

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2012/0363

BETWEEN:

**1. SEAFARI ST LUCIA LIMITED
2. RODNEY BAYSIDE LIMITED
3. MARGARIUS JOINVILLE**

Claimants

and

**1. THE HARBOUR PROPRIETORS UNIT PLAN NO02/2008
Otherwise known as the Harbour Condominium
2. MICHAEL WHITFIELD**

Defendants

Appearances:

Mr. Mark Maragh for the Claimants

Ms Leandra Verneill for the Defendants

2013 : June 6;
2014 : September 25.

JUDGMENT

- [1] **BELLE, J.:** The Claimants and the Defendants are neighbours. They share the use of a right of way to Rodney Bay from the area of the Rodney Bay Marina. The Claimant is a restaurant business known for its proprietorship of a restaurant known as Big Chef. The Claimants recently opened a dockside restaurant and bar called Tapas.
- [2] The Defendant is the owner of a condominium complex where visitors and some owners reside.
- [3] The opening of Tapas appears to be the bone of contention between the parties since for a number of years they coexisted as neighbours without complaint until the Claimant took steps to construct and plan the opening of "Tapas."

- [4] The Complaint of the Defendants in this suit is that the opening of Tapas would cause disturbance to the owners and lessors of condominiums who reside close to the right of way which passes between the two properties. The Applicants/Defendants has given evidence that if an event were held at the site of the Tapas some of the Applicants/Defendants' residential condominiums would be affected by the smell of food, loud music and the movement of patrons. Apart from that they complain that the windows from the top floor of Tapas provided a view straight into the bedrooms and other rooms of the Applicants/Defendants' condominiums across the right of way. These circumstances prompted negotiations of the conditions under which the Tapas restaurant could be opened.
- [5] It would therefore appear to have been in the interest of the parties to work out a mutually acceptable agreement. But they failed to do so.
- [6] The Claimant applied for an injunction on 18th April, 2012 after the Defendant erected a fence to block the direct entrance of patrons attempting to reach the Tapas restaurant by way of the night life. Consequently the Claimant is hereinafter in this judgment referred to as the Respondents/Claimants and the Defendant as the Applicants/Defendants.
- [7] The injunction obtained by the Respondents/Claimants restrained the Applicants/Defendants from blocking the Respondents/Claimant's access to the right of way in contention pending trial of the issues. At this point the parties began to negotiate a settlement.
- [8] The settlement talks broke down and the Applicants/Defendants on the 5th day of November, 2012 applied for the Claimants' Claim to be struck out and for the injunction to be discharged or stayed.
- [9] In their affidavit in support of the Application for the injunction the Respondents/Claimants' Marcarius Joinville states in paragraph 8 of his affidavit of April 18th 2012:

"On Wednesday 28th March, 2012, the Respondents commenced the construction of the fence. On Thursday 29th March, 2012 at approximately 5 p.m. I noticed that the Respondents, whether by themselves, their servants or agents bored holes into the concrete pathway constructed by the Applicants apparently on the lands belonging to the Applicants namely Parcels 457 and 459."

[10] In paragraph 10 Macarius Joinville states:

"In the interim, along with our counsel aforementioned attempted to arrive at a compromise with the Respondents in attempt to resolve the issue of the blocking, restriction of hindering of the Applicant's access to the right of way to no avail by meeting with the board of the First Respondent at which meeting the Second Respondent was in attendance along with other board members namely, Martin Johnson, Bernard Johnson, Robert Joseph while Nick Bowden attended along with Rosemary Joinville and Mr. Maragh. The Second Respondent made it clear that he intended to erect the fence unless the Tapas restaurant was altered from its approved purpose as a restaurant to residential. The meeting took place on Thursday 12th April, 2012.

[11] In paragraph 11 the deponent Macarius Joinville states:

"I sought the agreement of the Respondents not to continue with the erection of the fence until we had collectively come up with options to allay the fear of the Second Respondent that the Tapas would not affect his enjoyment of his villa, but they have continued with the construction of the fence."

Respondents/Claimants' Submissions

[12] In his submissions counsel for the Respondents/Claimants states that the relevant rules relating to summary judgement are Part 15 of the CPR and Part 26 (3) which deals with striking out applications.

[13] Counsel summarized the Applicants/Defendants' application as follows:

- (1) The Claimants/Respondents have no real prospect of succeeding on the claim or the issues.
- (2) The evidence produced by the Defendants supported the Defendants' counterclaim and defence.
- (3) The Respondents/Claimants have given no evidence in support of their assertion that the Defendants have trespassed on the Respondents/Claimants property."

[14] The Respondents/Claimant's counsel argue that the main issue in the matter is whether a right of way exists along the path defined in the statement of claim and whether their servants, agents and customers access to the right of way has been unlawfully interfered with by the Defendants. I will discuss this matter in greater length later.

[16] Applicants/Defendants argue that clearly a right of way exists but the origins and nature of the said right of way are disputed. However Counsel for the Respondents/Claimants argue there is no dispute that the Claimants respondents have set out a case which meets the legal requirements for the remedies sought.

