BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No. 2041 of 2012

BETWEEN:

ROY COTTLE

EVANESE COTTLE

CLAIMANTS

AND

VIDA EDWARDS

DEFENDANT

Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court

2012: December 06

2013: January 16, 23

May 27

Mr. Vincent Watson with Mr. Derick Oderson for the Claimants

Mr. Guyson Mayers for the Defendant

DECISION

INTRODUCTION

[1] On 26 November 2012, the Claimants filed a notice of application seeking interim injunctive relief against the Defendant in the following terms:

(a) the Defendant her agent and or servants to remove all locks, chains or other barriers to entry from the right of way situated at Porey Spring, Saint Thomas until further order of this Honourable Court;

(b) that the Defendant her agent or servants refrain from applying or causing or allowing any locks, chains or other barriers to entry to be applied to and or otherwise preventing the Claimants from

using the said right of way until further order of this Honourable Court;

[2] The principal ground of the application as set out in the notice of application was as follows:

> The Defendant her servant and/or agents wrongfully constructed a barrier across the right of way on the 22nd day of September 2012 which deprived and/or caused or allowed the Claimants to be deprived of use of the right of way and still deprives or causes or allows the Claimants to be deprived of such use;

[3] An *inter partes* hearing took place on 16 and 23 January 2013 at the end of which I granted the Claimants the relief sought and promised to give my written reasons at a later date. I do so now.

THE CLAIM

[4] By their substantive claim filed on 26 November 2012, the Claimants seek the following relief:

(1) A Declaration that the right of way 1.83 metres wide shown on a Plan of Land made and certified on the 31st day of July 1995 by Andrew R. Bannister Land Surveyor, is the right of way to the property owned by the Claimants;

(2) A Declaration that the Defendant has wrongfully deprived the Claimants to (sic) the use of the said right of way

(3) A Declaration that the Claimants are entitled to the use of the right of way on foot and by vehicle for the purposes of gaining access to and from their property.

(4) An Order restraining the Defendant whether by herself or her agents or howsoever from depriving or allowing or causing the Claimants to be deprived of the use of the said right of way;

(5) An Order restraining the Defendant whether by herself or her agents from obstructing or otherwise hindering the Claimants from the use of the said right of way;

(6) Such further or other relief as this Honourable Court may deem fit; and

(7) Costs.

THE EVIDENCE

[5] The Claimants filed two affidavits in support of their application, one on 26 November 2012 ("the Claimants' first affidavit") and the other on 7 December 2012 ("the Claimants' second affidavit"). The Defendant filed an affidavit in response on 12 December 2012. These affidavits are the sources of the evidence outlined below.

[6] The parties are neighbours. They occupy adjoining lands at a place they call Porey Spring, St. Thomas. They are elderly persons, all claiming to be almost octogenarians. Regrettably, neither neighbourliness nor age prevented this land-related dispute from reaching a judicial forum.

[7] The land on which the Defendant resides (the Defendant's land) lies eastward of that occupied by the Claimants (the Claimants' land). The eastern boundary of the Defendant's land adjoins the public road. These relative positions are shown on a plan of the Claimants' land made and certified by Mr. Andrew Bannister, Land Surveyor on 31 July 1995 ("the surveyor's plan").

[8] The surveyor's plan was exhibited with the Claimants' first affidavit. It shows the Claimants' land as containing

344.0 square metres and states it to be located at Spring Farm, St. Thomas. It identifies the public road, showing it as leading to Porey Spring in one direction and to Dunscombe Plantation in the other. It appears that where the parties reside is called Porey Spring or Spring Farm.

[9] The surveyor's plan also shows an area designated "right of way". It is 1.83 metres wide. As depicted, it starts at the point where the north-eastern corner of the Defendant's land meets the public road and runs, east to west, along the entire northern boundary of the Defendant's land. It penetrates the Claimants' land and runs along the northern boundary of that land for a distance of 6.65 metres. It spans those lands and the southern boundaries of the adjoining lands. This is the area over which the Claimants contend they enjoy a right of access by foot and vehicles. I shall refer to it as "the strip".

