THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS

SAINT CHRISTOPHER CIRCUIT

(CIVIL)

A.D. 2013

CLAIM NO. SKBHCV 2013/0262

BETWEEN:

[1] PORT ZANTE MERCHANTS ASSOCIATION
[2] SOL E MAR
[3] CAPTAIN JACK
[4] SQUARE DUTY FREE
[5] DIAMOND ISLAND
[6] DUTY FREE PLAZA

Applicants/Defendants

AND

[1] ALEX DECOSTA
[2] URBAN DEVELOPMENT CORPORATION
[3] MINISTRY OF TOURISM
[4] THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Respondents/Defendants

Appearances:

Ms. Natasha Grey of Chesley Hamilton and Associates for the Applicants/Claimants

Ms Marsha Henderson of Henderson Legal Chambers for the 1st Respondent/Defendant

Mr. Sylvester Anthony with Ms. Angelina Sookoo of Law Offices of Sylvester Anthony for 2nd Respondent/Defendant

Ms. Simone Bullen-Thompson, Solicitor General for 3rd and 4th Respondents/Defendants

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2013: October: 9, 15, 23

The applicants, a number of merchants at Port Zante, the premier shopping mall in Basseterre, St. Kitts, claiming urgent pre-action relief under CPR Part 17, sought an

interim injunction against a barbeque vendor who had been granted permission by the authorities, to operate a barbeque stall every Friday at the Port Zante Mall in close proximity of the applicants' stores. The applicants all complain that the four grills operated by the barbeque vendor, the 1st respondent, emit heavy smoke and soot and this was a nuisance causing losses and damages to their stores and their health, and affecting their customers generally. The evidence filed on their behalf disclosed that the profitability of the stores was being affected and that there was irritation to the eyes of two of the store owners, and that they were also coughing and their cheeks were being affected. There was no medical evidence to support this physical injury. Even though the matter was made *inter parties* without an order being granted, the applicants failed to file their substantive claim and continued to seek relief under Civil Procedure Rules (CPR) Part 17.

Held: Dismissing the Application:

1. That affidavits supporting the application for an injunction disclosed that the applicants enjoyment of their stores were being substantially interfered with and even though challenged by the respondents were sufficient to show that there was a serious issue to be tried. In cases of this nature the court was not required to decide whether the applicants had a prima facie case or a strong prima facie case. It was sufficient that the applicants' affidavits provided the evidential backing for the court to form the view that there was a serious issue to be tried.

Applied: American Cyanamid Co. v Ethicon Ltd.; Tetrosyl Ltd. V Silver Paint and Lacqueur Co. Ltd [1979] C.A.T. No. 599 reported in New L.J. August 28, 1980

Other cases considered: Georgetown (Town Clerk) v Hughes and Others (1997) 56 W.I.R. 313 Court of Appeal of Guyana; A.G v Wellingborough UDC (1974) 72 LGR 507 C.A.; Mothercare Ltd. V Robson Books [1979] F.S.R. 466; Hall v Jamaica Omnibus Services Ltd 9 W.I.R. 344; Gillingham Borough Council v Medway (Chatham) Dock Co Ltd [1993] 3 QB 343; John A. Gumbs v The Attorney General of Anguilla Civil Appeal No. 9 of 2005

2. That where on the affidavits, the evidence show that the damages and losses being complained of is capable of being remedied by 'damages' and that there is no claim that the respondents will be unable to make good those damages, an injunction will not be granted unless there were exceptional circumstances present. There were no exceptional circumstances in this case as what was being complained of was a negative impact on the profitability of the stores owned by the applicants; they not being in a position to represent other stores who were not a party to the action. Further, a mere statement that minor physical complaints such as eye and cheek irritations and coughing without any indication that they were having a real effect on the health of the applicants were not sufficient to ground a finding that damages would not be an adequate remedy.

