ST. VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. SVGHCV005/2002

BETWEEN:

PALM ISLAND RESORTS LIMITED

Appellant

and

ARTS FRIENDS LIMITED

Respondent

Before:

The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
The Hon. Mr. Brian Alleyne, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Bertram Commissiong Q.C., Ms. Mira Commissiong with him for the Appellant
Mr. Parnell Campbell Q.C., Ms. Sandra Robertson with him for the Respondent

---

2002: December 4;
2003: March 6.

JUDGMENT

[1] **ALLEYNE, J.A.[AG.]:** This is an appeal against the order of Justice Frederick Bruce-Lyle made in Chambers on 19th February 2002, continuing an interlocutory injunction granted by Justice Ian Donaldson Mitchell Q.C. on 11th January 2002. The terms of that injunction are repeated in the order and purport to restrain the appellant/defendant by its officers, servants or agents or howsoever otherwise from:-

> "(1) Interfering with or removing any vegetation from Lot Number 53 on Palm Island or from any lands in the immediate vicinity of Lot Number 53 or of the electricity generator and desalination plant owned or operated by Arts Friends Limited.

(2) Removing or disturbing any topsoil on any part of Lot Number 53 on Palm Island or any lands in the immediate vicinity of Lot Number 53 or of the electricity generator and desalination plant owned or operated by Arts Friends Limited.

(3) Bulldozing or escavating [sic] any land or any area on Lot Number 53 on Palm Island or in the immediate vicinity of Lot Number 53 or of the electricity generator and desalination plant owned or operated by Arts Friends Limited.

[2] The grounds of appeal as set out in the appellant's amended Notice of Appeal are:

[1] The learned trial Judge failed to consider adequately or at all whether there was a cause of action in relation to the area of land referred to in paragraph 12 of the claimant's affidavit made by Ursula Streit-Griessel on the 11th January 2002 as a result of such failure the learned trial Judge continued the said injunction against the defendant denying it the right to enter upon land to which it is and was at the relevant time lawfully entitled.

[2] The learned trial Judge failed to consider adequately or at all whether damages would be an adequate remedy in respect of the alleged violation of the right which the claimant says it has in respect of this said parcel of land. By failing to do so His Lordship could not consider and appreciate that the said parcel of land belongs to the Defendant and that the only right which the Claimant alleged to have to occupy it was a bare licence granted by the Defendant which licence the Defendant said it had withdrawn – see paragraph 9 of the Defendant's affidavit made by Charleston Jackson on the 6th February 2002.

[3] The terms of the order granting the injunction are too wide and uncertain. It has caused the Defendant to cease all development work near to the Claimant's property fearing to go on its own land lest it be said to be "in the immediate vicinity" of the claimant's land. Palm Island is so small that such a restriction imposes severe hardship on the Defendant.

[4] The learned trial Judge failed to consider adequately or at all that the burden of proof lay on the Claimant to satisfy the Court that the injustice the Claimant will suffer as a result of the refusal of injunctive relief would be greater than that which the Defendant will suffer by granting it and that no attempt was made by the Claimant to discharge that burden.

[3] Learned Queen's Counsel for the appellant asserted – a fact which is confirmed by learned Queen's Counsel for the respondent - that Palm Island is a luxury resort

island in the southern Grenadines, a tiny island on which the respondent owns a house, aesthetically attractive as are all the properties on the island. The appellant holds a 99-year lease over the island, the term commencing from the 13th day of August 1966. The respondent is a sub-lessee of the appellant in respect of lot 53 containing 18,183 square feet as delineated in a plan lodged in the Survey Office of St. Vincent and the Grenadines bearing registration number Gr 137. The term of the said sub-lease expires one day before the expiry of the appellant's head-lease.

[4] In 1997 the respondent was allowed by management of the appellant to build a diesel generating electricity plant on the appellant's land. The respondent also built a desalination plant, substantially on its own land but with a slight encroachment onto the appellant's land. In addition, the respondent, with the permission of the appellant, planted flowers on a portion of the appellant's land adjoining the respondent's land, for the purpose of beautifying the area.

[5] On or about 3rd January 2002 the appellant began removing vegetation and topsoil from the area planted in flowers, and about 9th January the same year the appellant bulldozed a portion of its land, thereby exposing the foundation wall of part of the building housing the generator and severing the electricity cable which provides the earth connector for the generator. The appellant has repaired the severed cable.