[10] In their affidavits, the Claimants describe the strip as separating their land from the Defendant's land. This is incorrect. The Claimants' land lies directly behind the Defendant's, if one beats a westward path from the public road. However, the parties accept that the surveyor's plan depicts the relative positions of their land. Hence, nothing turns on this discrepancy.

[11] The Claimants acquired title to their land by a deed dated 2 June 1999. They exhibited that document with their second affidavit. The description of their land as contained in the deed makes express reference to, and otherwise reflects information shown on the surveyor's plan. The strip is also mentioned in the description. There, the property is said to abut, in part, 'on lands of Clariston Edwards over which passes a right of Way One point eight three (1.83) metres wide leading to a public road which leads to Porey Spring and Dunscombe respectively…'. The deed contains no express grant of a right of way over the strip or otherwise.

[12] The Claimants deposed that the strip is unpaved and of poor quality but that it provides their only means of access to and from the public road. They claimed to have enjoyed unimpeded use of it for over 53 years. They deposed further that, on or about 22 September 2012, the Defendant erected a barrier across the strip, thus preventing them from using it. They described the resultant inconvenience at paragraph 7 of their second affidavit:

> "Our household comprising ourselves and three of our children, our daughter Cassandra Cottle and our two sons Albert and Rodney Cottle have suffered severe inconvenience since the Right of Way has been blocked and we can no longer drive to our homes. There are three cars in our household. We are forced to park our vehicles away from our home and walk more than 100 feet from the cars. This is especially difficult on the First Claimant when he has to transport heavy loads such as agricultural produce to our home. He has an impaired leg and suffers pain when he has to walk for long periods. He walks with a rocking motion and a limp. Our son Albert Cottle works as a DJ and has to transport heavy musical equipment to his vehicle at all hours of the night."

[13] Their further evidence is that by letter dated 6 November 2012, their Attorney-at-Law wrote the Defendant advising that the barrier should be removed. They deposed that they also sought advice from Mr. Bannister.

[14] The Defendant denied that 'the right of way in question is the only means of access to the Claimants' home.' She deposed that she provided a pedestrian access along the southern boundary of her land but that the first-named Claimant, Mr. Cottle, said that he did not want it. With respect to the access along the northern boundary, she stated at paragraph 7 of her affidavit:

> "It is true that the right of way that is at issue is unpaved and of poor quality. The right of way in question was a small track which could be accessed by foot only. Some years ago, I decided to buy a motor car. I therefore, had to extend the width of the track to accommodate the vehicle. From the time I widened the track, the Claimants, their children and their visitors, started to drive over it in increasing numbers. There are now about ten vehicles which use it, passing a few feet from the front of my house. The right of way was never intended to be more than a walking track. The way it is being used is not consistent with its intended purpose."

[15] The Defendant admitted that she obstructed the movement of cars over her land. She deposed as follows:

> "I erected a barrier across the portion of my land next to my house in order to protect my health and the deterioration of my house as a result of the exhaust fumes and water-splash from the many motor vehicles which traverse that area, passing mere feet from my house. I have had to visit the doctor with an infected throat and the side of my house has been affected."

[16] Her further evidence is that she reported her concerns to the police and that she instructed her Attorney-at-Law to write the Claimants and the Chief Town Planner. She exhibited with her affidavit a letter to the Claimants dated 28 September 2012 and one to the Chief Town Planner dated 6 November 2012.

[17] The Defendant also exhibited a photograph she alleged to have been taken on 6 December 2012. It depicts what appears to be two vehicles parked on a passage way accepted by the parties to be the area next to her house over which vehicles drive. She claimed that the vehicles were parked there by persons associated with the Claimants. Her further evidence is that the Claimants and their guests now park vehicles on this area, thereby making it difficult for her to access her house and for her son to park his vehicle on her land. The Claimants through their Counsel, Mr. Vincent Watson, admitted to driving their vehicles along the passage way to the point beyond which the barricade impeded

access. There was no evidence of vehicles being parked in this area prior to the erection of the barricade.

