BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2011/0158

BETWEEN

ELISABETH ROBERTSON

Applicant

-and-

CHRISTINA WASHBURN
ALFREDO CALLWOOD

Respondents

Appearances:
Ms. Tanya N. Scantlebury of Price Demers & Co. for the Applicant
Mr. Lewis Hunte QC of Hunte & Co. Law Chambers for the Respondents

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2011: July 07
2011: July 28, September 23

Mandatory injunctions on interlocutory applications – Test for the grant of mandatory injunction – Least risk of injustice if injunction was wrongly granted – High degree of assurance that applicant will be able to establish right at trial - Whether special circumstances must be shown – Serious issue to be tried – Are damages an adequate remedy

The applicant and the respondents are neighbours. Their lands are contiguous to each other. In November 2006, the respondents undertook excavations on their property to construct a driveway. It is alleged that this resulted in the undermining of portions of the applicant's land thereby causing damage to it. The parties attempted to resolve their dispute with the assistance of their respective lawyers. In or around March 2007, the respondents commenced building a retaining wall but never completed it. On 24 August 2008, the parties had a joint site inspection with personnel from the Public Works Department and the Town and Country Planning Department at the site of the dispute. During the inspection, the second respondent agreed to resume construction a retaining wall but to date, the works remain outstanding.

The applicant then applied for a mandatory injunction on an interlocutory application for the respondents to complete the construction of a retaining wall on their land.

HELD:

[1] It is not part of the court's function at this interlocutory stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend not to decide difficult questions of law which call for detailed and mature considerations. There are matters to be dealt with at trial. But, where, however, the grant or refusal of an injunction is incapable of recompense by damages, the relative strength of the parties' case may be considered particularly in an application such as the present one: American Cyanamid Co. v Ethicon [1975] AC 396 at 408 – 409 referred to.

[2] A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted: see Halsbury's Laws of England (4th ed.) Vol. 24 at para. 848. In this application, the special circumstance which is pleaded is the looming possibility for another active hurricane season and the applicant fears that more damage will be caused to her property.

[3] The test to be applied for the grant of a mandatory injunction is which course is likely to involve the least risk of injustice if it turns out to be 'wrong': Chadwick J in Nottingham Building Society v Eurodynamics Systems Ltd[1], later approved by the Court of Appeal in Zockoll Group Limited v Mercury Communications Ltd[2]. In the present application, the respondents can be compensated in damages if the order was wrongly obtained whereas the applicant's land cannot be un-eroded if further destabilization occurs over the upcoming hurricane season. In addition, there is a high degree of assurance that the applicant can establish her right at trial.

JUDGMENT

[4] HARIPRASHAD-CHARLES J: The sole issue to be determined here is whether the circumstances of this case are appropriate for the imposition of a mandatory injunction on an interlocutory application.

[5] On 28 July 2011, I gave an oral reasoned judgment granting the mandatory injunction prayed for by the applicant ordering the respondents to complete the construction of a retaining wall in accordance with the recommendations outlined in the report of Kraus-Manning Construction Services Inc dated 10 December 2010 ("the Kraus-Manning Report"). I had promised to reduce my oral reasons into a written judgment. I do so now.

[1] [1993] FSR 468 at page 474.
[2] [1998] FSR 354.

Background Facts

[6] The applicant and the respondents are neighbours. In or about November 2006, the respondents undertook excavations on their property to construct a driveway. It is alleged that the excavations resulted in the undermining of portions of the applicant's land thereby causing damage to it. The parties attempted to resolve their dispute with the assistance of their respective lawyers. In or around March 2007, the respondents commenced building a retaining wall but never completed it.

[7] On 24 August 2008, the parties had a joint site inspection with personnel from the Public Works Department ("the PWD") and the Town and Country Planning Department (the TCPD") at the site of the dispute. During the inspection, the second respondent agreed to resume construction of the retaining wall but to date, the works remain outstanding.

[8] On 22 June 2011, the applicant brought an action for damages for breach of contract, negligence and nuisance for the damage caused to her land. On the same date, she applied for a mandatory injunction for the respondents to complete construction of the retaining wall in accordance with the recommendations outlined in the Kraus-Manning Report or alternatively, that she be permitted to construct the wall at the respondents' expense.

The evidence

[9] From the outset, I remind myself of the principles emanating from the landmark case of American Cyanamid Co. v Ethicon[3] which establish the general approach that a court ought to take at this interlocutory stage of the hearing. The evidence available to the court is incomplete. It is given on affidavits and has not been tested by oral cross-examination. The court cannot adequately try on affidavits or witness statements the truth or falsity of the applicant or respondents' assertions.

