IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2015/0209

BETWEEN:

JAMES BRISTOL

Claimant/Applicant

AND

1. **MAXINE CAMPBELL**
2. **BRANFORD JOLLY**
3. **ROYLYN JOLLY**

Defendants/Respondents

Appearances:

Mrs. Ria Marshall-Ghust of Henry, Henry & Bristol of Counsel for the Claimant
Mr. Henry Paryag of Counsel for the Defendants
The Claimant and the Second-Defendant being present. The First and Third Defendants being absent.

2018: May 10, 23; 30.

Private Nuisance - Mandatory interim injunction - Test for the grant of mandatory injunction - Least risk of injustice if injunction is wrongly granted - Mandatory interim injunction amounting to a final relief - Special circumstances must be shown - Delay- Whether disgorges exercise of court's discretion

[1] **DYER, J. (Ag):** This is another chapter in the dispute between the Claimant/Applicant ("Mr. Bristol") and the Defendants who are neighbours. Mr. Bristol is by this application, which was filed on the 23rd January 2018, seeking:-

(i) An injunction restraining the Defendants, whether by themselves or by their servants or agents or howsoever otherwise form entering Mr.

Bristol's property which is in boundary with the First Defendant's property, from cutting, trimming any trees or bushes thereon and from committing any act of trespass of any nature whatsoever on Mr. Bristol's property; and

(ii) A mandatory injunction requiring the Defendants to within 30 days construct a concrete drain along the eastern boundary of the First Defendant's property so as to collect and divert all water, sewage and other runoff from the First Defendant's property.

Preliminary matters

[2] The application was made without notice but was heard *inter partes*. When the application came on for hearing on the 10th May 2018, the Second Defendant ("Mr. Jolly") and the Third Defendant ("Mrs. Jolly") (hereinafter both referred to as "the Jollys") were present but their counsel Mr. Paryag was absent. The Jollys are husband and wife and occupy the First Defendant's house at L'Anse Aux Epines. The First Defendant is their daughter. The First Defendant was also absent as she apparently resides in the UK. The Jollys made an oral application for a 7 day adjournment of the hearing on the ground that their attorney had an accident earlier on that day and was unable to attend the hearing. This application was opposed by Mrs. Marshall-Ghust. Having heard the parties I was minded to grant the short adjournment sought. I was however of the view that the *status quo ante* should be maintained until such time that the application could be heard. I therefore enquired as to whether the Jollys were aware of the nature of application which was before me. Mrs. Jolly, who was authorized by her husband to speak on his behalf, informed me that they were present for the hearing of the injunction. Whilst the Jollys disputed that they had trespassed on Mr. Bristol's property, they were prepared to give certain undertakings to the Court which essentially disposed of the first part of Mr. Bristol's application.

[3] I had reservations regarding whether the Court could grant the interim mandatory injunctive relief sought by Mr. Bristol since it amounted to final relief. I accordingly directed that he was to file skeleton arguments addressing this issue and the matter was adjourned to the 23rd May 2018 for arguments.

[4] The matter came on for further consideration on the 23rd May 2018. Mr. Bristol and his counsel Mrs. Mashall-Ghust were present thereat. Mr. Jolly was also present but his counsel Mr. Paryag was tardy. Mrs. Jolly was absent because according to Mr. Jolly she had fallen ill the night before and couldn't walk. The application was seemingly unopposed since no evidence or notice in opposition was filed by the Defendants. When Mr. Paryag eventually appeared he informed the Court that he had prepared an affidavit in opposition but that Mrs. Jolly was unable to swear same in light of her illness. I pause here to note that based on Mr. Jolly's earlier statements to the court, Mrs. Jolly had fallen **ill the night before**. Mr. Paryag therefore seemingly intended to file the Defendants' evidence in opposition on the morning of hearing. Any such last-minute filing (which would have been tantamount to ambushing Mr. Bristol) would have been entirely unacceptable since Mr. Bristol's application was filed in late January 2018. It bears repeating that parties are under a duty to assist this Court in furthering the overriding objective of the CPR 2000.

