IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2009/0155

BETWEEN:

GRENADA BUILDING AND LOAN ASSOCIATION

Claimant

and

GRENADA CO-OPERATIVE BANK LIMITED

Defendant

Appearances:

Mr. Leslie Haynes, Q.C., and Ms. Dia Forrester for the Claimant
Mr. Ruggles Ferguson and Ms. Anyika Johnson for the Defendant

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2009: June 23rd, 24th
July 2nd

JUDGMENT

[1] **MICHEL, J. (Ag.):** By a claim form filed on 20th April 2009 the Claimant, Grenada Building and Loan Association, filed an action against the Defendant, Grenada Co-operative Bank Limited, seeking the following relief:

1. An injunction to restrain the Defendant by itself or its servants or agents or workmen or otherwise howsoever from erecting and or continuing the erection of any building so as to cause a nuisance or illegal obstruction to the Claimant's ancient windows and or obstructing and or diminishing the access of light to the windows of the Claimant or any of them;

2. An injunction quia timet restraining the Defendant by itself or its servants or agents or workmen or otherwise howsoever from interfering with the Claimant's access to light;

3. A declaration that the Claimant is entitled to examine the quality of the wall constructed by the Defendant adjacent to the Claimant's property which was constructed to replace the lateral support that the Defendant removed from the Claimant's property;

4. Damages;

5. Costs and further or other relief as the court sees fit.

[2] On 5th May 2009 the Defendant filed an acknowledgement of service of the Claimant's claim form and statement of claim and filed a defence on 19th May 2009.

[3] Apart from the substantive matter, two applications were made to the Court in this matter.

[4] The first application was made by the Defendant by notice of application filed on 15th May 2009 for an order that:

1. The statement of claim filed herein on the 20th day of April 2009 be struck out with costs;

2. All proceedings in the substantive action be stayed pending the hearing and determination of this application;

and for costs. The Defendant's application was supported by an affidavit of its Managing Director filed on the said 15th May 2009 and was accompanied by an exhibit.

[5] The second application was made by the Claimant by notice of application filed on 2nd June 2009 for the following orders:

1. That the Defendant be restrained until after judgment in this action or until further order in the meantime whether by itself, its respective servants or agents or otherwise howsoever from continuing the construction and or

erection of a five storey building on its land situate at Church Street in the Town of St. George's, the western boundary of which is common to the eastern boundary of the Claimant's property also situate at the above said Church Street and known as "Argle House";

2. That the Claimant be at liberty by its servants or agents, its legal advisers, experts and workmen upon three days' notice to the Defendant to enter the Defendant's property and there to inspect the recently-constructed wall situate on its common boundary with the Defendant and to carry out experiments to ascertain whether the wall provides sufficient support to the Claimant's land and building. The Claimant undertakes to do no unnecessary damage and as soon as its investigations are completed to make good all damage done by it, if any.

[6] The Claimant's application was supported by affidavits filed on 2nd, 3rd and 19th June 2009, which affidavits were accompanied by several exhibits. The Defendant filed a notice of opposition to the Claimant's application, which notice was filed on 19th June 2009, and also filed three affidavits in opposition to the application, which affidavits were filed on 17th and 23rd June 2009 and were accompanied by exhibits. The Defendant also presented to the Court written submissions and authorities in support of its opposition.

[7] The application by the Defendant was scheduled for hearing on 2nd June 2009 but was adjourned, on application by Counsel, to 3rd June and then 5th June, on which latter date it was heard.

[8] At the conclusion of the hearing of the Defendant's application, the Court reserved its decision on the application and made an order that, upon an undertaking given to the Court by Learned Counsel on behalf of the Defendant that the Defendant will not undertake any further construction on the wall on the side of the common boundary between the parties, the hearing of the application by the Claimant for an injunction is adjourned to 23rd June 2009, with liberty by either party to apply.

[9] The application by the Claimant was heard on 23rd and 24th June 2009, with the decision on this application also being reserved and with an undertaking given by the Defendant not to undertake any construction whatsoever on the wall on the side of the common boundary between the parties until the rendering of a judgment on this application, but with liberty by either party to apply.