THE CLAIMANTS' SUBMISSIONS

[18] Mr. Watson, who appeared with Mr. Derrick Oderson for the Claimants, referred me to the case of ***American Cyanamid Co v Ethicon Ltd (No. 1)*** **[1975] A.C. 396**. He submitted that the principles expressed in that decision required me to consider where the balance of convenience lies. He contended that the balance cannot lie in preventing the Claimants from using the strip. Responding to a submission made by the Defendant's Counsel, he submitted that a grant of interim injunctive relief would not result in a final determination of the issues between the parties.

[19] Counsel also submitted that the Claimants enjoy an easement over the Defendant's land. He referred me to a passage found at page 375 of Sampson Owusu, ***Commonwealth Caribbean Land Law*** in support of his submission. In that passage, the author explains the concept of an easement and identifies a right of way across another's land as an example of such.

[20] Mr. Watson submitted further that the conveyance contains an express grant of a right of way or that it recognises the existence of a right of way. He urged that in determining the manner in which the strip might be used, the Court must take account of contemporary modes of transportation since the rights attaching to an easement evolve with society. In support, he referred me to ***Moncrieff and another v Jamieson et al*** **[2007] 1 W.L.R 2620.**

[21] Mr. Watson also submitted that the Claimants' delay in filing the application was not inordinate. He urged that it was reasonable for the Claimants to write to the Defendant and contact Mr. Bannister before initiating proceedings. The Defendant took no issue with this submission.

THE DEFENDANT'S SUBMISSIONS

[22] Counsel for the Defendant, Mr. Guyson Mayers, submitted that the Claimants are seeking to use the strip for vehicular access, a purpose for which it was not intended. He contended that despite the erection of the barrier, the Claimants are able to access their property by foot which, he submitted, is the intended use of the strip. He stated further that the erection and maintenance of the obstruction is necessary to protect the Defendant's property and health.

[23] Mr. Mayers further submitted that the grant of relief would have the effect of bringing the action to an end without a trial on the merits. He urged that the issues between the parties should be determined after such a trial. He relied on the case of ***Miller et al v Cruickshank*** **(1986) 44 WIR 319**.

[24] Counsel's final submission was that the injunction sought was a mandatory one. Citing the case of ***Digicel (Barbados) Limited v Cable and Wireless (Barbados) Limited*** **No. 974 of 2005 (date of decision 19 May 2005)**, he urged that a claimant seeking such relief has a heavier burden to discharge than otherwise. He maintained that the burden was not discharged in this case.

THE LEGAL APPROACH

[25] ***Section 44 (b)*** of the ***Supreme Court of Judicature Act, Cap. 117A*** of the ***Laws of Barbados*** confers a discretionary power on this Court to 'grant a mandatory or other injunction', at any stage of proceedings, where it appears just or convenient to do so.

[26] In ***Toojays Limited v West Haven Limited*** **Civ. App. No. 14 of 2008 (date of decision 16 September 2011)** Burgess J.A. discussed the approach to be taken by a court when determining whether to grant or discharge an interim injunction. After a careful consideration of the above statutory provision, the guidelines in ***American Cyanamid*** and the decision of the Court of Appeal in ***Williams v Canadian Bank of Commerce Trust Co (Caribbean) Ltd*** **(1981) Barb LR 11,** he concluded, at paragraph 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.

[27] Burgess J.A. concluded at paragraph 40 that '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.' He went on to point out that '[a]dequacy of damages can only be a relevant consideration as an aspect of an inquiry into what is just or convenient.'

The First Stage – Serious Question to Be Tried

[28] Adopting this approach, I need first to determine whether there is a serious question to be tried. The relevant test was set out by Diplock L.J. in ***American Cyanamid*** at pages **407 to 408**, in this way:

> The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried.
>
> 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. These are matters to be dealt with at the trial…

Diplock L.J. went on to state that the court should move to the second stage of the inquiry unless it considers that the plaintiff's claim for a permanent injunction has no real prospect of success at the trial.

[29] The parties in this matter did not dispute that a right of way exists along the northern edge of the Defendant's land for the Claimants' benefit. However, the means by which the right to pass is to be exercised and, it seems, the physical extent of the right of way, are in dispute.

