BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

Suit No: CV 662 of 2008

BETWEEN

PROPRIETORS UNIT PLAN NUMBER 25	**1st PLAINTIFF**
PROPRIETORS UNIT PLAN NUMBER 29	**2nd PLAINTIFF**
~~**ETERNITY HOLDING LIMITED**~~	~~**3rd PLAINTIFF**~~
HIEROGLYPHICS INVESTMENTS	**4th PLAINTIFF**

AND

PARAVON INVESTMENTS INC	**1st DEFENDANT**
WEST COAST CONSTRUCTION LTD	**2nd DEFENDANT**

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

(In Chambers)

2009: December 4, 8 and 17

Mr. Leslie Haynes Q.C. in association with Mr. Damian Edghill and

Ms. Rhea Seale for the 1st, 2nd and 4th Plaintiffs/Applicants

Mr. Dale Marshall, Q.C. in association with Mrs. Tammy Bryan for the 1st Defendant/Respondent

DECISION (No. 2)

[1] ***Nature of the Application:*** This is an urgent *inter partes* application brought by the Plaintiffs, under a Summons filed on October 21, 2009 seeking *inter alia*, further interim restraining orders against the Defendants in respect of certain express and implied easements and/or equitable licences and/or prescriptive or other rights which the Plaintiffs (together with the several unit owners of the Glitter Bay Condominium Apartments who have been joined in the action as Plaintiffs) claim to have and enjoy over adjoining lands and structures and other areas situated on lands of the First Defendant situated at Glitter Bay, St. James, hereinafter called the "Central Facilities".

[2] ***Background:*** The Plaintiffs' application follows an earlier application made before ***Alleyne J. (ag)*** in April this year in which the intended First and Second Plaintiffs obtained an interim injunction (hereinafter called "the Principal Order") against the intended Defendants retraining them:

> *"1. from entering upon the lands and property in respect of the Condominiums situate at Glitter Bay in the parish of Saint James in Barbados, such Condominiums having been established under Condominium Declarations filed on the 12th May, 1983 and on the 31st day of March, 1982 respectively by Glitter Bay Limited (as Vendor therein) of the One Part Barclays Bank International Limited (as Mortgagee therein) of the Second part and Roderick G. Norris and his wife Barbara J. Norris (as Purchasers therein) of the Third Part until further order of the Court;*
>
> *2. from obstructing and/or impeding in any manner whatsoever any rights and/or easements of way or access as shown and delimited in the said Condominium Declarations and/or the Conveyance dated the 21st day of May, 1983 made between Glitter Bay Limited (as Vendor therein) of the One Part Barclays Bank International Limited (as Mortgagee therein) of the Second part and Roderick G. Norris and his wife Barbara J. Norris (as Purchasers therein) of the Third Part until further order of the Court; and*
>
> *3. from carrying out any construction and/or demolition works and/or alterations of any kind on the property known as the "Central Facilities" situate to the south of buildings in respect of Block A and B of the said Condominiums, and comprising, inter alia, the following:*
>
> *a) The swimming pool and its ancillary buildings, structures and amenities;*
>
> *b) The tennis courts and their ancillary buildings, structures and amenities;*
>
> *c) The bar and restaurant area and its ancillary buildings, structures and amenities;*
>
> *d) The concierge and communal toilet facilities and their ancillary buildings, structures and amenities;*
>
> *which said property known as the "Central Facilities"…."*

[3] Just over 2 months after the grant of the Principal Order, the First Defendant through its attorneys-at-law, by letter dated June 30, 2009, issued a notice to the Royal Estate Corporation and to Lt. Col. Anthony Troulan and Mr. Joseph Troulan requiring them to vacate and give up possession of a section of the Glitter Bay Reception building situated on the First Defendant's lands on or before July 14, 2009. ***["Exhibit BJ2" annexed to affidavit-in-support of Roderick G. Norris filed October 21, 2009.]***

[4] By letter dated July 14, 2009, attorneys-at-law acting for the Royal Estate Corporation, Lt. Col. Anthony Troulan, Mr. Joseph Troulan and the Plaintiffs, responded to the aforesaid notice and informed the First Defendant, *inter alia*, that the Royal Estate Corporation and Messrs. Anthony and Joseph Troulan occupied the Great House as persons who had been contracted by the First and Second Plaintiffs to carry out certain management and maintenance duties in respect of the Glitter Bay Condominiums as well as in respect of the area known as the "Central Facilities".