[6] In her affidavit sworn on behalf of the respondent in support of the application for the injunction Ursula Streit-Griessel, a director of the company, deposed that:

> "The Claimant fears that if the Defendant continues the removal of vegetation and the disturbance of topsoil and the bulldozing of land in the immediate vicinity of the demised premises and on land which the Claimant own or over which the Claimant enjoys an easement or a licence, that the overall impact on the Claimant's property would be severe and irremediable for a considerable period of years in that all electricity and water services to Villa Almaviva (the respondent's property) would be disrupted."

[7] The respondent applied for and obtained an interim injunction on an application without notice supported by the affidavit of Ursula Streitt-Griessel, a director of the respondent company, which was filed on 11th January 2002. The application was granted and an interim injunction was ordered on the same day, 11th January 2002. The respondent filed an application to continue the injunction, on 22nd January 2002, and on 1st February 2002 the appellant filed an application to dismiss or vary the interim injunction. The latter application was supported by the affidavit of Charleston Jackson, Secretary of the appellant company, sworn and filed the 6th February 2002.

[8] The applications were heard on 19th February 2002, and the learned trial Judge ordered that the application to dismiss or vary the interlocutory injunction do stand dismissed and that the said injunction do continue in force until further order or until the trial of the action. The terms of the injunction were incorporated into the said order, which was entered on the 25th February 2002, and are set out in paragraph 1 of this judgment.

[9] The appellant relies on the principles laid down in the case **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504. At page 509 Lord Diplock declared the object of interlocutory injunctions to be to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages, but pointed out that:

> "the plaintiff's need for such protection must be weighed against the corresponding need for the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages. … The court must weigh one need against another and determine where 'the balance of convenience' lies."

[10] His Lordship went on to state, after an examination of the history of the development of the rule, that:

> "The court must no doubt be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious issue to be tried."

[11] Having read the Ruling of the learned trial Judge at the hearing of the applications to continue and to discharge the injunction, I am satisfied that the learned trial Judge applied his mind to both these issues, and I am not prepared to interfere with his finding. In **Martin Alphonso and Others v Deodat Remnath**, Civil Appeal No. 1 of 1996 (British Virgin Islands) Singh JA had this to say:

> "Where a question of fact has been tried before a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion."

[12] This, of course, is not a case in which witnesses gave oral evidence. Nevertheless I see no reason to disturb the learned trial Judge's findings on these issues and I would therefore dismiss grounds 1 and 2 of the appellant's grounds of appeal. In my view the same applies to ground 4, which I would also dismiss.

[13] I turn now to ground 3 of the grounds of appeal, by which the appellant asserts that the terms of the order are too wide and uncertain. The appellant submits that the injunction is so wide and uncertain that it has caused the appellant to cease all development work near to the claimant's property, fearing to work on its own land lest it be held that it was working "in the immediate vicinity of" lot number 53, of the electricity generator, which is entirely on the appellant's land, and far removed from the respondent's land, or of the desalination plant.

[14] Learned Queen's Counsel for the appellant submitted that it is essential that a party who is subject to an interim injunctive order should know with certainty what he may and may not do pending trial. Counsel argued that it is necessary in any interlocutory injunctive order for the maximum degree of certainty to be provided as to what is and is not permitted pending the trial of the action. He urged that the act which you seek by injunction to restrain should be set out in clear and precise terms so that the party restrained knows precisely what he can and cannot do. Mr. Commissiong submitted that the wording of the injunction in this case leaves the

appellant in grave doubt in this regard, in that the term "in the vicinity of" is very imprecise and uncertain, leaving the respondent the sole judge of the limits beyond which the appellants may not go.

[15] Learned Counsel cited the case of **Redland Bricks Ltd. v Morris** [1969] 2 All ER 577 at 580 F. This was a unanimous decision of five Law Lords delivered by Lord Upjohn, and dealt with what His Lordship described as "interesting and important questions as to the principles on which the court will grant quia timet injunctions, particularly when mandatory." His Lordship then went on to lay down some general principles, including that, in the case of a mandatory injunction, "the court must be careful to see that the defendant knows exactly in fact what he has to do."

[16] Learned Queen's Counsel for the appellant submitted that under the terms of the injunction the appellant can never know how near to or how far from the boundaries of lot 53, or the desalination plant or the generating plant its workmen should be instructed to carry out works by bulldozing or removing topsoil or vegetation, without risking contempt proceedings. Following **Redlands Bricks Ltd v Morris,** a court will discharge an injunction if it does not inform the party restrained exactly what he ought to do or refrain from doing.