[30] The Claimants deposed that the right of way is the area identified as a right of way on the surveyor's plan and that they are entitled to use it for pedestrian and vehicular access. The Defendant claimed that the "right of way in question was a small track which could be accessed by foot only". She claimed to have extended it to accommodate the passage of her motor car, though she did not indicate precisely when this was done. She deposed that the right of way was intended to provide pedestrian access only.

[31] I am not expected to resolve any issues of fact that arise at this stage on the untested evidence before me. It is also not possible for me to determine the true scope and nature of the right of way on the basis of that evidence. For that reason, I will not comment on the legal submissions made by Counsel that were intended to aid in the determination of those issues.

[32] Having considered the claim form, the statement of claim, the affidavits filed in support of the Claimants' application and that filed by the Defendant, I cannot say that their claim is frivolous or vexatious or that it fails to disclose that they have any real prospect of success for a permanent injunction at trial. There is a serious question to be tried.

The Second Stage – The Balance of Justice

[33] In ***Toojays***, Burgess J.A. summarised the required approach at the second stage of the two-stage inquiry, in this way, at **paragraph 50**:

> … 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 L.J. 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".

Practical Effect of Relief

[34] This statement presupposes that the issues between the parties will ultimately be determined after a trial. However, I must consider Mr. Mayers' submission that the application should be refused since, in his view, the practical effect of granting the interim injunctive relief would be to bring an end to the proceedings.

[35] In ***N.W.L. Ltd v Woods*** **[1979] 3 All E.R. 614,** Lord Diplock enunciated the approach to be adopted in such cases. He said at **page 625**:

> … when properly understood, there is in my view nothing in the decision of this House in *American Cyanamid …* to suggest that in considering whether or not to grant an interlocutory injunction the judge ought not to give full weight to all the practical realities of the situation to which the injunction will apply. *American Cyanamid*…was not dealing with a case in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial.

He continued:

> Cases of this kind are exceptional, but when they do occur they bring into the balance of convenience an important additional element. In assessing whether what is compendiously called the balance of convenience lies in granting or refusing interlocutory injunctions in actions between parties of undoubted solvency the judge is engaged in weighing the respective risks that injustice may result from his deciding one way rather than the other at a stage when the evidence is incomplete. … The nature and degree of harm and inconvenience that are likely to be sustained … by the defendant and the plaintiff respectively in consequence of the grant or the refusal of the injunction are generally sufficiently disproportionate to bring

> down, by themselves, the balance on one side or the other; and this is what I understand to be the thrust of the decision of this House in *American Cyanamid …* Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

[36] Mr. Mayers referred me to a passage found in the judgment of Carey J.A. in ***Miller*** which was adopted from the headnote of ***Cayne v Global Natural Resources Plc*** **[1984] 1 All E.R. 225**. Carey J.A. stated at **page 324**:

> *Indeed as Cayne v Global Natural Resources Plc … demonstrates:*
>
> *Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice, and to balance the risk of doing an injustice to either party. In such a case the court should bear in mind that to grant the injunction sought by the plaintiff would mean giving him judgment in the case against the defendant without permitting the defendant the right of trial. Accordingly, the established guidelines requiring the court to look at the balance of convenience when deciding whether to grant or refuse an interlocutory injunction do not apply in such a case, since, whatever the strengths of either side, the defendants should not be precluded by the grant of an interlocutory injunction from disputing the Claimants claim at a trial.*

[37] I must state that I find no support in ***Cayne*** for the conclusion stated at the end of that headnote. Where a party's case is overwhelmingly strong, a court will not shy away in resolving an application for interim relief in that party's favour, even though it may have the practical effect of bringing the matter to an end.

[38] Nonetheless, I accept the general approach recommended in ***N.W. L. Ltd*** and endorsed in ***Miller*** and ***Cayne.*** In considering the grant or refusal of interim injunctive relief, ***Toojays*** requires an inquiry into the balance of justice, once there is a serious question to be tried. Where the decision would have the practical effect of bringing the action to an end, a court must bear that in mind as part of the inquiry.