Applied American Cyanamid Co. v Ethicon Ltd. [1975] AC 396; considered Polaroid Corporation v Eastman Kodak Co [1977] R.P.C. 379

3. That an applicant who seeks relief under CPR Part 17 is only entitled to an exercise of discretion in a proper case. It would not be appropriate to exercise such discretion where on the initial hearing of the ex parte application, the court orders that the matter be made *inter parties*. At the very least the applicant should file his substantive claim by the date of the *inter parties* hearing as it would no longer be appropriate for the court to exercise this discretion.

Considered: Martin v Channel Four Television Corp [2009] EWHC 2788 (QB) (06 November 2009); Capital One Developments Ltd v Customs and Excise Commissioners 2002 WL 45401 Chancery Division

JUDGMENT

[1] Ramdhani J (Ag.) By a Notice of Application dated the 3rd October 2013, the applicants, before commencing proceedings under Part 8, sought an injunction by way of interim relief pursuant to Part 17 of CPR 2000. They have filed a Certificate of Urgency and have also stated in their application that it is in the interest of justice that they be granted interim relief prior to the filing of their substantive claim. Two Affidavits, filed on behalf of the 2nd and the 6th applicants supported the application.

PARTIES

[2] Very early into the hearing on an application made by Ms Grey the 1st applicant was removed as a party to these proceedings. The remaining applicants in this matter are all merchants who own shops at 'Port Zante' the premier shopping center in Basseterre, St. Kitts, and one of the first shopping areas visited by many tourists, especially cruise ship passengers. The applicants sell among other things, a variety of tourist-oriented merchandise inclusive of cigars and clothing.

[3] The 1st respondent is the owner and operator of four barbeque grills who has been given permission to prepare and sell barbeque meats every Friday at Port Zante in the vicinity of the shops owned by the applicants. The 2nd applicant, the Urban Development Corporation who together with the 3rd respondent is the Ministry of

Tourism has collaborated to grant permission to the 1st respondent. The 4th respondent, The Hon. Attorney General is joined in these proceedings as Government's representative.

INITIAL HEARING

[4] The application came *ex parte* before the court on the 9th October 2013, but the Court considering that an *inter partes* hearing would not operate to cause the applicants injustice[1], declined to make an ex parte Order and directed that application and supporting documents be served on all the Respondents and the matter was heard *inter partes* on the 15th October 2013. After fully hearing the matter on that day, the Court reserved its ruling. This decision was delivered on 23rd October 2013.

BACKGROUND

[5] The smell and the smoke associated with barbeque often evoke a variety of pleasant thoughts inclusive of the joyful expectations of the arriving weekends and happy moments. But this is not so in this case. The applicants, merchants at Port Zante, however, are completely unhappy with the smell and smoke of the four barbeque grills of the first respondent who has been granted permission by the authorities to prepare and sell barbeque meats every Friday near the shops of the applicants. They ground their claim in nuisance. They complain that the smoke and the smell substantially interfere with their use and enjoyment of their stores, and are causing damage to their merchandise and to their health.

[6] By their Notice of Application, the applicants primarily seek by way of interim relief:

> "1. An Order restraining the Respondents by themselves by themselves, their servants, and or agents or persons subject to their control, authority or direction or howsoever otherwise from causing or permitting the 1st Respondent or his servants or agents from operating a barbeque grill or

[1] *Re First Express Limited, The Times October 10, 1991* discussed with approval by the Learned Authors of Commercial Litigation Preemptive Remedies 3rd edn. 1997 at page 91.

any other item which emanates charcoal smoke in the direct vicinity of the Applicants' stores until the hearing of this action or until further order of this Honourable Court.

2. An Order that the Respondents take all reasonable steps to return the immediate surroundings of the Applicants' stores to the status quo prior to the date when the 1st Respondent took up his vending in the present area".