[5] In the said letter, the Plaintiffs reminded the First Defendant that the area referred to in the First Defendant's notice-to-quit was an area within a building known as the "Great House" within which, the Plaintiffs have by consent enjoyed certain amenities since the early 1980's.

[6] The Plaintiffs also formally requested the First Defendant, through its legal representatives, to confirm that it would not seek to interfere with any of the said services or amenities, failing which they would apply to the High Court for orders and declarations for the protection of their rights. ***["Exhibit BJ3"- affidavit-in-support of Roderick G. Norris filed October 21, 2009.]***

[7] Following the Plaintiffs' letter of July 14, 2009, several letters then passed between the parties' respective legal representatives in relation to the First Defendant's claim to possession of the Great House.

[8] The First Defendant also commenced a separate High Court Suit No. 1387 of 2009 against the Royal Estate Corporation seeking possession of the area within the "Great House" which it occupied.

[9] On September 23, 2009 the Plaintiffs' attorneys-at-law wrote to the First Defendant's legal representatives advising that the Plaintiffs had observed that the First Defendant, its building contractors and the representatives of Black Bess Quarry Ltd appeared to be making arrangements with the intention of tearing down and demolishing the structure known as the "Great House" situate at Glitter Bay Estates.

[10] The Plaintiffs reiterated their claim that the First and Second Plaintiffs (as well as the individual condominium unit owners) had certain rights and interests in an over the "Great House" and further informed the First Defendant that since the "Great House" was not specifically covered by terms of the Principal Order issued by ***Alleyne J. (ag)*** in April 2009, the Plaintiffs would be applying to the High Court for a variation of the Principal Order so as to extend the scope of the interim injunction to include the "Great House".

[11] The Plaintiffs reserved all of their rights and called upon the First Defendant to render, within 48 hours, its written undertaking not to demolish or in any way alter the Great House, including any of its ancillary buildings and/or services running to, or from the same. ***["Exhibit BJ7"- affidavit-in-support of Roderick G. Norris filed October 21, 2009.]***

[12] By letter dated September 28, 2009, the First Defendant through its legal representative, refused to give the requested undertaking. ***["Exhibit BJ8"- affidavit-in-support of Roderick G. Norris filed October 21, 2009.]***

[13] Instead, as appears from paragraphs 15 to 16 of the affidavit of Roderick G. Norris filed October 21, 2007 on or about October 16, 2009, the Defendants and/or their servants and/or agents commenced demolition works on parts of the Great House and buildings ancillary thereto.

[14] In consequence of the aforesaid demolition works, the Plaintiffs filed the current application on October 21, 2009 claiming protective orders in respect of the remaining portions of the Great House and certain other areas and structures not specifically covered by the Principal Order.

[15] The First Defendant does not deny that it has commenced work on the demolition of the "Great House". In fact, it asserts that it was always the intention of the Defendants to demolish the building referred to as the Great House. It maintains that the building is free of any proprietary or contractual or other interests claimed by the Plaintiffs and denies any and all rights asserted by the Plaintiffs over the site. ***[Paragraphs 6 and 10 of the affidavit-in-response of Michael Smith Alleyne filed November 9, 2009.]***

[16] The areas for which the Plaintiffs seek further interim protective orders are more particularly identified in the Summons of October 21, 2009, in the affidavit-in-support of Roderick G. Norris filed on the same date and in Clause 14 of the Amended Statement of Claim filed on November 20, 2009.

[17] ***The Submissions for and against the grant of interim relief****:* At the hearing of the Summons, both parties produced lengthy legal submissions and many legal authorities for and against the relief sought and, following 2 days of oral arguments, the Court reserved its decision.