[39] However, I need not elaborate on this, for I am not persuaded that this is a case where the grant or refusal of the injunction would have such an effect. If the injunction is refused, there is a realistic prospect that the Claimants would wish to proceed to trial for a declaration that there is a right to traverse the Defendant's land by vehicles. Equally, if the relief is granted, the Defendant may wish to proceed to trial for a final order that the right to traverse is by foot only. Consequently, a grant of interim injunctive relief would merely be a holding measure pending the final resolution of these issues by the Court.

[40] Mr. Mayers contended that if the Claimants' application was to succeed, they would have no incentive to pursue the substantive claim since they would have achieved their objective. Counsel ignored the fact that a Claimant who secures interim injunctive relief is duty bound to pursue his or her substantive claim expeditiously. This was emphasised by Peter Williams J.A. in ***Maloney v Robertson et al*** **Civ. App. No 7 of 2010 (date of decision 30 September 2011)**. He stated at paragraph 30:

> An interim injunction is generally granted "in order to hold the ring" until the dispute between the parties can be properly decided at a trial: *Morritt LJ* in *Desquenne et Giral U.K. Ltd v. Richardson [2001] F.S.R. 1* at *7*. There is an obligation on a plaintiff who has obtained an injunction in his favour to press on expeditiously with the substantive case.

[41] Indeed, a Claimant who has obtained interim injunctive relief but fails to pursue the substantive case expeditiously is at risk of having the injunction discharged or the claim dismissed: ***Greek City Ltd. v Demetriou and Athanasiou*** **[1983] 2 All E.R. 921**.

Mandatory Injunctions

[42] I turn to Mr. Mayers' submission that a higher standard must be met to secure the grant of a mandatory injunction. Counsel referred me to paragraphs 9 and 10 of the decision in ***Digicel*** where Inniss J. stated as follows:

> In American Cyanamid Co. v Ethican Ltd…it was held that when the court is requested to grant an interlocutory injunction, a major consideration is wherein lies the balance of convenience. When the injunction sought is a mandatory injunction, however, the consideration goes far beyond the balance of convenience.

> The effect of a mandatory injunction is more drastic than in the case of a prohibitory injunction, consequently, the courts are extremely reluctant to grant such an injunction. Before granting a mandatory injunction the court must be reasonably certain that the final outcome is likely to be in favour of the applicant.

[43] In so stating, Inniss J. echoed the position expressed in an oft cited passage from the judgment of Megarry J. in ***Shepherd Homes v. Sandham*** **[1971] 1 Ch 340 at page 351** which reads:

> …the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

[44] At paragraph 12 of his decision, Inniss J. cited the following passage from the judgment of Campbell J in ***Esso Standard Oil SA Ltd. v. Chan*** **(1988) 25 JLR 110 at 112**:

> The principle applicable to the grant of a mandatory injunction which is comparable in its nature and function to a mandamus is that it will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established, and also the right sought to be protected is clear.

[45] Mr. Watson contended that, in any event, the requirements set out in the case were satisfied. I disagree. For the reasons outlined at paragraphs [29] to [31] above, it cannot be said that the right that the Claimants seek to protect is clear in every respect.

[46] Nonetheless, there is no hard and fast rule that a case must be unusually strong and clear before a court can grant a mandatory injunction. Each case must be examined on its own facts and the consequences of granting or withholding the injunction considered. The fundamental objective of the court must be to arrive at a decision that will result in the least risk of injustice if it turns out, at trial, that another result is arrived at. An examination of the authorities bears this out.

[47] In ***Digicel***, Inniss J. correctly identified the rationale underlying the guidelines in ***Shepherd Homes***. He stated, at paragraph 13:

> The rationale behind the creation of this extremely high standard is that the primary consideration of the court is **to avoid injustice**. There is **generally**, a greater risk of injustice if the Court granting a mandatory injunction has got it "wrong", than would be the case where a prohibitory injunction is sought. (emphasis mine).

[48] Inniss J. endorsed the statement of principles contained in the decision of Chadwick J. in ***Nottingham Building Society v Eurodynamics Systems Plc*** **[1993] F. S. R. 468 at 474** and approved by the Court of Appeal of England and Wales in ***Zockoll Group Ltd v Mercury Communications Ltd*** **[1998] F.S.R. 354**. Chadwick J. stated:

> 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'...
>
> 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, 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 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.