[10] I will deal first with the application to strike out the statement of claim. The grounds of this application were as follows:

1. The Claimant has failed to issue, file and serve a claim form in accordance with the mandatory requirements of Rules 8.1 (1) (a), 8.1 (4) and 8.2 of the CPR 2000;

2. The filing of the action herein by the Claimant amounts to an abuse of the process of the Court;

3. The current claim does not disclose any reasonable cause of action against the Defendant; and

4. The relief sought by the Claimant in the current action is not supported, either in law or in fact, by the particulars of the claim.

[11] In terms of the first ground, the Claimant did issue a document dated 20th April 2009 titled "CLAIM FORM", which was filed at the Office of the Registrar at 3.15 p.m. on the said 20th April 2009 and which was served on the Defendant on 21st April 2009. In fact, by acknowledgement of service filed on behalf of the Defendant on 5th May 2009, it was acknowledged that the Defendant had on 21st April 2009 received the claim form. The requirements of Rule 8.1 (1) (a) have clearly therefore been satisfied. It appears also that the claim form is generally in accordance with Form 1 of the Appendix to the CPR, with the statement of claim contained in the claim form complying with the requirement to set out briefly the nature of the claim and any specific remedy being claimed. The requirements of

Rule 8.1 (4) have therefore been satisfied. The statement of claim in this matter was contained in the claim form, as is clearly permissible under the rules, which is evident from Rule 5.2 (3) where it is provided that the statement of claim must be served with the claim form unless the statement of claim is contained in the claim form. The applicable requirements of Rule 8.2 have therefore been satisfied.

[12] In the submissions made by Learned Counsel for the Defendant – both orally at the hearing of the application and in the written submissions presented in advance of the hearing – it was also contended that the claim form does not comply with Rule 8.6 (1), it is not a single, independent form with its own independent certificate of truth and it contains no prescribed notes as required by Rule 8.14 (1) (e).

[13] These additional submissions also do not find favour with the Court, because all of the requirements of Rule 8.6 (1) have been complied with, there is no requirement that the claim form and statement of claim must be in separate, independent documents each with its own certificate of truth, and the prescribed notes for defendants (as per Form 1A) as required by Rule 8.14 (1) (e) were in fact filed with the claim form on 20th April 2009.

[14] Even if it were to be found, however, that the claim form issued, filed and served by the Claimant in this case had suffered from some defect of form, the following quotation from Volume 1 of the 2001 White Book at page 176 could have proven useful:

> *"In a number of cases decided since the implementation of the CPR, the courts have taken a liberal approach to 'technical errors' made by a party, including issuing a claim on the wrong form. In Hannigan v. Hannigan and Others [2000] AER D693, CA said it was disproportionate, and unjust (under r.1.1 the overriding objective) to strike out a claim made on the wrong form when the defendant had been given all the information required to understand what the claimant was seeking."*

[15] In terms of the second ground, it is difficult to see how the discontinuance of proceedings on the basis that the Claimant is no longer desirous of proceeding with the matter can be the basis for striking out a subsequently-filed matter as an

abuse of the process of the Court. It is not that the Claimant gave a reason for no longer being desirous of continuing with the matter which reason was subsequently shown to be false. In fact, it was only subsequent to the discontinuance that the Claimant gave a reason why it was no longer desirous of continuing with the matter, that is, because it desired to file a fresh case due to the cumbersome amendments that would have to be made to the claim as previously filed. This cannot justify the invocation of the draconian sanction of striking out the Claimant's statement of case as an abuse of the process of the Court.

[16] In terms of the third ground, Learned Counsel for the Defendant submits that the claim does not disclose any reasonable cause of action against the Defendant because the construction of the building by the Defendant was approved by the Planning And Development Authority and because the Claimant failed to provide any particulars of the extent of the diminution of light that would meet the standard as recognized by the law.

[17] The first limb of the submission can be easily disposed of by reference to the English case of **Hunter and Others v. Canary Wharf Ltd.**[1], which was cited by Learned Queen's Counsel on behalf of the Claimant as authority for the proposition that the permission of the planning authority does not derogate from the property rights of another nor does it give a party any immunity from suit in respect of nuisance.