[3] [1975] AC 396 at 408-409, per Lord Diplock.

[10] Now to the evidence which was adduced thus far. The applicant produced her affidavit supported by documentary evidence from three expert witnesses and a Report from Mr. Potter, the Chief Planner at the TCPD.[4]

[11] In a nutshell, she averred that she is the owner of a parcel of land which is contiguous to the respondents' land. In or about November 2006, the respondents commenced excavation of their land which caused damage to her land. Negotiations commenced between the parties with a view to resolve the problem. Subsequently, the respondents commenced building of a retaining wall but stopped notwithstanding the intervention of the PWD and the TCPD. The applicant relied on the Report from the TCPD which is indeed telling. Mr. Potter, the Chief Planner, conducted a joint site inspection with the parties. He advised, among other things, the following:

1. "Failure by Mr. Callwood to finish construction of the retaining wall in a timely manner has continued to undermine both the applicant as well as the respondents' properties.

2. It was agreed that Mr. Callwood should resume construction of the retaining wall as soon as weather conditions permit. Mr. Callwood indicated that he would resume by November 2008 and this was agreed upon.

3. Both parties are to work together towards the sustainable development of their properties and the community as a whole."

[12] Subsequently, the applicant employed the services of three experts, namely: Messrs. Ronald Gurney, Craig Noblett and Marc Downing. The gist of their reports support her contention that (1) the cause of the loss of the land is as a direct result of the respondents' excavation and (2) the urgent construction of a retaining wall would be an appropriate method to prevent further damage occurring to the applicant's property particularly since the hurricane season has just began.

[13] At paragraph 12 of her affidavit, the applicant deposed that damage to her property increased during the hurricane season last year and she is extremely concerned about the

[44] See Affidavit filed on 22 June 2011 together with Exhibits "ER1 – ER11."

level of damage that will be caused this year. She stated that if the retaining wall is not built expeditiously, the damage to her property will continue.

[14] On 4 July 2011, the respondents filed a joint affidavit. They deposed that in or about 2006, they commenced construction on their land which adjoins the applicant's land and in order to gain access to the construction site, they carried out excavation to construct a driveway. They averred that no slippage or adverse effects to the applicant's land have occurred either before or after the excavation.[5]

[15] At paragraphs 9 and 10, the respondents deposed as follows:

> 9. "It is true that we commenced construction of a retaining wall but since the excavation was carried out we suffered no adverse effects to parcel 117 or to our driveway or the building we constructed. Completion of the retaining wall was not and is not a matter of urgency and we decided to delay its completion pending our acquisition of sufficient funds.
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> 10. Parcel 149 is also not adversely affected by the excavation we carried out and it cannot be adversely affected unless slippage of Parcel 117 first occurs."

[16] The respondents have submitted an expert report of Mr. Amilcar Camilo, Managing Director of Mirsand Town Planning and Architects Ltd. The Report is dated 29 June 2011 and in summary, states:

> "The instability on Mrs. Robertson's land (Parcel 149) is not the result of any excavation done on Ms. Washburn's land (Parcel 117). It is the result of the transportation and depositing of loose dirt and boulders on her land….She could have secured this loose material in the manner explained above and so prevent it escaping onto Ms. Washburn's land. Even after Ms. Washburn completes her own retaining walls, that will not prevent escape of the loose soils and the boulders from Mrs. Robertson's land. It will prevent some of it from proceeding beyond the retaining wall."

[17] As I earlier stated, it is not part of the court's function at this interlocutory stage to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend. There are matters to be dealt with at trial. But, where, however, the

[5] See paragraph 8 of Affidavit of Christina Washburn and Alfredo Callwood filed on 4 July 2011.

grant or refusal of an injunction is incapable of recompense by damages, the relative strength of the parties' case may be considered particularly in an application such as the present one.

Applicable legal principles

[18] The grant of any injunction is in the discretion of the court and the court is vested with a wide discretion. The court must have regard to the overriding objective.

[19] At the interim stage as opposed to at the trial of an action, the court generally will only grant a "prohibitory" injunction and will thereby usually seek to preserve the existing state of affairs between the parties. However, mandatory injunctions can be granted on interim applications[6] but the rights of the claimant must appear with the utmost clarity before any such relief is given or the defendant must have deliberately tried to steal a march on the claimant.