[17] In response learned Queens Counsel for the respondent Mr. Campbell submitted that all these issues had been addressed in the appellant's affidavit before the learned trial Judge, who must be assumed to have taken them into account. Learned Counsel also submitted that the phrase "in the immediate vicinity of" must be taken as conveying with reasonable certainty the areas in respect of which the appellant was restrained. The learned trial Judge's ruling in the matter makes no reference to the issue of the scope of the restraint, and this court has to determine the question.

[18] Redlands Bricks relates primarily and directly to mandatory injunctions, which the order in this case is not. However, it seems to me that this is a case where the

same principle should be applied. The appellant is the owner of the land to which the injunction applies, and is seeking to perform development works on that land. The effect of the injunction is to restrain him from undertaking such works until the trial of the action. Already he has been so restrained for in excess of one year. The limits of the restrictions, and the boundaries beyond which he cannot go, are not defined, either by reference to a survey plan, by distances from fixed points or otherwise. He is left to speculate as to what "the immediate vicinity" means, and is constantly at risk of being accused, along with his workmen, of contempt of court by breach of the negative injunction. There is clearly lack of clarity in the order, which, in my view, is bad for uncertainty.

[19] In **Low v Innes** [1864] 4 De G.J.&S 286 at 295 – 296 Lord Westbury L.C. had this to say:

> "The first duty of the court in granting an injunction of this kind is to lay down a clear and definite rule. If the language of the order in which the injunction is contained be itself ambiguous, uncertain, indefinite, giving no clear rule of conduct, the injunction becomes a snare to the Defendant, who violates it, if at all, at the peril of imprisonment. The court therefore should, in granting an injunction, see that the language of its order is such as to render quite plain what it permits and what it prohibits."

[20] On this ground, I would allow the appeal, with costs to the appellant both here and below.

Brian Alleyne, SC
Justice of Appeal [Ag.]

I concur.

Albert Redhead
Justice of Appeal

[21] **GEORGES, J.A. [AG.]**: I have had the advantage of reading my learned brother's judgment in draft and adopt as accurate his brief narration of the background facts of this case. And whilst I have reached the same conclusion that he has I have

done so for somewhat different reasons (in part) and therefore find it necessary to make the following comments.

[22] Firstly, it does seem to me that from the very outset Part 17.4 CPR 2000 which concerns interim injunctions and similar orders was not followed as it ought to have been.

[23] In particular paragraphs 4 and 5 of the said rule appear to have been totally ignored.

Paragraph 4 states that:

> "(4) The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period) if it is satisfied that –
> (a) in a case of urgency no notice is possible; or
> (b) that to give notice would defeat the purpose of the application"

Paragraph 5 stipulates that:

> "(5) On granting an order under paragraph (4) the court must –
> (a) fix a date for further consideration of the application; and
> (b) fix a date (which may be later than the date under paragraph (a)) on which the injunction will terminate unless a further order is made on the further consideration of the application."

[24] Be that as it may an inter partes hearing eventually took place on 19th February 2002 before a judge other than the judge who made the original interim order which appears to have been awarded to endure "until trial or further order of the Court." The learned trial Judge at the inter partes hearing ordered that it continue. It is that order which is appealed.

[25] Four grounds of appeal were argued by learned Counsel for the Appellant. These are in the amended notice of appeal and at paragraph 2 above.

[26] For Ground 1 learned Counsel contends that the learned trial Judge failed to consider adequately or at all whether there was a cause of action in relation to the area of land in the immediate vicinity of Lot 53 i.e. immediately adjacent to the frontage of the demised premises which had been landscaped and maintained by the Respondent with the approval of the Appellant since 1996 and which area formed an integral aspect of the appeal of the Respondent's house (Villa Almavilla) and its ancillary facilities and in respect of which interim injunction relief was now sought and had been granted.

[27] The Respondent acknowledged at paragraph 10 of the supporting affidavit of Ursula Streit-Griessel that the Appellant's predecessor had granted it permission to convert an existing storage room outside of Lot 53 (i.e. on the Appellant's land) into a building to house an electricity generator to augment the inadequate and unreliable supply of electricity to Villa Almavilla provided by the Appellant.

[28] Similarly acting on the authority of the Appellant's predecessor the Respondent also installed a Water Desalination Plant and a water and pump station on Lot 53 which structure encroached beyond the boundary of Lot 53 but not significantly. No objection was therefore raised.