[18] On the second limb of the submission, Learned Queen's Counsel conceded that mere interference with light does not give rise to a cause of action, but that the cause of action arises from materially diminishing the light coming in to the Claimant's property. In that regard, Learned Queen's Counsel concedes that the objection to paragraph 10 of the statement of claim may be justified in so far as it merely asserts an interference with the Claimant's right to light without more. However, he states that it is at paragraph 18 of the statement of claim that the cause of action really arises when the material diminution of the light coming in to

[1] [1996] 2 WLR 348

the Claimant's property is addressed. I do not therefore consider that the claim does not disclose any reasonable cause of action against the Defendant so as to justify the striking out of the statement of case under Rule 26.3 (1) (b) of the CPR.

[19] In terms of the fourth ground, Learned Counsel for the Defendant submits that the relief sought by the Claimant is not supported, either in law or in fact, by the particulars of claim because – although the Claimant seeks an injunction to restrain the Defendant from obstructing or diminishing or interfering with the Claimant's right to light – no particulars were provided in the statement of case of the quality of the interference with the Claimant's right to light and because – although the Claimant seeks a declaration of entitlement to examine the Defendant's retaining wall – the pleadings reveal no approach by the Claimant or refusal by the Defendant to allow an examination of the retaining wall.

[20] The first limb of this submission was largely addressed in dealing with the second limb of the previous submission and what was already stated then need not be repeated now. I would go no further in addressing this limb of the submission than to quote verbatim from paragraph 16.0.2 at page 274 of Volume 1 of the 2001 White Book –

> *"In Mc Philemy v. Times Newspapers Ltd [2000] 1 W.L.R. 1732; [1999] 3 All E.R. 775, Lord Woolf M.R. gave the following guidance as to the purpose and importance of statements of case. Statements of case are required to mark out the parameters of the case that is being advanced by each party. It is important that they identify the issues and the extent of the dispute between the parties. They should state concisely the general nature of each party's case. The need for extensive detail and particulars has been reduced by the requirement that witness statements must be exchanged. In the majority of proceedings, identification of the documents upon which a party relies, together with copies of the party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise."*

[21] As to the second limb of the submission, Learned Queen's Counsel on behalf of the Claimant submitted and this Court accepts that no prior demand is necessary in seeking a declaration of right and that there is no basis for striking out a

statement of claim for failure on the part of the Claimant to follow correct pre-action protocol.

[22] I am satisfied therefore from the averments made in the statement of claim contained in the claim form, that the relief sought by the Claimant in this case is supported by the particulars of the claim and that there is no justification for the striking out of the statement of claim.

[23] In the circumstances, the application by the Defendant to strike out the statement of claim in this matter is dismissed with costs to the Claimant to be agreed or otherwise assessed.

[24] I turn now to the application for interim relief filed by the Claimant. This application was heard on 23rd and 24th June 2009, with oral submissions made by Learned Queen's Counsel Leslie Haynes, on behalf of the Claimant, and oral submissions made by Learned Counsel Ruggles Ferguson, on behalf of the Defendant, which supplemented the written submissions previously presented to the Court on behalf of the Defendant.

[25] The facts which gave rise to the application for interim relief can be summarized as follows:

1. The Claimant is the owner of a portion of land at Church Street in the City of St. George's on which is constructed a three-storey building.

2. The Defendant is the owner of a portion of land which abuts and abounds the property of the Claimant and on which portion of land there existed for several years a dwelling house which was of a size, height and proximity that did not interrupt the Claimant's enjoyment of and access to light entering its ten windows, five each on the first and second floors on the eastern side of the property.

3. This state of affairs existed for a period in excess of twenty years so that the Claimant had enjoyed for over twenty years uninterrupted access of

light, thus acquiring an easement under Section 2 of the Prescription Act, Cap. 252 of the Revised Laws of Grenada 1990.

4. The Defendant demolished the dwelling house on its aforesaid portion of land, which was over ten feet away from the common boundary with the Claimant, and has commenced construction of a five-storey building thereon, with the western wall of the building being constructed on the common boundary with the Claimant's property.