[18] ***Exercise of the Court's Discretion:*** In considering the application, the Court has necessarily kept the Diplock guidelines for the grant of interim prohibitory injunctions firmly in mind. [See ***American Cyanamid Co v. Ethicon Ltd [1975] A.C. 396*** *per Diplock L.J.;* ***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 3.28 and 3.33- 3.37.]***

[19] Applying the guidelines, the Court is satisfied that the further interim prohibitory injunction sought by the Plaintiff at paragraph (b) of the Summons should issue in this case. The reasons for the Court's decision are set out below:

a) *Is there a serious issue to be tried?* Firstly, the Court is satisfied that the initial question to be addressed on the application, namely, whether there is a serious issue to be tried, should be answered in the affirmative. In fact, this is a case where the Court is satisfied that there are many serious issues to be tried;

b) As clearly appears from the Amended Statement of Claim filed herein on November 20, 2009, the First and Second Plaintiffs (together with the several unit owners of the Glitter Bay Condominium Apartments who were on December 4, 2009 by an order of this Court joined in the substantive action as Plaintiffs) claim rights in the form of express and/or implied easements and/or equitable licences and/or prescriptive or other rights which they and/or their predecessors-in-title claim to have enjoyed in and over the "Central Facilities", and in particular over various buildings, structures and rights of way situated on and over the adjoining lands and of the First Defendant situated at Glitter Bay, St. James.

c) At paragraphs 22, 23 and 24 of the affidavit of Roderick G. Norris filed herein on October 21, 2009 in support of the Summons for further injunctive relief, the Plaintiffs and the owners of units in the Glitter Bay Condominium Apartments assert that they have acquired easements, rights and interests within the area within the orange lines/borders shown on a plan entitled "Topographic Survey (Sheet 2) Pemberton Princess Hotels, Glitter Bay, Porters, St. James prepared by Gillespie & Steel and dated September, 2005, a true copy of which is appended to entitled "Topographic Survey (Sheet 2) Pemberton Princess Hotels, Glitter Bay, Porters, St. James prepared by Gillespie & Steel and dated September, 2005;

d) A true copy of the plan showing the several areas in dispute is appended to the aforesaid affidavit of Roderick G. Norris filed herein on October 21, 2009 in support of the Summons and marked ***"Exhibit BJ9".***

e) At the hearing, Counsel for the Plaintiffs drew the Court's attention to the plan and carefully identified on the said plan the several areas and structures in respect of which the Plaintiffs seek additional interim relief under the Summons.

f) The substantive case, he submitted, concerned the creation of easements and other rights over land. While the express easements are not in issue, the Plaintiffs contend that there are serious issues to be determined at the substantive trial in relation to whether implied easements have been created over the adjoining lands of the First Defendant in respect of areas such as the children's play area, the seating area adjacent to the bar and the beach and the garden and other waste/collection area to the north east of the estate.

g) Mr. Haynes referred to paragraph 2 of the Agreement for Sale which is attached to the Amended Statement of Claim filed on November 20, 2009 and marked "Exhibit A" and submitted that at the substantive hearing, the Court would firstly be called upon

to determine whether the Garden falls within the definition of "Central Facilities" and could properly be regarded as *"a recreational facility to be erected….etc"* within the meaning of the definition.

h) In the alternative, he argued, the Court would be asked to decide whether the Plaintiffs had acquired an implied easement over a communal garden and/or prescriptive rights such as would preclude the First Defendant as the owner of the servient tenement from developing the adjoining lands and interfering with the Garden in a way which would cause it to lose its character as a communal garden. He cited ***In re Ellenborough Park et al v. Maddison (1956) Ch. 131*** and ***Mulvaney v. Gough et al [2003] 4 All ER 8*** and an extract on the acquisition of easements by implied grant from ***Cheshire and Burn's Modern law of Real Property, 13th Edition, pp. 506-512.***

i) The Plaintiffs' claim to easements and/or rights over the adjoining lands of the First Defendant including the Garden was vehemently resisted by the First Defendant. Although the First Defendant is still to file its Defence, it has in its several affidavits- in response to the application, denied the existence of any and all of the rights asserted by the Plaintiffs.

