in our courts interpretation of our written Constitutions. For the reasons adduced in the preceding paragraph of this judgment, this Court is of the view that the aspiration for the law to be a unified institution argues for the statutory expression "just or convenient" to be interpreted as requiring an inquiry into the "balance of justice" rather than the "balance of convenience".

[50] To summarise, it is our view that the balance which courts must achieve is the statutory balance of what is just or convenient and that that balance is fully captured in an inquiry into the balance of justice. The task with which the court is concerned is admirably captured in a dictum of **Kerr LJ** in the English Court of Appeal decision in ***Cambridge Nutrition Ltd v British Broadcasting Corporation [1990] 3 All***

ER 523 at ***535*** where he said*:* "the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial". This task is by nature complex since, as was noted by **Lord Hoffman** in the Privy Council decision from Jamaica of ***National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] 1 WLR 1405*** at ***1409***: "….the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be".

[51] Against the foregoing jurisprudential backdrop, this Court now turns to the application of the ***American Cyanamid*** guidelines by **Goodridge J.** in this case.

Serious Question

[52] **Goodridge J.,** correctly we may add, considered the first question, namely, whether there was a serious question to be tried. On this, she concluded at **para [15]** of her judgment that in her view "the plaintiff has shown on the pleadings that it has an arguable case, one which cannot be regarded as frivolous or vexatious". There is no complaint in respect of this conclusion and nothing more needs be said on **Goodridge J.'s** determination of this first question.

Determining the Balance of Justice

[53] On basic principles of *stare decisis*, **Goodridge J.** was bound to follow the approach to the ***American Cyanamid*** guidelines which this Court laid down in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11***. This means that, once she had satisfied herself that there was a serious case to try, she should have directed her attention at the second stage of the inquiry to the balance of justice. Instead, she took the view, at **para [16]** of her judgment, that having been satisfied that the pleadings disclosed a serious case to try, the next question which she had to ask was "whether damages would be an adequate remedy". This approach is inconsistent with the judgment of this Court in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd (1981) Barb LR 11*** at ***page 17*** where it was stated that adequacy of damages is merely "a significant factor in assessing where the balance of convenience lies".

Adequacy of Damages

[54] The principle that adequacy of damages is to be considered as "a significant factor in assessing where the balance of convenience lies" means that the question as to whether or not damages would be an adequate remedy must be assessed in the context of the overall function of the court in the granting or refusal of an interlocutory injunction which is to hold the balance as justly as possible between the parties until trial. The nub of the Appellant's complaint is in effect that **Goodridge J.** did not do this. Accordingly, it is incumbent upon this Court to carefully examine **Goodridge J.'s** judgment on this issue.

[55] At **para [17]** of her judgment, **Goodridge J.** wrote:

> 'As was stated by Lord Diplock in the *American Cyanamid* at page 408-
>
> > "…the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of application and the time of trial. If damages…would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.
>
> If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction".'

[56] The approach to the question of adequacy of damages in this statement of the law by **Lord Diplock** was referred to by **de la Baside CJ** in ***Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362*** at ***368***, as the narrow approach to adequacy of damages. It is perhaps better described as the general approach.

[57] This approach views "damages" as referring to those damages which are legally recoverable in the action, and "adequate" as being synonymous with quantifiable. It proposes that as a general rule, the object of best enabling the trial judge to do justice between the parties, whichever way the decision goes at trial requires that, in the words of **Buckley LJ** in the English Court of Appeal decision in

Polaroid Corporation v Eastman Kodak Co. Ltd [1977] RPC 379** at **395, "if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained save in exceptional circumstance".

[58] Of course, this general rule is wholly consistent with the notion of justice in our common law system expressed in the maxim that equity follows the law. Since justice is achieved at law by the award of damages, it follows therefore that equity can only in exceptional circumstances grant an injunction where compensation in damages would be otherwise adequate.

[59] It is for this reason that **Buckley LJ** formulates this approach as a general approach which may be inapplicable in "exceptional circumstances". In this regard, it appears from the cases that what constitute "exceptional circumstances" are those circumstances where the interest of justice renders the general approach inapplicable. Thus, **Sachs LJ** in the English Court of Appeal decision of ***Evans Marshall & Co. Ltd v Bertla SA [1973] 1 ALL ER 992*** at ***1005*** said:

> "The standard question in relation to the grant of an injunction, "are damages an adequate remedy?" might perhaps in light of authorities of recent years, be written: "Is it just in all the circumstances that a plaintiff should be confined to his remedy in damages?"