5. The completion of the building presently being constructed by the Defendant in such close proximity to the Claimant's building would reduce the Claimant's access to light, which reduction the Claimant fears will be substantial, substantial enough to render the occupation of the first and second floors of the Claimant's property uncomfortable according to the ordinary notions of mankind and to prevent the Claimant from carrying on its business as beneficially as before.

6. The Defendant excavated the soil on the common boundary shared with the Claimant to a level well below the first floor of the Claimant's property and within its basement level, thus removing the support partially or wholly provided by the soil prior to the excavation. A retaining wall has since been constructed by the Defendant on the common boundary, but the Claimant desires to inspect it so as to ensure that it was constructed in such a manner as to provide sufficient lateral support to the Claimant's building.

[26] Against this factual background, the Court must decide whether to grant an injunction restraining the Defendant, until the determination of the substantive action, from continuing the construction or erection of a five storey building on its land, which shares a common boundary with the Claimant's property, and whether to grant an order permitting the Claimant to enter the Defendant's property to inspect the recently-constructed wall on the common boundary so that the

Claimant can carry out experiments to ascertain whether the wall provides sufficient support to the Claimant's land and building.

[27] In terms of the question whether or not to grant the interim injunction, Learned Queen's Counsel on behalf of the Claimant submits that, based on the above facts and based on the principles laid down in **American Cyanamid Co. v. Ethicon Ltd.**[2], which is the recognized judicial authority on the grant of interim injunctions, and **Colls v. Home and Colonial Stores Limited**[3], which Learned Queen's Counsel referred to as the locus classicus in relation to the law on easements of light, there is clearly a serious issue to be tried and so the Claimant has surmounted the first hurdle to obtaining an interim injunction.

[28] Learned Counsel for the Defendant had argued that there could not be a serious issue to be tried in the substantive proceedings because of the issues raised by the Defendant in its striking out application. But Learned Counsel conceded that if the Court were to rule against the Defendant on its striking out application then it would follow that there is a serious issue to be tried in relation to the easement of light.

[29] The Court having earlier ruled against the Defendant on its striking out application, there is no longer any question as to whether or not there is a serious issue to be tried and the question now becomes – in accordance with **American Cyanamid** – whether damages would be an adequate remedy if the Court were to find in favour of the Claimant in the substantive proceedings.

[30] Learned Queen's Counsel submitted that an award of damages would not be adequate compensation in this matter because this is an issue of property rights and, in the matter of property rights, the person whose rights are being infringed is always prima facie entitled to an injunction to prevent further infringement of those rights. The decision of the English Court of Appeal in the case of **Regan v. Paul**

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[2] [1976] 1 All ER 504
[3] [1904] AC 179

Properties DPF No. 1 Ltd and Others[4] was cited by Learned Queen's Counsel as authority for this proposition.

[31] In the **Regan case**, the English Court of Appeal reviewed the authorities on this question and pronounced as it did on the issue of damages versus an injunction when property rights have been infringed. The Court of Appeal, however, affirmed that the grant of an injunction was a discretionary remedy and that it remained open to a court, in the appropriate circumstances, to award damages instead of granting an injunction.

[32] This Court will, in the circumstances of this case, decline to exercise its discretion in favour of granting an injunction for the following reasons:

1. Unlike in the **Regan case**, where the facts had been determined and a finding was made at the end of the case that a property right had been infringed for which injunctive relief ought to be granted, there is no determination at this juncture that the Claimant's property rights have been infringed, but only that there is a serious issue to be tried as to whether or not they have been. Having regard therefore to the serious impact that the Defendant contends that the grant of an injunction at this stage can have on its project and on its overall operations, to grant an injunction against the Defendants in the present circumstances on the mere possibility that there might be an infringement of the Claimant's property rights, is a draconian decision not justified in the circumstances of this case.

2. Again, unlike in the **Regan case**, where the Defendant need only have been restrained by injunction from fully completing one out of sixteen units of a mixed commercial and residential development, in the present case the injunction sought is to restrain the Defendant from continuing with the construction and or erection of its building altogether.