[5] Mr. Paryag also indicated that he had not been served with the application and affidavit in support. Even if this were so, Mr. Paryag based on his earlier indications to the Court that the evidence was in final form, was clearly aware of the contents of Mr. Bristol's application. How else would he have been in a position to prepare a response thereto? It later became clear that the application was personally served on the Jollys on the 25th January 2018[1] because, according to Mrs. Marshall-Ghust, Mr. Paryag was no longer available at the address on the record for service. The Defendants had however failed to provide details of their new address for service in accordance with **Rule 3.11(3) of the CPR 2000**. The

[1] See Affidavit of Service filed herein on 1st February, 2018.

litigation being that of the Defendants, to my mind the onus was on them in such circumstances to bring the documents served on them to the attention of their counsel. Mr. Paryag did not seek an adjournment of the matter, and right so, as the Court would not have been minded in the circumstances to accede to any such request

The Facts & Procedural History

[6] The nature of this case and the procedural history can be gleaned from the pleadings. The latter comes into focus because at the hearing Mrs. Marshall-Ghust relied on same in seeking to explain Mr. Bristol's delay of approximately 2 years and 7 months in filing this application. Mrs. Marshall-Ghust also submitted that Mr. Bristol's delay was due to the fact that the expert evidence which confirmed his claim as to the inadequacy of the drainage and the sewage issue was received in June 2017. I propose to deal with the issue of delay later in this judgment.

[7] Mr. Bristol commenced this action, which was initially for nuisance for damage caused to his property, on the 29th May 2015 by filing a claim form. The relief sought includes a prayer for damages and for an injunction requiring the Defendants to construct such drainage as is necessary to collect runoff water from the First Defendant's lot to the natural water course to the east of and below Mr. Bristol's lot. The gravamen of Mr. Bristol's claim is that this nuisance was caused by the construction of a house and driveway on the First Defendant's lot in or about 2014. Mr. Bristol avers that as a result of the construction and the resultant redirection of the water from the First Defendant's property, his property now floods and such flooding threatens the security of same. It is Mr. Bristol's pleaded case that the flooding is extraordinary and only began after the construction and that it never occurred before even during heavy rainfall.

[8] Mr. Bristol amended his claim in June 2016. He asserts therein that the Defendants caused a mud drain to be dug along the east boundary of the First Defendant's property which he says is not only ineffective but also causes stagnant water deposits, which are a hazard that encourage breeding of carrier pests such as mosquitoes. Mr. Bristol also avers that he had employed the services of Construction & Construction Support Services in February 2016 to analyze the water flowing onto his property from the First Defendant's lot. The samples collected were tested by the National Water & Sewage Authority who concluded that the said water was contaminated by sewage or water directly influenced by agricultural or industrial processes. Mr. Bristol further avers that the First Defendant's septic tank and leach filed are within 5 feet of the boundary between his lot and the First Defendant's resulting in sewage from the First Defendant's lot entering his lot.

[9] The Jollys caused an amended defence to be filed herein wherein they essentially deny that they caused the nuisance as alleged by Mr. Bristol and put him to strict proof.

[10] The matter came on for case management on the 27th September 2016 and on the 29th November 2016. The first case management conference ("CMC") was adjourned because the First Defendant was yet to be served and there was no proof that the Jollys had been served with notice of the CMC. The second CMC was also adjourned because Mr. Bristol through his counsel requested and was granted a further opportunity to serve the First Defendant. The matter was adjourned on this occasion to January 2017 for further case management. It appears that the First Defendant was served in the intervening period since Mr. Paryag appeared as counsel for all of the Defendants at the further CMC held on the 23rd January 2017. Thereat Mr. Bristol made an oral application for permission to call an expert. This application was refused by the Court on the ground that **Rule 32.6 of the CPR 2000** anticipates a written application. Case management directions were given. On the 10th February 2017 Mr. Bristol applied for

permission to call Mr. Terrence Smith as an expert. On the 27th February 2017 Mr. Bristol also sought permission to call Mr. Hugh Thomas as an expert. Leave was granted by the Court on the 9th March 2017 to adduce such expert evidence. Mr. Thomas' report was to be filed on or before 9th May 2017 and Mr. Smith's report was to be filed on or before 9th June 2017. Both expert reports were filed within the time limited by the Court.

The Evidence

[11] Mr. Bristol adduced an affidavit in support of his application at bar. He relies therein on certain parts of his Witness Statement and also the Expert Report of Terrence Smith. Ms. Marshall-Ghust also referenced Mr. Thomas' expert report at the hearing.

