SAINT LUCIA

IN THE EASTERN CARIBBEAN SUPREME COURT

COURT OF APPEAL

CIVIL APPEAL NO. 10 OF 1995

BETWEEN:

BARBARA KIDDELL — APPELLANT

VS

WINDJAMMER LANDING COMPANY LIMITED — RESPONDENT

Before: The Honourable Mr Satrohan Singh — Justice of Appeal
The Honourable Mr. Albert Redhead — Justice of Appeal (Ag)
The Honourable Mr Odel Adams — Justice of Appeal (Ag)

Appearances: Mr. Michael Gordon for the appellant
Mrs. Brenda Floissac-Flemming for the respondent

[October 31, November 1, 25, 1996]

JUDGMENT

SATROHAN SINGH JA

On November 1st, 1996 this Court allowed this appeal with costs to the appellant and promised to give its reasons therefore. We now give those reasons.

By a deed of sale dated July 24, 1990, the appellant purchased from the respondent Block 1053 B parcel 531 situate at La Brelotte, St. Lucia (hereinafter referred to as Villa 23). The said deed of sale contained 19 servitudes, two of which Nos. 7 and 19 were of particular significance to this appeal: These servitudes read as follows:-

(7) No structure, other than a house and a garage as herein specified shall be erected on the property and no fences, hedges, walls, excavations or other erections shall be completed upon the property without the location, design and materials having first been approved by the vendor.

(19) The vendor, its successors and assigns reserve the right to enter upon the property subsequent to conveyance at any time and from time to time for the purpose of confirming its compliance with applicable bye-laws and regulations as well as the development controls of the vendor.

Having purchased Villa 23, the appellant and the respondent entered into a maintenance agreement by which the respondent undertook to provide and maintain such

facilities as water and electricity and share the cost with the appellant. A misunderstanding arose concerning this agreement. That misunderstanding is now before the High Court. The upshot of this misunderstanding was that the respondent stopped providing the appellant with electricity. The maintenance agreement in relation thereto was therefore terminated. The appellant then, in an effort at obtaining her own electricity, erected a pole on Villa 23. The respondent purporting to rely on servitudes 7 and 19 aforementioned, entered the property of Villa 23 and removed the said electric pole.

As a consequence, the appellant sued the respondent in trespass, and, by way of summons, sought from the Court an interlocutory injunction to restrain the respondent and its servants or otherwise from entering or crossing Villa 23 for the purpose of removing there from or interfering with any matter or thing attached thereto until after the trial of the action or until further order. **Matthew J** heard this application and refused the injunction sought with costs. The appellant appealed from that order and this Court reversed the Judge's order and granted the appellant the injunction in the terms sought with costs.

The issue that arose for determination by this Court was whether when **Matthew J** refused the injunction he did so in the proper exercise of his judicial discretion. Mr. Gordon for the appellant submitted that the judge acted on a wrong premise of law when he purported to exercise his discretion. As a result he exercised no discretion thereby leaving this Court free to exercise its own discretion in determining the appeal. The premise of law referred to by Mr. Gordon was when **Matthew J** observed in his judgment that the usefulness of servitude 19 would be "minimal" if the respondent can only enter and do nothing. Learned Counsel described this observation as a clear clarion call to anarchy.

By that statement, which was couched in language more appropriate to a final judgment, the learned judge was expressing the opinion that servitude 19, empowered the respondent to adopt the method of self-help rather than seek the assistance of the Court, should they be satisfied that the appellant had breached the provisions of servitude 7. That is the controversial substantive issue in the suit which would have to be determined by the judge when the matter is to be finally determined. We consider this statement to be premature and wrongly preemptive and prejudgmental of the substantive issue of trespass, that being the real issue in the suit brought by the appellant. The law is settled that in

hearing and determining an application for an interlocutory injunction the Court must not attempt to decide the substantive claim. It is enough if the plaintiff shows that there is a serious question to be tried. [See **American Cyanamid Co. v. Ethricon Ltd (1975) 1 All E.R. 504 H.L.]**.

We are therefore of the view that **Matthew J** acted on a wrong principle of law when he purported to exercise his discretion on his preemptive opinion. We therefore feel ourselves free to exercise our own discretion from what we consider to be the correct premise. In approaching our deliberations we do so against the backdrop of the principles involved in considering an application for an interlocutory injunction. These principles enunciated in the case of **American Cyanamid (Supra)** are as follows: (1) The plaintiff must establish that he has a good arguable claim to the right he seeks to protect; (2) The Court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried. (3) If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience. This balance of convenience may often be tipped in favour of the party which seems to have the better case and, an injunction ought not to be granted, if damages would be a sufficient remedy. Damages will seldom be a sufficient remedy if the wrong-doer is unlikely to be able to pay them or if the wrong is irreparable, or outside the scope of pecuniary compensation or would be very difficult to assess [See The Supreme Court Practice 1993 P 511].

In our judgment, we consider that the appellant has a good arguable claim to the right she seeks to protect and that there are serious questions to be tried on issue of the trespass alleged. Some of these serious questions would involve (1) the meaning of the word "structure" in servitude 7 and the application of the "ejusdem generis rule" to that clause (2) whether or not clause 19 affords the respondent the right to adopt the method of self-help in seeking to right an alleged wrong done by the appellant or, whether such self-help was impermissible and amounted to an abuse after a lawful entry, thereby converting that lawful entry to an unlawful entry ab initio. [See **Cinnamond and others v British Airports Authority (1980) 2 All E.R. 368**] and (3) Whether a plea of abatement of a nuisance can afford the respondent.

On the issue of the balance of convenience, we consider the provision of electricity in a house to be not a luxury but a necessity. We are of the view that the maintenance agreement between the parties having been terminated, the appellant should be allowed to negotiate for her own electricity at least until after the dispute has been resolved. Despite the fact that the respondent does not appear to be impecunious, we consider that damages would not be adequate for the inconvenience to be suffered by the appellant having to be without electricity in her home. Such damages would also be very difficult to assess. Unlike the case for the appellant, the record of proceedings before this Court does not show that the respondent would suffer any irreparable damage if the injunction is granted. Finally on the issue, prima facie, the appellant seems to have a better case. Given these factors, I consider the balance of convenience tipped in favour of the appellant.

Learned Counsel for the respondent raised the issue during the arguments that the appellant did not go before the judge with clean hands. I do not propose to deal with that issue as it was brought to our attention that the uncleanliness alleged on the part of the appellant were matters which are sub judice in other proceedings.

For all these reasons we reversed the Judge's order and on the undertaking as to damages given by the appellant we made the order for the injunction as prayed for in its amended form with costs to the appellant.

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SATROHAN SINGH
Justice of Appeal

I concur

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ALBERT REDHEAD
Justice of Appeal (Ag.)

I concur

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ODEL ADAMS
Justice of Appeal (Ag.)