LAW

[17] The Respondents/Claimants argue that only in the clearest of cases should the court strike out or enter summary judgment.

[18] Counsel argues that the Applicants/Defendants' case is that the court has not been provided with any compelling reason, fact or ground for granting the order for an injunction in the face of disputed factual and opinion evidence.

[19] Secondly Counsel argues that Applicants/Defendants refer to an alleged agreement between them and IGY Marina, as the basis for asserting that the right of way is a private one. But no such agreement has been placed before the court and the Respondents/Claimants submit, that none can be found because it does not exist.

[20] As far as the Application for the stay or discharge of the Interim order of 18th April 2012 is concerned counsel for the Respondents/Claimants argue that the Applicants/Defendants application alleges:

- (1) Failure to make full and frank disclosure;
- (2) No serious issues to be tried;
- (3) No trespass by the Defendants/Applicants
- (4) Counsel argues that paragraphs 4,6 and 9 can be subsumed under the ground of failure to make full and frank disclosure
- (5) There is no substantive claim
- (6) Failure to serve the application and supporting affidavit in respect of the application for interim injunction
- (7) The order is unduly harsh

(8) The risk of injunction against the Applicants/Defendants outweighs the risk of granting (discharging?) the injunction.

[21] Counsel for the Respondents/Claimants argue that the authorities are settled. According to counsel all that the court had to be satisfied of was that the claim was not frivolous or vexatious i.e. that there was a serious question to be tried. He cited **American Cyanamid Co v Ethicon Ltd [1975] All ER 504**, in support of this proposition.

[22] Counsel argues that once the serious case stage has been surmounted then the court has to look at the balance of convenience. I pause to state that the more acceptable terminology is balance of justice see: **Toojays Ltd v Weathaven Ltd [2012] 2 LRC, 65** However the point is made that the risk of harm and deprivation to the Respondents/Claimants from an unlawful interference to their right or access and use of the right of way weighed heavily against any possible inconvenience to the Applicants/Defendants in granting the order.

[23] Counsel pointed to the erection of the fence which is complete. The costs of the replacement of the fence is easily ascertainable. Counsel submitted but in the case of loss or damage to be suffered by the Respondents/Claimants by the Defendants interference the costs or losses are not easily ascertainable.

[24] Counsel relied on the dictum of Lord Diplock in American Cyanamid in the following terms:

"it is not 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 claim of either party may ultimately depend nor to decide difficult questions of law, which call for detailed argument and mature consideration. These are matters to be dealt with at trial..."

[25] This submission amounts to saying that there are too many factual and legal issues to be determined that cannot be assessed by the court at this stage and urges the court to consider the basic issue of balance of convenience or balance of justice.

[26] Left to be determined are (1) whether the Defendants have failed to make full and frank disclosure Whether the Claimants have performed their obligations under an agreement between the parties. Whether the agreement referred to deals with the issue of the right of way.

[27] In relation to the submissions that the Respondents/Claimants acted with delay in seeking the injunction the Claimants state that until the Applicants/Defendants embarked upon their unlawful course of conduct the Respondents/Claimants were under no obligation to act. However action was taken as long as peaceful resolution by negotiation and dialogue failed.

[28] Counsel argues that in the premises the Applicants/Defendants have failed to prove, or set out any facts or argued any legal basis for imposing a stay of the court's order, in particular based on risk of ruination.

Applicant/Defendants Submissions

[29] I have read the Applicants/Defendants Application, submissions and affidavits. The Claimant has outlined most of the issues raised by the Applicants/Defendants in their application. I should add that at sub-paragraph (3) (vii) of the Applicants/Defendants application the Applicants/Defendants state that the Respondents/Claimants have behaved wrongfully and in breach of their statutory duties in that they built Tapas building:-

- (a) On a parcel of land measuring 788 square feet which land the (Claimants)/Applicants do not have title to
- (b) Too close to the boundary in the building measuring () instead of 8-10 ft from the boundary in accordance with planning regulations.

[30] I have considered these grounds along with statements made in the affidavits in support of the Application to strike out the Claim and to discharge the injunction and I conclude that the Applicants/Defendants were upset about the fact that in their view the Respondents/Claimants acted illegally and therefore they (the Defendants) took the law into their own hands to stop the Claimants by building the offending fence.

[31] I would assume that the Applicants/Defendants are well aware that the building of the fence would not stop the Respondents/Claimants from doing what they wanted to do but that this act would make the Claimants uncomfortable.

[32] I also rely on the other grounds of the Applicants/Defendants application to arrive at my conclusion. In Sub-paragraph (4) (i) to (ii) of the application the Respondents/Claimants state:

- [33] The Claimants' behaviour is one which has misled the Court into granting the injunction:
- (i) The Claimants knew of the Respondent's intention to build a fence by letter dated February 7, 2012 to the Claimant's solicitor.
 - (ii) The Claimants received correspondence from the Respondents' attorney at law ignored the communication and never attempted to resolve the issues between the parties.
 - (iii) There was an agreement between the parties dated March 11, 2011 which obligations were not fulfilled by the Claimants which issues the Respondents asked that the Claimants address to no avail.