[12] In a nutshell Mr. Bristol says that on Thursday 18th January 2018, he returned from work at about 3 p.m. Upon alighting from his car his gardener approached him in an agitated state and told him that some men who were working for the Defendants were cutting trees in his property just over the common boundary between his property and the First Defendant's. On the following day, at about 8:15 a.m. he heard some chopping at the back of his house. He went to the boundary between the respective properties and observed *inter alia* that a lot of trees had been cut and heavy stream of water was coming from the First Defendant's property "*as it has always done*."[2] Mr. Bristol testifies that although a light shower had fallen three hours earlier in the morning, there was constant water coming out from the area of the septic tank soak away.

[13] Mr. Bristol incorporates by reference certain statements in his witness statement which he says are identical to what he stated in his affidavit regarding the constant water coming out form the area of the septic tank soak away. It would have been helpful if the paragraphs being incorporated by reference were indicated in his

[2] See paragraph 8(vi).

affidavit in support. Mr. Bristol testifies that despite the Defendants having had notice of the recommendation made by the expert Mr. Smith they have despite their initial promise to construct the drain,[3] continued to permit excessive water and sewage runoff to enter his property. According to Mr. Bristol, Mr. Smith had recommended at paragraph 5.1 of his report that an engineered stormwater drain be constructed on the First Defendant's property to convey flow to an appropriate municipal drain or natural watercourse to prevent the outflow of surface water to Mr. Bristol's property. Mr. Bristol says that he is fearful that sewage runoff entering his property could have serious implications on his health and that of the other occupants of his property. No expert or other cogent evidence was adduced to support his statements in this regard. Mr. Bristol says that the trespass and nuisance will continue unless the Defendants are restrained. Mr. Bristol avers that he is accordingly seeking interim relief as a matter of urgency. No certificate of urgency was filed by Mr. Bristol. Mr. Bristol did not say the circumstances which made the matter urgent. Based on Mr. Bristol's evidence regarding the state of affairs which had necessitated this application, it appears that the only new situation was that the Defendants were now allegedly trespassing on his property.

[14] It is against this backdrop that the application for an interim mandatory injunction came on for hearing and falls to be determined.

The Law on the Grant of Interim Injunctions

[15] The law on interim injunction is well established. It is accepted that the grant of interlocutory relief, whether by way of mandatory injunction or otherwise is entirely discretionary. The Court's jurisdiction to grant such relief stems from **section 24 of the West Indies Associated States Supreme Court (Grenada) Act** which empowers the court to grant such interim relief if it is "*just or convenient*" to do so and on such terms as the court thinks fit. The Court in exercising this discretion

[3] The Jollys in their defence denied that they made any such promise.

has adopted the following test which was laid down by the House of Lords in the locus classicus **American Cyanamid Co. v. Ethicon** [1975] AC 396:-

(i) The first step is for the applicant to show that there is a serious issue to be tried. In short, the claim must have substance. The Applicant must show that he has a real prospect of succeeding in its claim for a permanent injunction at the final trial.

(ii) Once the applicant has established this, the Court consider whether:-

(a) If the applicant were successful at a final trial, damages would be an adequate remedy; and

(b) If the respondent were successful at trial, damages under a cross-undertaking to pay damages by the applicant in return for an interim injunction would be an adequate remedy. If damages would be an adequate remedy and the applicant would be in a financial position to meet the cross-undertaking there would be no reason to refuse the interim injunction.

(iii) If there is any doubt as to the adequacy of the remedy of damages to either or both of the parties, the court must consider the balance of convenience and the individual facts of the case. In weighing up the various factors, the fundamental objective of the court is to take the course which ultimately involves the least risk of injustice, should the court's decision to grant or refuse an injunction turn out to be wrong.

(iv) Where the factors are evenly balanced, the courts have been inclined to preserve the *status quo.*

Principles for granting Mandatory Injunctions

[16] In the submissions filed herein Mrs. Marshall-Ghust submits that the principles for granting a mandatory injunction are the same as for a prohibitory injunction. It is,

with the greatest of respect to counsel, well established that mandatory injunctions on interim applications are viewed in a slightly different light to prohibitory injunctions.[4] Courts are generally reluctant to grant mandatory injunctions as they are, by their nature, likely to be harsh and instructive. As such they will usually only be granted at an interim stage where there are special circumstances:[5] **Parker v. Camden London Borough Council** [1986] Ch 162 (CA).