[7] The applicants have noted in their grounds supporting this application, that this is a matter of extreme urgency. They claim that they all have an interest in the use and enjoyment of their individual stores that are directly affected by the 1st respondent's conduct. They contend that when they became aware of the nuisance, they sought to get the 1st respondent to cease his barbeque activities, but to no avail.

[8] They state that the charcoal smoke which emanates from the grills is causing a substantial interference with the applicants' quiet enjoyment of their stores and that as a direct result of the nuisance, not only are they losing business, but that they are incurring losses and both they and their customers have been experiencing physical discomfort being forced to endure unhealthy and hazardous conditions.

[9] The affidavit of Mr. Sunil Gehani sworn to on the 3rd October 2013 in support of the application provides some evidence in support of the grounds. He is the owner of 'Duty Free Plaza' that is located at Building No. 9, Unit A in Port Zante. He states that when he started his business there in 2007 there were no food vendors in the area. He states that the 1st respondent began operating the barbeque grills on or about the beginning of August 2013 every Friday from about 10 a.m. to 6 p.m. selling fish, chicken among other things.

[10] He states that the grills are close to his store and that the charcoal smoke from the grills which is often very 'heavy', fills his store and leaves a smoke fume which lingers for hours. His staff and his customers have complained, and his customers, he states, have actually left his store because of the smoke. He states

that the smoke has caused him to cough constantly and he has problems breathing and that it has affected his eyes by causing redness and other irritations.

[11] He states that he has seen tourists cover their noses when they pass his store and that children kick and throw garbage bags that contain bones eaten from the cooked meats in close proximity of his store. He stated that on 13th September 2013, there was so much smoke in his store that his customers began feeling sick.

[12] The affidavit of Mr. Niraj Khubchandani the owner of Sol E. Mar dated the 3rd October 2013 also provide details of the losses and health hazards which have been caused to this deponent. He states that his store is located at Building No. 14, Unit 103, Port Zante since 2010. He sells watches, clothing, 'jewellery' among other things, and that he has had to discard some of clothing because of the damage from the charcoal soot. He has to continuously clean his store because of the soot and other particles. He also complains of losing business because of the smoke, and that with the increase of tourist from the coming tourist season, he expects that he will suffer more losses. He also complains of eye irritations, breathing problems resulting in him coughing constantly.

[13] Both of them stated that they lodged complaints with Mr. Keith Phillip the manager of the 2nd respondent and the Commissioner of Police who have both tried to rectify the situation by asking the 1st respondent to relocate. The 1st respondent actually left the area briefly, but returned saying that he had been given permission from the Minister of Tourism. Mr. Gehani indicates that he spoke to the said Minister who informed him that the 1st respondent had gotten permission and that his vendor's license was pending.

[14] Both Mr Gehani and Mr Khubchandani stated that the continuing nuisance is affecting their respective health and businesses. Mr Gehani now takes '*Combiflam*', a medication to alleviate the pain he feels in his cheeks. Both gentlemen stated that unless the 1st respondent is restrained the profitability of their stores will be negatively affected.

[15] There are two affidavits before the court on the other side, both sworn to and filed on the 14th October 2013, one for the 2nd respondent sworn to by Mr. Keith Phillip Operations Manager of the Urban Development Council, and one for the 3rd and 4th respondents sworn to by Ms. Patricia Martin, Permanent Secretary of the Ministry of Tourism. There was no affidavit filed on behalf of the 1st Respondent.

[16] Mr. Phillips' affidavit, apart from raising a number of legal and technical objections which were developed by counsel at the hearing, stated that the 2nd respondent had given permission to another barbeque vendor over a year and a half ago to operate at Port Zante. That vendor is no longer operating. He states that, that previous vendor effectively ceased operations voluntarily and not because of any complaints. He notes that the 3rd respondent, the Ministry of Tourism has granted permission to the 1st respondent to conduct his barbeque activities.