[34] I have taken note of the assertion that there was an agreement and I have seen the agreement exhibited MW5 in Michael Whitfield's affidavit filed on 5th November 2012 relation to which the Respondent's/Claimant's Counsel claims that the Respondents/Claimants have substantially performed their obligations. The Respondents/Claimants' further submission is that the agreement did not expressly or impliedly deal with the issue of the right of way.

[35] in my view there are issues addressed in the Agreement which clearly relate to the alleged ongoing negotiations between the parties on the construction of Tapas and its use as a restaurant and Bar.

[36] The Agreement states for example at paragraphs (1), (2), (5) and (6)

"Mark Joinville representative of Tapas Bar to construct a wall to a height of 7ft along the deck of Tapas Bar, commencing at the water's edge to abut with the stone fence building of Tapas Bar

The Wall is to be constructed of "Durock" material and must attain sound proof quality equivalent to that of concrete block wall.

The 1st three (3) doorways of the Tapas Bar on the side adjacent to The Harbour condominium unit owned by Michael Whitfield/Le Petit Coin Estates Ltd shall be blocked off with solid timber panels and must attain sound proof quality equivalent to that of a concrete wall.

Windows on the upper floor of the Tapas Bar building facing the Harbour, shall be of fixed wooden louvres and angled in such a way so as to restrict direct view into the Harbour condominium unit owned by Michael Whitfield/ Le Petit Coin Estates Ltd."

- [37] The existence of this agreement is therefore relevant to the application for the injunction. The extent to which the obligations were performed was a relevant consideration. The fact that the agreement was not mentioned in the application was a material nondisclosure.
- [38] I am of the view that had this fact of the existence of the Agreement dated 11th March 2011 been mentioned at the time of the application the injunction would not have been granted, since it would have indicated that there was an ongoing negotiation which had reached an advanced stage and that compliance with the agreement would possibly resolve the conflict between the parties making it unlikely that any serious damage would be caused by the Applicants/Defendants' action.
- [39] In my view this is sufficient ground to discharge the injunction.
- [40] However I am also of the view that the Respondents/Claimants should not have taken the law into their own hands in erecting the fence. If an agreement had been breached then they should have been able to rely upon that and other grounds to bring their own action in a court of law for breach of contract, nuisance or otherwise.
- [41] The Respondents/Claimants could also rely on the officers of the Royal Saint Lucia Police Force to ask for noise to be toned down or disturbances to cease in circumstances where such disturbances occurred. I do not think that erecting a fence was necessary or useful even if this act cannot be proved unlawful.
- [42] I also conclude that this is not the time for the court to be attempting to resolve complex issues of fact or law and rely on the authority of **American Cyanamid** as cited by counsel for the Respondents/Claimants.
- [43] I also conclude that the issue of the history and effect of the right of way is such a complex issue which cannot now be determined. Consequently the application for the Claimant's Claim to be struck out cannot succeed since it is not clear that the pleadings do not give rise to issues which have to be decided.

[44] I acknowledge that the allegation of trespass is a weak one based on the facts disclosed so far. But the factual conclusions in relation to that matter are to be resolved at trial unless factual concessions are made. This means that at least two of the claims in the Statement of Claim are worthy of further investigation at trial. However no evidence has been adduced to demonstrate that the possible damage caused to the Respondents/Claimants cannot be compensated in Damages at trial.

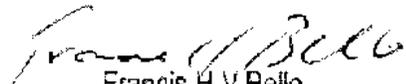
[45] I therefore dismiss the application to strike out the claim and to enter summary judgement but I discharge the injunction imposed by this court on 18th April, 2012 because firstly the Respondents/Claimants is guilty of material non-disclosure, which in my view goes to the root of the matter because the discussions between the parties had reached a stage where there was an agreement that certain matters would be dealt with before the Tapas restaurant and bar was opened. The operation of this agreement required disclosure and explanation with regard to its possible impact on the resolution of the matter. Failure to disclose it deprived the court of the opportunity to address this matter which also points to the real issue between the parties which is not the use of the right of way but the degree to which the operation of Tapas will affect the quality of enjoyment of the properties affected at the Harbour Condominiums.

[46] Secondly this is not a strong case and the evidence of some damage being caused to the Respondents/Claimants business is weak at this time. In any event it would most likely be possible to compensate the Respondents/Claimants for such damage if any is proved.

[47] The Court's formal order is therefore:

1. The Applicant/Defendants' application to strike out the Respondents/Claimants' Claim and for summary Judgment is dismissed.
2. The Injunction dated 18th April 2012 is hereby discharged.
3. The Applicant/Defendants shall undertake not to change any aspect of the use of the right of way or develop the fence erected on the right of way in any way until the court has resolved this matter.

4. The Applicant/Defendants are awarded costs for the application to discharge the injunction to be assessed if not agreed.


Francis H V Belle
High Court Judge