j) At the hearing, Counsel for the First Defendant submitted that interim injunctions are granted in aid of legal rights and that the burden lay on the Plaintiffs to satisfy the Court by evidence that it was entitled to such rights as they had claimed. He accordingly urged the Court to examine each and every alleged entitlement or right for which the Plaintiffs claim the protection of the Court by way of injunctive relief.

k) Mr. Marshall submitted further that the Plaintiffs' several causes of action could be summarized under 8 distinct claims as follows: i) the easements established under the Condominium Declarations; ii) the express easements grounded in the Deeds of Conveyance; iii) a licence to use the "Central Facilities" at Glitter Bay grounded in express and/or implied and/or statutory grant and/or by prescription and/or by way of contract and/or contractual licence and/or by way of equitable licence; iv) an easement in the nature of a right to use and enjoy and to pass and repass over the "Central Facilities" at Glitter Bay by way of express and/or implied and/or statutory grant and/or by way of prescription; v) estoppel by conduct; vi) a declaration that by reason of section 66 of the ***Property Act, Cap. 236***, the First Defendant acquired its title to the adjoining lands upon which the "Central Facilities" are situated subject to the existing rights, title and interest of the Plaintiffs; vii) Estoppel by reason of equitable licence or otherwise; and ix) a declaration that the Plaintiffs have acquired rights of access to and use of the "Central Facilities" by virtue of section 35(1) of the ***Limitation and Prescription Act, Cap. 232.***

l) Counsel for the First Defendant, in his very helpful written submissions, provided the Court, *inter alia*, with authorities and extracts from ***Cheshire and Burn's Modern law of Real Property, 13th Edition, pp. 490- 499 and 506-512*** relating to the law of easements and the acquisition of easements by express and implied grant, by statute and by prescription.

m) Mr. Marshall also cited an extract from the textbook ***Spry's Equitable Remedies, 5th Edition @ p. 457*** together with dicta from Lord Jauncey in ***R. v. Secretary of State for Transport, ex parte Factorame Ltd [1991] 1 A.C. 603.*** He submitted that the Plaintiffs had failed to adduce sufficient evidence, and in some cases, had provided no evidence to support many of the claims they had made.

n) Mr. Marshall submitted that in the absence of sufficient evidence of the existence of the legal right claimed, the Court was compelled to find that there was no serious issue to be tried, that the Plaintiffs have no good arguable case and consequently no real prospect of success at the trial. He further submitted that several of the Plaintiffs' claims were, in his view, without merit and that the Court should refuse to grant an interim injunction to protect them.

o) The Court has examined each of the Plaintiffs' several claims and satisfied itself broadly as to the many legal issues which will have to be established in relation to each claim at the substantive trial.

p) The Court has also had regard to the matters set out in the Plaintiffs' affidavits of April 18, 2009 and October 21, 2009 and is satisfied that the Plaintiffs have adduced the necessary threshold evidence on this application to convince the Court that their several claims to rights and interests over the First defendant's adjoining lands are not frivolous or vexatious and further, that serious legal questions have arisen in relation to the alleged rights which can only appropriately be determined at the substantive trial.

q) In particular, the Court has examined the plan ***("Exhibit BJ9")***, together with the definition of "Central Facilities" Agreement for Sale exhibited to the Amended Statement of Claim filed herein and has further taken note of the evidence of Robert Norris that he is personally aware that the Plaintiffs (as well as the owners of units in the Glitter Bay Condominiums) have always, as a matter of legal right, had access to the additional areas listed at paragraph 24 of the affidavit for their use and enjoyment and have paid for the upkeep in whole or in part of these areas from the inception of the development in the early 1980's.

r) The Court is satisfied that the validity of the Plaintiffs' claims in particular to an express and/or implied easement and/or other rights over the Garden situated within the adjoining lands of the First Defendant is also an issue which will have serious consequences for the continued enjoyment by the Plaintiffs (as well as the owners of units in the Glitter Bay Condominiums) of their individual units on the one hand and for the ability of the First Defendant on the other hand to maximize the full potential of the adjoining lands which it owns and in which it has invested some BDS$29 million dollars.

s) As clearly appears from the affidavits of Christopher Stroud, John Mills and Michael Smith Alleyne filed herein in November 2009, the First Defendant has always intended to develop the land which it owns adjoining the Glitter Bay Condominiums as a high-end condominium development from which it expects to make net profits of $76,000,000.00.