[17] Ms. Martin's affidavit confirmed that sometime between August and 1st October 2013, the St. Kitts Tourism Authority in collaboration with the Urban Development Corporation gave verbal approval for the 1st respondent to operate as a barbeque vendor at Port Zante.

[18] She states that "the Ministry of Tourism and the Urban Development Corporation would from to time collaborate in making decisions, in relation to the allocation of space in the common areas of Port Zante, for use as is deemed appropriate and conducive to marketing St. Kitts as a tourist destination."

[19] She states that "the approval given to the 1st respondent was in keeping with the 3rd respondent's policy of uplifting and empowering citizens of the Federation by facilitating the optimal spread of benefits of tourism to all the economic sectors."

[20] She states that there was permission granted previously to another barbeque vendor who had been located not far the present location of the 1st respondent's grills, and that there had not been any complaints from the applicants or anyone else. She also throws into the mix that this is not the first complaint being made by

the applicants, they have complained about cultural performance at the port on the basis that these negatively affect business.

[21] She states that the applicants never informed the 3rd and the 4th respondents that the barbeque vending was affecting their business neither did they give the 3rd and 4th respondents an opportunity to rectify the alleged nuisance. This of course contradicts the applicants' version that they complained to the UDC and the Commissioner of Police.

ISSUES RAISED BY THE APPLICATION

Question No. 1 –Whether the Application is fatally flawed on the basis that there are no proper parties named as Applicants?

[22] Very early into the hearing objections were taken by the counsel for the respondents that the applicants were not properly named in the pleadings; that from their research it had appeared to them that several of the applicants were not juridical personalities capable of maintaining an action before the courts. It was on this submission being made that the applicants sought and was granted the court's permission to withdraw the 1st applicant from these proceedings on the basis that whilst the 1st respondent was in the process of being incorporated that had not yet been completed. Notwithstanding this the respondents continue to maintain their objection that none of the applicants have been properly named as is required; one cannot tell if they are companies or if they are simply businesses and in which case the question arises as to whether they possess the requisite legal personality?

Question No. 2 – Whether the principles governing the grant of interim injunctions favour the grant in this case? A primary issue raised by the Respondents is that there is no serious issue to be tried in relation to these applicants; there is no existing cause of action?

[23] Under this head, the respondents are contending that the applicants did not have a cause of action as their papers showed that at most what was being alleged was a public nuisance, and that none of these applicants have shown that they have suffered any harm over and above the class of persons affected to ground their right to bring a claim in public nuisance.

Question No. 3 – Whether the court should exercise its discretion under Part 17 to grant interim relief before a substantive action is filed?

[24] Under this head, the respondents contend that this is not an appropriate case to grant relief under Part 17 as there has been no urgency shown in this matter, nor does the interest of justice indicate that interim relief should be granted before the substantive claim is filed.

DISCUSSIONS AND FINDINGS

Question No. 1 – Whether the Application is fatally flawed on the basis that there are no proper parties named as Applicants?

[25] The respondents have challenged the form of the pleadings. They state that it is not known whether any of the applicants are legal persons capable of maintaining an action. They say that this is fatal to the application being made to the court.

[26] It is true that the applicants have not been properly named. When a company is named as a party it is appropriate that the usual abbreviations such a 'Ltd.', 'Inc.' follow the name of the company so that the party can be properly identified. The court notes however, that the respondents indicate that they themselves have sourced company records for at least two of the applicants in this matter. So at the very least, the proceedings are capable of being maintained. In any event, the court, having regard to the perceived urgency of this application, does not think that at this stage that to omit the full particulars of the company is fatal to this

application, once assurances are given that these parties are indeed juridical persons, and that the papers would soon be placed in order. The court would recommend that the when substantive matters are being proceeded with that the pleadings be amended to reflect to proper name for each of the applicants.

Question No. 2 – Whether the principles applicable to the grant of an interlocutory injunction indicate the grant of the relief being sought? Is there a serious issue to be tried? Are damages an adequate remedy? Does the balance of convenience favour the grant of the order sought?