[4] [2006] 3 W.L.R. 1131

3. The nature of the undertaking being embarked upon by the Defendant, which is the construction of a modern building in the heart of the capital city as the headquarters of its operations, is not an enterprise that can be said to be unreasonable, inappropriate or other than desirable. And the fact that the result of this undertaking is likely to disturb the status quo as it prevailed in the locality for a period in excess of twenty years, or upwards of fifty years, as emerged from the facts presented, is but a natural consequence of a process which is normally referred to as progress or development. To use the discretionary powers of the Court, therefore, to effectively stall or thwart progress or development in the capital city of Grenada so as to preserve a status quo that may well be incongruous with current-day realities, is not something that I believe is justified in all the circumstances. If, at the conclusion of the substantive case, the Court finds that the Claimant's rights were infringed by the Defendant, then the Claimant will be entitled to be compensated in damages for this infringement, which compensation the evidence suggests that the Defendant will be in a position to pay.

4. The Claimant is affected by laches in pursuit of this matter because, having known at least from October 2008 that the Defendant was intending to construct a building which was likely to affect the Claimant's access to light, it was not until June 2009 that the Claimant made the current application for injunctive relief to stop the construction or erection of the building after the Defendant had already spent seven million dollars out of a projected budget of twenty one million dollars for the construction of the building. Granted that there may have been circumstances not borne out of indolence by the Claimant which generated the delay in making this application, but they are not circumstances created by the Defendant such as to disentitle it from relying on the Claimant's laches. The net result is a determination by this Court that it would be unjust to the Defendant at this stage to grant the injunctive relief sought.

[33] Of course, in the treatment of the issue of the adequacy of damages, I have also addressed the issue of the balance of convenience, or the balance of justice as some judges have preferred to call the balancing exercise which **American Cyanamid** called for once the issue of the adequacy of damages has been resolved. The balance, I have determined, would favour not granting the injunction in the circumstances of this case.

[34] This determination makes it unnecessary to delve into the question which **American Cyanamid** calls for an answer to, as to whether the status quo should be preserved and, if so, what is the status quo that should be preserved, whether to allow the continuation of the construction of the building now in progress or whether the status quo to be preserved is the status quo ante October 2008 when construction of the building commenced. These questions need not now be answered.

[35] In terms of the Claimant's application for an order permitting the Claimant to enter the Defendant's property to inspect the recently-constructed wall on the common boundary of the Claimant and the Defendant so that the Claimant can carry out experiments to ascertain whether the wall provides sufficient support to the Claimant's land and building, this Court accepts the submission of Learned Queen's Counsel on behalf of the Claimant that the fair trial of the matter justifies the grant of the order sought. The Court, however, requires that the inspection be carried out expeditiously and with minimum disruption to the Defendant's operations.

[36] The Order of the Court is as follows:

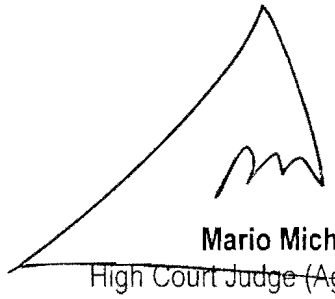
Upon an undertaking by the Claimant to compensate the Defendant in damages in case the Court shall find that the Defendant has suffered any by reason of the implementation of this Order which the Claimant ought to pay

And upon a further undertaking by the Claimant to do no unnecessary damage in the process and to make good all damage done by it, if any, as soon as its investigations are over

This Court orders that the Claimant be at liberty, by its servants or agents, its legal advisers, experts and workmen, upon three days notice to the Defendant to enter the Defendant's property and there to inspect the recently-constructed wall situate on the common boundary of the Claimant and the Defendant and to carry out experiments to ascertain whether the wall provides sufficient support to the Claimant's land and building

This Order shall be fully implemented by the Claimant within two weeks of the date of the Order or within such extended time as shall be agreed upon by the parties to these proceedings or as shall be ordered by the Court.

[37] The Court having granted one order sought and refused the other in the application for interim relief, each party to the application shall bear its own costs.



Mario Michel
High Court Judge (Ag.)