[20] In American Cyanamid Co. v Ethicon[7], the House of Lords laid down the following test for the grant of an interim injunction:

1. there must be a serious issue to be tried;

2. if the claimant were to succeed in establishing his right to a permanent injunction at trial, could he be adequately compensated in damages for the refusal of an interim injunction? If not;

3. if the defendant were to succeed in establishing his right to do that which he was sought to be prevented from doing, could he be compensated in damages for the grant of an interim injunction?

4. if there is doubt as to the adequacy of the respective remedies in damages, where does the balance of convenience lie (having regard to the general prudence of preserving the status quo)?

5. if the matter is still in doubt, where other factors appear to be evenly balanced, the counsel of prudence is to preserve the status quo.

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[6] See **Locabail International Finance Ltd v Agroexport, The Sea Hawk** [1986] 1 All ER 901 at 906.
[7] [1975] AC 396 at 408-409, per Lord Diplock.

Mandatory Injunctions on interlocutory applications

[21] Mandatory injunctions on interlocutory applications are viewed in a slightly different light than prohibitory injunctions. On such injunctions, the learned authors of Halsbury's Laws of England (4th edn)[8] said:

> "A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

[22] In Nottingham Building Society v Eurodynamics Systems Ltd[9], Chadwick J set out the law governing the grant of an interlocutory mandatory injunction, in terms which were approved by the Court of Appeal in Zockoll Group Limited v Mercury Communications Ltd[10]. Chadwick J said:

> "First, this being an interlocutory matter, the over-riding consideration is which course is likely to involve the least risk of injustice if it turns out to be 'wrong' in the sense described by Hoffman J.
>
> 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 steps 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 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.
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> 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

[8] 4th ed. Vol 24 at para. 848.
[9] [1993] FSR 468 at page 474.
[10] [1998] FSR 354.

> 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".

[23] The Zockoll test for mandatory injunctions was endorsed by our Court of Appeal in Antigua Aggregates Limited v The Attorney General of Antigua & Barbuda and Antigua Commercial Bank[11]. George-Creque JA stated at paragraph 14:

> "In any event, the trial judge considered that the relief sought was in the nature of a mandatory injunction and concluded, based on an application of the principles in Zockoll Group Ltd. v Mercury Communications Ltd. (No. 1)[12] that the least risk of injustice in the particular circumstances favoured the court declining to order the removal of the restriction…."

Applying the test to the facts of this case

[24] Ms. Scantlebury for the applicant relied substantially on the test to be applied for the grant of an interim injunction. To my mind, this is an incomplete approach as the application before the court is for a mandatory interlocutory injunction. The test to be applied to such applications is derived from Zockoll. If I may encapsulate, the test is: which course is likely to involve the least risk of injustice if it turns out that the injunction was wrongly granted. That said, it seems almost impossible to apply Zockoll strictly without any reference to the American Cyanamid principles because if (a) the applicant were to succeed in establishing her right to a permanent injunction at trial, could she be adequately compensated in damages for the refusal of the mandatory injunction? If not; if the respondents were to succeed in establishing their right, could they be compensated in damages for the grant of a mandatory injunction?

[25] Turning to the evidence, it appears that there is a serious issue to the tried. The applicant seeks damages for breach of contract, negligence and nuisance. Particulars of nuisance/negligence are pleaded at paragraph 8 of the Statement of Claim. In summary, the question is whether a party who undertakes work on their property in such a manner as to cause damage or destabilize an adjoining property and fails to remedy the damage caused is liable. The simple answer is yes. In her affidavit, the applicant outlines the

[11] HCVAP 2009/003 (George-Creque JA, Gordon, QC JA [Ag.], Baptiste [Ag.]), Judgment 19 October 2009 (unreported).
[12] [1998] FSR 354.

location of the land, and refers to three reports providing details of the erosion issues facing her land.

[26] The respondents have supplied an expert report which clearly supports the existence of instability on the applicant's land although it conflicts as to the cause. The report concludes that the instability on the applicant's land is not as the result of any excavation done on the respondents' land, but as a result of works undertaken by the applicant herself. Pictures of the eroded areas and unstable structures are also exhibited. However, the applicant says the areas referred to by the respondents are different from the area where the applicant wants the wall built. The truth of the matter is irrelevant at this stage – but clearly there is a serious issue to be tried. Both parties have identified that there is instability in the applicant's land – the location and cause of the instability and whether the respondents are liable are issues for trial.