[27] There is no doubt that the court is clothed with power to grant an interim injunction in all cases where is it just and convenient to do so, having regard to the applicable legal principles. Such relief may be granted whether or not there has been a claim for final relief of that kind, and any order made may be made unconditionally or upon such terms as the court consider just'[2]. Additionally, in a suitable case, the court has a power to grant an injunction against a public authority in a claim for nuisance even though that authority may be claiming to carry out its statutory and public functions in accordance with policy.[3]

[28] The approach which the court should take and the tests which are to be applied have been laid down by Lord Diplock in the landmark case of *American Cyanamid Co v Ethicon Limited* when he stated:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. …So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to

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[2] American Cyanamid Co. v Ethicon Ltd. [1975] AC 396

[3] See Georgetown (Town Clerk) v Hughes and Others (1997) 56 W.I.R. 313 Court of Appeal of Guyana; see also *A.G v Wellingborough UDC (1974) 72 LGR 507 C.A.*

> disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[29] These principles indicate that when an application is made for an interlocutory injunction, in the exercise of the court's discretion, the first question for the court to consider is whether there is a serious issue to be tried. 'If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the court's grant of, or its refusal to grant, an injunction? If there is doubt as to whether damages would not be adequate, the court will seek to discover where lies the balance of convenience' or as recent cases have framed it 'the balance of justice'?[4]

A SERIOUS ISSUE TO BE TRIED

[30] The respondents have taken an argument that the application and supporting evidence do not disclose a claim in private nuisance, but rather a claim in public nuisance. As such they say that these applicants, who have brought this action in their own name, do not have a claim in public nuisance as they have not presented any material that shows that they have suffered greater inconvenience than all the persons who are allegedly affected by the acts being complained of. Thus, they are effectively saying that there is no serious issue to be tried. I note here for guidance the learning found in Halsbury Laws (Vol. 24 at para. 955):

> "The mere fact that there is doubt as to the existence of the right which the plaintiff is asserting is not sufficient to prevent the court from granting an interlocutory injunction, although it is matter for serious attention." See Ollendorf v Black (1850) 4 De G & Sm 209 at 211; Evans Marshall and Co Ltd. v Bertolla S.A. [1973] 1 All ER 992

[4] American Cynamid see footnote 2; see judgment the judgment of Hariprasad Charles J in JIPFA Investments Ltd v Natalee Brewley et al Claim No. 38 of 2011 BVI

[31] It is however; also open to the Court to find that there is no serious issue to be tried if the evidence before the court fails to disclose that the applicants have any real prospect of succeeding in their action for a permanent injunction. As Lawton L.J. noted in Tetrosyl Ltd. V Silver Paint and Lacqueur Co. Ltd.[5]: 'A serious question … can only arise if there is evidential backing for it."

[32] It is in this context that this Court will go on to consider whether these applicants do have a legal right that they are capable of pursuing? In seeking to ascertain whether there is a viable cause of action and whether there is any evidential backing for finding that there is a serious issue to be tried, I reminded that the prospects of the applicants' success are only to be investigated to a limited extent, and really not to be weighed against their prospects of failure.[6]

[33] Does the applicants then have a viable cause of action? In answer to this question, this Court will look to the principles governing the law of private nuisance and public nuisance. It is useful to set out the learning found in Halsbury's Laws Vol 34, 4th Ed. para 315:

> "Every person is required by law to exercise his rights, whether over his own or public property and with due regard to existing rights of others, and an unreasonable excessive or extravagant exercise of this rights to the damage of other constitute a nuisance. Thus a person is guilty of a nuisance who in the exercise of his right of access to his premises, on a public highway acts so unreasonably as to have no regard to the similar rights of access possessed by his neighbours." See *AG v Brighton and Hove Co-operative Supply Associations*.[7]

Note Halsbury's Laws of England Vol 34, 4th Ed. At para 305 which states:

> "A public nuisance is one which inflicts damage, injury or inconvenience on all of the members of a class who come within the sphere or neighbourhood of its operation. It may however, affect some to a greater extent than others. There is no requirement that an activity must in itself be unlawful to constitute a public nuisance, and disturbance caused by

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[5] [1979[C.A.T. No. 599 reported in New L.J. August 28, 1980.
[6] Mothercare Ltd. V Robson Books [1979] F.S.R. 466 at 474
[7] [1990] 1 Ch 276; Original Hartlepool Collieries Co. v Gibb [1877] 5 Ch. D. 713. see also Hall v Jamaica Omnibus Services Ltd 9 W.I.R. 344

> lawful use of the highway constitute such a nuisance in an appropriate case See: AG v PYA Quarries Ltd [1995] 2 QB 169 at 184.[8]"

[34] In John A. Gumbs v The Attorney General of Anguilla[9] Barrow JA stated clearly that proceedings which are brought to abate a public nuisance must generally be brought by the Attorney General and he quoted with approval the following passage found in Halsbury Laws:

> "All civil proceedings brought in respect of public nuisance other than a private action by an individual who, or a public or local authority which has suffered particular damage or an action brought by a local authority in its own name to protect the inhabitants in its area must be brought with the sanction and in the name of the Attorney General. This rule applies whether it is an individual or a local or other public authority who seeks to proceed."[10]

I also note para. 370 of Vol. 34 Halsbury which states:

> "A private individual or a public authority [11] May bring an action in his own or its own name in respect of a public nuisance when, and only when, he or it can show that he or it has suffered some particular, foreseeable[12] and substantial damage over and above that sustained by the public at large[13] or when the interference with the public right involves a violation of some private right of its own[14]

[35] The respondents are right that if this is a case of public nuisance, then the applicants, commencing this action on their own behalf, are required to show that they have suffered particular damages over and above the members of the class affected. The Learned Solicitor General has urged this Court to find that these applicants have not met the threshold of showing that they have been affected over and above other users of Port Zante.

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[8] [1993] 3 QB 343
[9] *Civil Appeal No. 9 of 2005*
[10] Vol 34 at para 372, 4th Ed.
[11] In Gravesham Borough Council v British Railways Board [1978] Ch 379, [1978] 3 All ER 853
[12] Overseas Tankship (UK) Ltd v Miller SS Co Pty, The Wagon Mound (No. 2) [1967] 1 AC 617 at 636, [1966] 2 All ER 709 at 714, PC
[13] Williams's Case (1592) 5 Co Rep 72b
[14] Boyce v Paddington Borough Council [1993] 1 Cp 109

[36] On an application of this nature, the court is not required to express a view as to whether there is a prima facie case or a strong prima facie case on the papers.[15] The court's only role on this issue to ascertain whether the papers disclose a viable cause of action and in so doing raise a serious question fit to be tried – the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

[37] The evidence indicates that all the persons who traverse the Port Zante shopping district and come within the sphere of the barbeque grills may be affected by the acts of the 1st respondent. I note that there was an attempt to join the 'Port Zante Merchant Association' as a party. This is the association that is comprised of all 49 stores at the Port Zante shopping center. Here was an indication that the acts being complained of, were affecting all the merchants as well as their customers. Arguably this is a case of public nuisance.

[38] Further, the applicants have presented evidence to show that they have been affected over and above other users of the Port Zante Mall. If what they are saying is true, how could it be argued otherwise? In Campbell v Paddington Corporation[16], the defendant constructed a stand that was erected across a highway to enable certain persons to view a procession. The stand was considered a public nuisance, but a private homeowner who was able to show that the stand so constructed, was preventing her from selling seats in her home to persons who wished to view the procession. The court found that she had established loss as a direct consequence of the public nuisance, and she was able to recover damages.