[49] Hence, as Hoffman J. made clear in ***Films Rover International Ltd. v Cannon Film Sales Ltd*** **[1987] 1 W. L. R. 670 at 680**, the fundamental test, whatever the nature of the injunction, is which decision will result in the lower risk of injustice should it turn out at the trial to have been the "wrong" one.

[50] The position has been aptly expressed by Lord Hoffman in ***National Commercial Bank Jamaica Ltd. v Olint Corp Ltd*** **[2009] 1 W. L. R. 1405** at paragraphs 19 and 20, as follows:

> 19. There is … no reason to suppose that, in stating [the principles in [***American Cyanamid***], Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other…What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action…But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding 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…
>
> 20. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren…What matters is what the practical consequences of the injunction is likely to be.

[51] Lord Hoffman went on, at paragraph 21 to deprecate the 'box-ticking approach' of deciding whether the injunction should be classified as mandatory or prohibitive followed by an application of the 'high degree of assurance' test, if mandatory. He noted that such an approach 'does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction.'

[52] I have quoted from these authorities, at length, to demonstrate that it is not axiomatic that an application for a mandatory injunction must be refused unless the court is satisfied that there is a high degree of assurance that the Claimant will succeed at trial.

[53] Turning to the case before me, the Claimants sought orders that the Defendant (1) remove the barrier and (2) desist from impeding movement along the strip. The first limb of this relief is mandatory in terms. However, it does not require the taking of any step by the Defendant that would cause her irremediable harm. The evidence is that the barriers comprise tree trunks and a piece of wire attached to two concrete columns. The parties have confirmed that there is no need to destroy the columns. Once the wire and tree trunks are removed, pedestrian and vehicular passage is possible. There is no irremediable loss to the Defendant in removing these impediments.

[54] Hence, the application of a higher standard with respect to this limb of the relief is unwarranted. Taken as a whole, the purpose of the relief sought is to secure for the Claimants unimpeded use of what they claim to be a right of way for pedestrian and vehicular access, until the final resolution of their claim. I had to consider the practical consequences of granting or refusing the relief sought and strive to make a decision which is least likely to cause irremediable prejudice to one or the other party. This approach is consistent with that advocated in ***Toojays***.

WEIGHING THE FACTORS

[55] I turn therefore to the factors which I considered to be relevant in determining where the balance of justice lies.

[56] I have already stated that the removal of the barrier would not result in any irremediable prejudice to the Defendant. I had to consider what other harm she might suffer as a result of the grant of the injunction. She claimed that her health and property are affected by passing vehicles. She produced no medical or other corroborative evidence in support of these assertions, though she may well do so at trial. It is accepted that money cannot truly compensate for injury to health. However consequential harm of the nature described by the Defendant is remediable in damages. I have also considered that any unauthorised movement of vehicles over her land constitutes a trespass.

[57] On the other hand, if the injunction is wrongly refused, the Claimants would have suffered a loss for which they cannot reasonably be confined to a remedy in damages. They would have been deprived of a right of vehicular access to their home which could result in significant hardship and inconvenience. I have taken account of their ages. The evidence is that Mr. Cottle has difficulty walking and that moving heavy loads from the public road to their house is a major burden for him.

[58] Weighing these factors, I considered the balance of the risk of doing an injustice to be greater if I withheld the injunction than if I granted it. Additionally, there was a further point that favoured a resolution in the Claimants' favour. The Defendant's evidence suggests that it is has been "[s]ome years" since the Claimants were driving over the area next to her house. It seems to me that the removal of the barrier would restore the parties to the position they were in before the dispute between them arose.

DISPOSAL

[59] Hence, in the circumstances, I held the view that the balance of justice rested in favour of the grant of the injunctive relief sought by the Claimants. However, a speedy trial of this matter would be in the best interests of the parties.

[60] For the foregoing reasons, I granted the Claimants the relief they sought and decided to hear the parties as to costs.

Olson DeC. Alleyne

Judge of the High Court