[27] It seems to me that although there is a serious issue to be tried: should the court wait until that issue is resolved at trial to decide whether the retaining wall should be constructed? The applicant alleged that the hurricane season is on us again and if the retaining wall is not constructed expeditiously, the damage to her property will continue.

[28] Ms. Scantlebury submitted that while damages are sought, the building of the retaining wall is the main remedy sought and damages in isolation would not be an adequate remedy in this case. The claimant's primary concern is for preservation of her land which has become destabilized over the past 4 years.

[29] Learned Queen's Counsel Mr. Hunte who appears for the respondents argued that even if the applicant were to succeed in establishing her right at trial, damages would be a sufficient remedy. He cited American Cyanamid.[13] I believe that Mr. Hunte QC was referring to Lord Diplock's statement of principle that "*If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a*

[13] [1975] 1 All ER 504 at 510-511.

financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."[14]

[30] Lord Diplock continued:

> "If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction"

[31] That being the principle, I respectfully disagree with Mr. Hunte QC. It is trite that land is a singular resource. I am of the view that further destablilization of the applicant's land cannot be compensated in damages. On the other hand, if this injunction is granted and the respondents build the retaining wall but the applicant fails to make out her claim at trial, the respondents can easily be compensated in damages for the cost of building the wall.

Special circumstances

[32] Mr. Hunte QC submitted that in order for the court to grant a mandatory injunction on an interlocutory application, special circumstances have to be pleaded. He argued that no special circumstances were pleaded in this case.

[33] With respect, I believe that Mr. Hunte QC has misconceived the law applicable to mandatory injunctions. The learned authors of Halsbury's Laws of England (4th edn)[15] said that "*a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will* **not normally** *be granted.*"

[14] See page 5 of *American Cyanamid* located at Tab 2 of the Applicant's submissions bundle.
[15] 4th ed. Vol 24 at para. 848.

[34] The authors continued: "*However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application."*

[35] In any event, the applicant alleged that the "*hurricane season is upon us once again… if a retaining wall is not built expeditiously, the damage to my property will continue*." In my opinion, this is tantamount to a "special circumstance."

Greater Risk of Injustice

[36] I have weighed all the factors. If I were to grant the mandatory injunction for the respondents to complete the building of the retaining wall at this interlocutory stage of the proceedings, I am of the view that it will not carry a greater risk of injustice if it turns out to have been wrongly made. There is no doubt in my mind that the respondents can be compensated for the costs of building the retaining wall if the order is wrongly made, but the applicant's land cannot be un-eroded if further destabilization occurs over the upcoming hurricane season. In that respect, there is an undertaking as to damages. Furthermore, the looming possibility of yet another active hurricane season convinces me of the urgent nature of the application.

[37] It is debatable whether the applicant will be able to establish breach of contract on the basis of the "agreement" at the site visit in 2008 because on the face of it, the exact status of this agreement is unclear. However, on the evidence presently before the court, I feel a high degree of assurance that the applicant can establish that (1) the respondents carried out excavations which damaged her property and (2) they agreed to build a retaining wall and have since failed to do so and have been negligent or created a nuisance thereby.[16]

[38] Accordingly, in addition to showing a serious issue to be tried, I am of the view that the applicant has a good arguable case. The expert report provided by the respondents has not convinced me that there would a greater risk of injustice in requiring the construction of the wall at this stage – on the balance of probabilities, the least risk of injustice lies with

[16] See Exhibit ER11 in particular –Letter by Louis Potter, Chief Planner, particularly at paras. 1 and 2.

granting the order sought so the applicant's land is not placed at further risk of damage during the upcoming hurricane season.

[39] Applying the Zockoll test to the present application, I am of the respectful view that this is an appropriate case to grant a mandatory injunction.

Undertaking as to damages

[40] In her affidavit, the applicant has not given the necessary undertaking in damages. However, I presume that she is aware that such an undertaking is a necessary condition for the court to grant the order which she seeks.

Conclusion

[41] In the premises, my order will be as follows:

1. The respondents, within 6 weeks of this order, arrange for the building of the retaining wall in accordance with the recommendations found in the Report of Kraus-Manning Construction Services, dated 10 December 2010.

2. If the respondents do not commence construction within 8 weeks of the date of this order, the applicant shall be entitled to instruct a construction company to complete the works forthwith and the respondents shall be liable to reimburse the applicant for the costs of said works.

3. The applicant shall give an undertaking as to damages in the amount of the estimate of the costs of construction of the wall until the trial of this action.

4. Costs will be costs in the cause.

Indra Hariprashad-Charles

High Court Judge