[39] Each of the deponents are saying that their own business have been affected and they have had to clean their stores of soot, and they have personally lost customers because of the proximity of the barbeque grills to their stores.

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[15] American Cynamid at p 410D
[16] (1911) 1 KB 869

[40] On this application, the applicants have provided the court with some evidence in support of their claim that they have suffered particular damages, thus grounding their right to seek relief in an action for public nuisance. On the evidential backing of the affidavits, this Court therefore find that there is a serious issue to be tried.

WHETHER DAMAGES IS AN ADEQUATE REMEDY

[41] If damages are an adequate remedy, the court will not grant interlocutory relief on this nature unless there are exceptional circumstances present. The rationale for considering whether damages would afford the applicants an adequate remedy has been explained in the case of Polaroid Corporation v Eastman Kodak Co[17]:

> "… but in every case of an application for an interlocutory injunction until trial the court must, in my judgment, approach the case with the object of making whatever order will be likely best to enable the trial judge to do justice between the parties, whichever way the decision goes at trial. Their freedom should only be interfered with to an extent necessary to this end. This, as I understand the decision in the case of American Cyanamid Company v Ethicon Limited [1975] A.C. 396 is the reasoning underlying the decision of the House of Lords in that case. Accordingly if the plaintiff can be compensated in damages for anything he may wrongfully suffer between the date of the application and the trial, the defendant should not be restrained, save in exceptional circumstances."

[42] On the evidence the applicants speak to losses at the stores, and harm to their businesses. Are the losses and the damages being suffered by their stores, such that they can be compensated? The court is told that soot has to be cleared from stores and the smell of smoke permeates cigars and clothing. These are all matters that are well and truly capable of compensation. But what about the effect it has on their business? Is it that such interference can cause irreparable harm to their businesses? The evidence makes the statement that the continuation of the barbeque would be 'a recipe for havoc to the Port Zante Merchants'. The court was keen to discover what this phrase 'recipe for havoc' meant. But what the court has actually discovered in this examination is that the barbeque activities would

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[17] [1977] R.P.C. 379 at 395

negative impact the profitability of the stores.[18] So what the court is left with is a 'loss of profits'. (And it is noted that this is also only in relation to the applicants, as they are not in a position to represent the other merchants at Port Zante, who were not parties to the matter.) The respondents would of course say that this too is capable of compensation. That would surely be so, and the Court is well aware that at least the 2nd to the 4th Respondents are likely in a position to pay those damages.

[43] Then there has been some evidence of harm to their health. But the respondents say that there are no medical reports or other cogent evidence of the kind of irreparable harm that could have led the court to make the kind of order being sought. What is said is that eyes are irritated from the smoke, and cheeks are affected, and there is constant coughing. Anyone walking through smoke could have irritated eyes and might cough. Is this the type of evidence a court should be prepared to enjoin policy decisions of the statutory corporations, Government Ministries and the Government Representative, the Hon. Attorney General, the last two Respondents who states clearly that their acts are within their statutory power and is being done for the purpose of allocating space in the common areas at Port Zante for use as it is deemed appropriate and conducive to marketing St. Kitts as a tourist destination? I think not.

[44] Even if I considered a grant of an injunction against the 1st respondent alone, the evidence is still woefully short of showing irreparable harm for which damages would not be an adequate remedy. Having joined all of the respondents, the court is not bound only to consider the ability of the 1st respondent to make good any damages which the applicants might suffer where the order was not granted; these other respondents would still be called upon in that event if it going to be found that acts caused any damages.

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[18] Paragraph 20 of MR Gehani's Affidavit.

[45] I am satisfied that in this case, damages would be an adequate remedy, and there are no exceptional circumstances present in this case, and it is for this reason that I will refuse the application for interlocutory relief.