t) The First Defendant argues that if the further injunctions are granted, it would suffer extreme and disproportionate hardship

since it would be prevented from concluding its arrangements for its high-end condominium development project planned for the site.

u) The cost of the acquisition of the land (BDS$29,050,661.00) (being part of an overall Hotel Purchase investment of Canadian $41,900,000.00) would, it says, have been stranded until whenever the case is resolved. Furthermore, the First Defendant contends, the property would be blighted as all development on the land would have to be put in abeyance until the disposal of the action. ***[Paragraphs 28-29 of the affidavit-in-response of Michael Smith Alleyne filed November 9, 2009.]***

v) The First Defendant further argues that if granted, the further injunctions would compel the First Defendant to substantially alter its current plans for the development of the site and to proceed with a development which would not maximize the potential of the property and its overall profitability, market appeal or attractiveness. The entire investment of $29 million Barbados dollars, it says, might be reduced to a minimal undevelopable value of land and its significant development and investment in Barbados would be lost. ***[Paragraphs 12-13 of the affidavit-in-response of John Mills filed November 9, 2009.]***

w) The Court is accordingly satisfied that in view of the competing claims of the respective parties, serious issues are to be tried in the substantive action in relation to the express and implied easements, contractual and/or equitable licences and other rights which have been claimed by the Plaintiffs on the one hand and denied by the Defendants on the other and which cannot be resolved at this early interlocutory stage;

x) In addition, having regard to the manner in which the Plaintiffs' multiple claims have been framed in the Amended Statement of Claim many of which are framed in the alternative, the Court is of the view, that it will be impossible at this early interlocutory stage to pre-empt the full trial and to come to a final determination of all the many questions of law which have to be decided in this case.

y) The Court is of the view that the present case is not a case of the kind envisaged by Lord Jauncey in the ***Factortame Case*** cited by Mr. Marshall, where the only question at issue is one of law which could possibly be decided at the stage of a contested application for an interim injunction. In the circumstances, the Court declines to accept Mr. Marshall's invitation to undertake a detailed examination of each and every aspect of the Plaintiffs' claims with a view to satisfying itself that the rights claimed have been established.

z) In the result, taking a broad view of the Plaintiffs' case based on the threshold evidence provided on the application, the Court has satisfied itself that the Plaintiff has established it has rights of a type which raise many serious issues which are more appropriately tried at the substantive trial.

aa) *Will damages provide an adequate remedy?* Turning to the second question to be considered on the application, namely, whether damages are an adequate remedy, the Court has examined the question and found on the one hand that damages are likely to provide an adequate remedy for the First Defendant, which if later held to be successful at the trial, would be prevented, during the period of the injunction, from exploiting its lands and more particularly, from realizing its plans to construct a high-end condominium development on the Larger Area over which the "Central Facilities" have been erected.

bb) The financial loss which the First Defendant will undoubtedly incur if it were to be prevented by injunction from continuing the project until the action is finally disposed of, is in the Court's view, quite capable of being quantified, and this would make damages an adequate remedy for the First Defendant if it were to succeed at the trial.

cc) On the other hand, having regard to the First Defendant's declared intention to proceed *"in the shortest possible time"* with its plans to construct its high-end condominium project in the same general area of land over which the Plaintiffs' alleged easements and/or other rights are said to exist, the Court finds that it is inevitable that the structures and areas now in dispute will be demolished and /or destroyed forever.

dd) In these circumstances, the Court is satisfied that if the Plaintiffs were subsequently found to be successful at the trial, damages are unlikely to provide an adequate remedy for the First and Second Plaintiffs (and the individual condominium unit owners who have been joined in the action as Plaintiffs).

ee) In particular, the implied easements and/or other rights which the Plaintiffs claim in respect of the communal Garden area which the Plaintiffs have established and currently enjoy on the First Defendant's lands are likely to be lost forever if the Defendants are allowed to proceed with the planned construction of high-end condominiums within the area now encompassed by the "Central Facilities" before the issues in dispute are resolved at the trial. The Court is satisfied that the loss of the Garden area in particular, is an amenity and right which is unlikely to be very easily compensated by an award or damages following the trial.