Sachs LJ went on to identify examples of exceptional circumstances where the general approach would be inapposite. He said at ***page 1005***:

> "The courts have repeatedly recognized that there can be claims under contracts in which…it is unjust to confine a plaintiff to his damages for their breach. Great difficulty in estimating these damages is one factor that can be and has been taken into account. Another factor is the creation of certain areas of damages which cannot be taken into monetary account in a common law action for breach of contract: loss of goodwill and trade reputation are examples…"

[60] Another example cited by **Sachs LJ** where the "exceptional circumstances" approach may be justified is to thwart the cynical breach of contracts by parties who for commercial or other reasons would prefer to pay damages for its breach rather than perform the contract. **Sachs LJ** said at ***1008:***

> "The grant of these injunctions would be in conformity with the trend of recent decisions that the court, in using its discretion, is disposed to set its face against those who seek abruptly to break contracts in circumstances such as obtains in this case. The trend works in the interest of justice and also in the interest of the proper conduct of commercial relations."

[61] To the same effect is the observation of **Hoffman J** in ***Films International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670*** at ***688** that:*

> "Denial of the injunction may enable a party to achieve a commercial objective by a calculated disregard of the basic principle of a civil society that 'Men perform their covenants made'."

[62] **Goodridge J.** did not engage in any discussion of what is meant by adequacy of damages or the different approaches found in the cases to determining whether or not damages are adequate. However, it is clear from her judgment that she adopted the general approach which views "damages" as referring to those damages which are legally recoverable in the action, and "adequate" as being synonymous with quantifiable. Thus, at **para [18]** of her judgment she writes as follows:

> "Having regard to the nature of the plaintiff's case, I consider that if the plaintiff were to succeed at trial, damages would be an adequate remedy in the event it turns out that the injunction was wrongly discharged. There would be no difficulty for the court to compute such damages, if required."

[63] Was this the right approach in this case or was this a case for adopting the alternative in the interest of justice approach?

Balancing Justice in an Injunction in Aid of Specific Performance

[64] This Court accepts the contention of Counsel for the Appellants that the case law prior to the guidelines enunciated by **Lord Diplock** in the ***American Cyanamid*** has established that "an injunction in aid of an application for specific performance" must be treated as a specific example of where the general approach is inapplicable. The applicable principles in such a case are stated in ***Halsbury's Laws of England Vol 24, 4th Edn para 920*** as follows:

> "Pending proceedings for specific performance, the High Court will grant an injunction to restrain a vendor from dealing with property if there is a clear and undisputed contract, but, if this is open to doubt, the question becomes one of comparative convenience and an injunction will be granted or refused according to the side which the balance of convenience inclines."

[65] The statement of **Jessel MR** in ***Smith v Peters (1875) LR 20 Eq 511*** at ***513*** captures the fundamental principle that underlies the exercise of the court's intervention in cases concerned with "an injunction in aid of an application for specific performance" where he said:

> "I have no hesitation in saying that there is no limit to the practice of the court with regard to interlocutory injunctions so far as they are necessary and reasonable applications ancillary to the due performance of its function, namely, the administration of justice at the hearing of the cause."

[66] It is clear from this statement that in proceedings involving the grant of "an injunction in aid of an application for specific performance", the court is concerned with, in the words of ***Spry The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages 5th edn*** at ***pg 571,*** "the preservation of the interests of the parties in as just a manner as is possible pending the final determination of their rights". And as **Spry** concludes this quote, the cases prior to the ***American Cyanamid*** guidelines, then, merely represent "an example of the general powers of the courts to supplement other remedies with injunctions wherever the balance of justice renders it appropriate to do so".

Resolving the Instant Case

[67] Given the foregoing, the fundamental question in this case therefore becomes, "wherein lies the greater risk of injustice in discharging or not discharging the injunction?" If this is indeed the fundamental question, then, the force of the submission of Counsel for the Respondents that, in determining the question "wherein lies the greater risk of injustice in discharging or not discharging the injunction?" due consideration must be taken of the relative strength of the parties' cases becomes irresistible.

[68] This is particularly so when the statement of law by **Sir John Pennycuick** in the case of ***Fellows & Son v Fisher [1975] 3 WLR 184*** is taken into consideration. He stated there:

> "In many classes of case, in particular those depending in whole or in great part upon the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief."

[69] At the heart of this present case is the construction of an undated written lease agreement of premises at Holetown, St. James, and in particular, the provisions relating to an option to renew. Accordingly, in determining where the balance of justice lies, this Court must treat the relative strength of each party's case as relevant as was done in the English Court of Appeal case of ***Cambridge Nutrition Ltd v British Broadcasting Corp [1990] 3 All ER 523*** and in the Trinidad and Tobago Court of Appeal case of ***Jetpak Services Ltd v BWIA International Airways Ltd (1998) 55 WIR 362***.

[70] In approaching this task of weighing the relative strength of the parties' case, this Court is fully mindful of the words of **Lord Diplock** in the ***American Cyanamid [1975] AC 396*** at ***407*** on the court's function at the interlocutory stage of litigation:

> "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 considerations."