A NOTE ON DELAY

[46] I would note in passing that some arguments have been taken that these applicants have not made haste in approaching the court. The respondents say acts being complained of began in August of this year, several months ago. And that there was another barbeque vendor who had operated for some time beginning over a year and half ago. The court notes carefully that it would appear from the way the evidence is presented, that the other vendor was not at the very same spot. Neither am I told how many grills were being operated by the last vendor. If they are to be believed on this issue of delay some allowance must be made for the efforts they made to get the offending activity stopped by other means. I am not satisfied that they did not move to this Court in as short a time as could be expected. Further, if what they are saying is true that they did complain to Mr. Phillip of the UDC and the Commissioner of Police, there could hardly be any merit that they did not give the respondents an opportunity to abate the nuisance. By itself the test is not whether there has been delay but whether such delay made it unjust to grant an injunction.[19]

THE DISCRETION UNDER PART 17

[47] There is another reason why I consider that this application for an interlocutory injunction should be refused. I am not satisfied that this is an appropriate case for me to exercise my discretion under Part 17 to grant injunctive relief before substantive proceedings have been commenced.

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[19] Note the cases of Quaker Oats Company v Altrades Distributors Ltd [9181 F.S.R. 9; see also CPC (United Kingdom) Ltd. V Keenan [1986] F.S.R. 527 in which the applicants spent several months trying to negotiate a settlement before moving to the court for an interlocutory injunction.

[48] Part 17 of CPR 2000 allows an applicant in certain specified cases to apply to the court for injunction relief before he files a substantial claim. The applicant must show that this is a case of considerable urgency or that interest of justice requires the order to be made. I have dealt with the interest of justice above.

[49] Now this is an application that was filed on the 3rd of October 2013 with two affidavits supporting it sworn to on the same date. Grounds 17 and 18 of the Application reads as follows:

> "17. The Application is made without notice due to the urgency of the matter. Delay in having the interim orders granted will cause irreparable loss and damage to the Applicant. The urgency of this matter and the interest of justice lies in hearing this application without notice and urgently.
> "18. The Applicants undertake to file a Claim for nuisance within 7 days from the date of this order."

[50] The application came before the court on the 9th October 2013. On this date the court declined to grant an order and ordered that the application be served on the respondents, and that the matter should be returned to court on the 15th October 2013. When the matter came before the court for the *inter partes* hearing, there was still no Claim filed in the matter. More than 7 days had elapsed since the 3rd October 2013. This Court cannot think of any reason why the claim has not yet been filed. The court notes that the undertaking to file was for 7 days after the making of an order; but why should it have been contingent on the order being granted. A party should be vigilant and conscious of the rules. Having filed an application for an ex parte order requesting the court exercise a discretion under Part 17, the party is not expected to sit back and wait until that has been determined regardless of the passage of time. If the days go by, and more so if the matter is made *inter partes*, one would expect that the claim would be filed.[20] This has not happened in this case.

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[20] See generally Martin v Channel Four Television Corp [2009] EWHC 2788 (QB) (06 November 2009); Note also Capital One Developments Ltd v Customs and Excise Commissioners 2002 WL 45401 Chancery Division

[51] Part 17 of CPR 2000 is a rule that should not be invoked except for good reasons that are expressly permitted by the very rule, and the party invoking it should be cognizant to changing circumstances which would make it improper to exercise this discretion, even if it had been proper to so exercise it originally. In any event, the discretion is only to be exercised where the urgency is such or the interest of justice requires that the application be heard without notice. This application is being heard *inter partes*. The substantive claim should have been filed at least by the date of the *inter partes* hearing. This has not happened. At the date of delivery of this judgment the substantive claim was still not filed.

CONCLUSION

[52] Though the court has found that there is a serious issue to be tried, the court has found that on the evidence presented, damages would be an adequate remedy. In any event the court considers that this would not be an appropriate case to exercise its discretion to grant interim relief before proceedings are commenced under Part 8. In the circumstances the application is dismissed. Costs will be in the cause.

Darshan Ramdhani
Resident Judge (Ag.)