ff) *Where does the balance of convenience lie?:* As there is some doubt whether damages will provide an adequate remedy for the Plaintiffs in this case, the Court has necessarily proceeded to consider the third question to be considered when an application for an interim prohibitory injunction is under consideration, namely, where does the balance of convenience in this matter lie?

gg) Having taken all the circumstances of this case into account, the Court is satisfied that the First Defendant is likely to suffer the lower risk of injustice. Accordingly, the Court finds that the balance of convenience lies with the Plaintiffs;

hh) In the result, the Court holds that the *status quo* should be maintained until the substantive action is finally disposed of. Accordingly, the interim prohibitory injunction sought by the Plaintiffs at paragraph (b) of the Summons herein should issue.

[18] ***Disposal:*** The Court, being satisfied that it is just and convenient in the particular circumstances of this case that the further interim injunctions sought by the Plaintiffs should be granted, hereby makes the following Orders:

1. The Defendants are further restrained by their servants, agents or otherwise howsoever, until further Order of the Court, from carrying out any construction and/or demolition works and/or alterations of any kind on the property known as the "Central Facilities" situate to the south or otherwise of buildings in respect of Blocks A and B of the Glitter Bay Condominium Apartments, and comprising, *inter alia*, the following:

(e) the childrens' play area located between the childrens' swimming pool and the communal toilet facilities on the east and west respectively, and immediately to the north of the new access road to the Beach House;

(g) The First and Second Plaintiffs' Property Management Office currently used by the Royal Estate Corporation to manage the estate, being the Old Band Stand Office since December 2005;

(h) The main gatehouse situated at the entrance to Glitter Bay, including the safety/emergency, incident control point, communication, fire alarm, security facility;

(i) the seating area adjacent to the bar and the beach;

(j) the car park situate at the eastern end of the Condominium buildings in respect of Blocks A and B Glitter Bay;

(k) the man-made/artificial beach area to the high water mark situate immediately to the west of the white wall and steps on the western side of Glitter Bay estate. This area runs from the wall, the old gate and the tree to the south. It also borders the Beach House site, and runs to the boundary/wall to the north adjoining a property owned or managed by Fairmont Royal Pavilion;

(l) the household garbage facility building situate to the north of Blocks A and B Glitter Bay;

(m) the Garden and other waste/collection area to the north east of the estate;

(n) the water distribution central shut-off point;

(o) the stone, concrete and other pavements and pathways leading around the Glitter Bay Estate, including but not limited to those pavements and pathways which lead to and from Blocks A and B Glitter Bay to the pool and recreational area, to the car park, to the Great House and to the beach

which said areas known as the "Central Facilities" are shown and delineated in approximate terms (not being to scale) on the Plan entitled "Topographic Survey (Sheet 2) Pemberton Princess Hotels, Glitter Bay, Porters, St. James prepared by Gillespie & Steel and dated September, 2005, a true copy of which is appended to the affidavit of Roderick G. Norris filed herein on October 21, 2009 in support of the Summons for further injunctive relief filed on the same date.

2. The First Defendant undertakes not to continue to demolish the Great House before the 31st January 2010 so as to permit the Plaintiffs to remove and relocate the telephone exchange and the electricity meter situated therein.

3. The above injunction is subject to the First and Second Plaintiffs giving the usual undertaking in damages;

4. The Order for fortification of damages made by this Court on Tuesday, December 8, 2009 against the First and Second Plaintiffs in relation to the Principal Order of ***Alleyne J. (ag)*** of April 11, 2009 shall extend to and cover the undertaking in damages given by the First and Second Plaintiffs in respect of this Order;

5. With a view to ensuring a speedy trial of the substantive action, both parties are ordered to strictly comply with the time-lines stipulated in previous orders of the Court in relation to the joinder of additional Plaintiffs, the amendment of the Plaintiffs' Claim, the provision of further and better particulars and the filing and delivery of the Defence;

6. Costs of this application shall be costs in the cause;

7. There shall be liberty to apply.

Maureen Crane-Scott,

Judge of the High Court