[29] In applying for an interim injunction the Respondent avers at paragraph 14 of its supporting affidavit sworn by the said Ursula Striet-Griessel that it fears that if the Appellant continues the removal of vegetation and the disturbance of topsoil and the bulldozing of land in the immediate vicinity of the demised premises and on land which the Respondent …… an area which the Respondent enjoys or easement or licence the overall impact on its property would be severe and irremediable for a considerable period of years.

[30] It is to my mind pellucidly plain that the Respondent can lay no claim to ownership of any land in the immediate vicinity of or outside of the demised premises i.e. Lot

53. And its claim to an easement in respect thereof cannot in my view be maintained in law having regard to all the circumstances.

[31] In my judgment the Respondent has failed to show a legal or equitable right or interest, which could give rise to a cause of action, which would entitle him to the injunctive relief sought. As I see it these are not matters in dispute as learned Counsel for the Respondent argued and ought therefore to be left for trial. Nowhere in his ruling does the learned trial Judge appear to have specifically addressed that aspect of the case as learned Counsel for the Appellant rightly observed.

[32] The law in that regard is clear. The Court has a broad discretionary jurisdiction to grant an interlocutory or final injunction in all cases in which it appears to it to be just and convenient to do so but there is the overriding requirement that the Applicant must have a cause of action in law entitling him to substantive relief. See:

(1) **North London Rly Co v Great Northern Rly Co** (1883) 11 Q BD 30

(2) **The Siskins** (1979) AC 201

(3) **DSS v Butler** (1995) 1 WIR 1528 and

(4) **Mercedes Benz AG v Leiduck** [1996] 1 AC 284

[33] In its statement of claim the Respondent prayed for inter alia a Declaration that it was entitled to enjoy the easements or licences over the Appellant's lands as may be appurtenant to its tenure of the demised premises. A declaration like an injunction is not a cause of action but a remedy. No usage of right to any clearly defined part or portion of the Appellant's lands has been established by the Respondent so as to ground a cause of action in respect thereof. In my judgment, Ground 1 of the appeal succeeds and for that reason and that reason only the interim order of injunction ought not in my view to have been granted and should accordingly be set aside.

[34] In the event that I am wrong I now turn to Ground 2 of the appeal which alleges that the learned trial Judge failed to consider adequately or at all whether damages would be an adequate remedy in respect of the alleged violation of the Respondent's rights.

[35] In my view it is palpably plain that having regard to all the circumstances of the case and in particular to the adverse impact which the Appellant's developmental/operational activities would have on the aesthetic aspect of the Respondent's house and its ancillary facilities, which are admirably summarized by the learned trial Judge in his ruling, damages clearly could not be a sufficient or adequate remedy in the circumstances and I therefore concur with his and Alleyne J.A.'s reasoning in that regard. Ground 2 of the appeal accordingly fails.

[36] As regards Ground 3. Here again I am ad idem with the views expressed by Alleyne J.A. and his reasons therefor. Lord Upjohn **in Redland Bricks Ltd v Morris** [1970] AC 652 at 666 declared that:

> "If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction then the court must be careful to see that the defendant knows exactly what he has to do and this means not as a matter of law but as a matter of fact."

[37] In that case the mandatory order was set aside by the House of Lords partly on the ground of hardship and partly because it gave the defendants no indication of exactly what was to be done. The requirement of precision applies to prohibitory injunction as well and in the instant case the awarding of the injunction does not define with sufficient precision the exact limits of the order and the expression "in the immediate vicinity" is open to caprice and thereby gives rise to embarrassment and confusion. Ground 3 of the appeal accordingly succeeds and on that ground also I would allow the appeal and set aside the interim injunction granted.

[38] Finally as regards Ground 4. For the reasons given in respect of Ground 2 above, I am fully satisfied that the learned trial Judge adequately addressed that aspect of

the case and I see no reason to interfere with his findings in that regard. Perusal of the learned trial Judge's ruling clearly shows that he was acutely aware of where the greater risk of injustice lay in granting or in refusing the injunction and concluded that the balance of convenience tilted in favour of the Respondent. Ground 4 of the appeal therefore has no merit and accordingly fails.

[39] In the result for the reasons stated in respect of Grounds 1 and 3 the appeal is allowed and the order of the learned trial Judge dated 19th February 2002 is hereby set aside with costs to the Appellant in this Court and in the Court below.

Ephraim Georges
Justice of Appeal [Ag.]