[17] In **Nottingham Building Society v Eurodynamics Systems Ltd** [1993] FSR 468 Chadwick J set out the law governing the grant of an interlocutory mandatory injunction in the following terms, which were approved by the Court of Appeal in ***Zockoll Group Limited v Mercury Communications Ltd***:-

> "*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.*
>
> *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*

[4] See **Elisabeth Robertson v. Christina Washburn et al Claim No. BVIHCV 2011/0158 at para. 21.**
[5] see **Parker v. Camden London Borough Council [1986] Ch 162 (CA).**

circumstances in which it 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". (My emphasis)

[18] This test for mandatory injunctions was cited with approval by our Court of Appeal in **Antigua Aggregates Limited v The Attorney General of Antigua & Barbuda and Antigua Commercial Bank** HCVAP 2009/003. It was also cited with approval in the BVI case **Elisabeth Robertson v. Christina Washburn et al** Claim No. BVIHCV 2011/0158.

Discussion

[19] Mr. Bristol's application at bar was framed to satisfy the test for interim injunctions. It was not framed to satisfy the test for mandatory injunctions. This was an incomplete approach as the relief he seeks is a positive mandatory injunction on a interim basis. The authorities establish that the practice of granting interim relief which amounts to a final relief is deprecated. It should only be granted in **exceptional cases where damage cannot be repaired**. One would have therefore reasonably expected the evidence in support to be marshalled to establish that the circumstances of this case are exceptional and that the damage alleged by Mr. Bristol cannot be repaired. It is for this reason that Mrs. Marshall-Ghust was directed to file submissions to assist the court in determining this application.

Whether Mr. Bristol's claim raises serious issue(s) to be tried

[20] I must bear in mind in determining this issue that having regard to the nature of the appliation, I am not called upon to decide whether Mr. Bristol will succeed at trial. I am only to decide whether he has a good arguable case for a claim in nuisance, namely one with a realistic as opposed to a fanciful chance of success. Mrs. Marshall-Ghust essentially says that the justice and convenience of the grant of

interlocutory relief in the instant case is established by (i) the danger to Mr. Bristol and the occupants of his property; and (ii) the destabilization/undermining of Mr. Bristol's property. She submitted that Mr. Bristol in reliance on evidence of the experts Mr. Thomas and Mr. Smith has made out a good arguable case that the conduct or activity complained of constitutes an actionable wrong. She submitted that this evidence establishes that:-

(i) Mr. Bristol's property is being adversely affected by the water and sewage run off from the First Defendant's property;

(ii) There is an undermining of Mr. Bristol's property;

(iii) During rainy periods Mr. Bristol's lawn is saturated with water and sewage; and

(iv) The sewage creates a hazard to health.

Expert Evidence

[21] Mrs. Marshall-Ghust also referred the Court to the Percolation Report of Mr. Thomas, who is a geologist and soils expert. This Report reveals that a percolation test was carried out on the First Defendant's property on 6th and 7th May 2017. The other court-appointed expert, Mr. Smith, was present when this test was conducted. Mr. Thomas opines at paragraph 3 *inter alia* that:-

(i) the soil at the location of the septic system drain field could be categorized as clayey sand;

(ii) one of the characteristics of such sandy soil is that they drain quickly;

(iii) the land was excavated to situate the building;

(iv) the hard impermeable bedrock at the location of the septic system drain field is estimated to be at depths of 1 m to 1.5 m at the location of the percolation hole. This is an effective barrier to liquid penetration; and

(v) this means that the soil layer is not deep. Subsurface drainage will be shallow at this location.

[22] Mrs. Marshall-Ghust also referred the Court to the Expert Report of Mr. Terrence Smith who is a civil engineer. It is of note that Mr. Smith was asked to opine on *"[w]hether the surface water drainage system on the Campbell Lot is adequate to prevent flooding on the Bristol Lot*." Mr. Smith relies on Mr. Thomas' findings and his own assessment and concludes at paragraph 5 that:-

(i) the high proportion of the First Defendant's Lot with impermeable cover will result in substantial volumes of stormwater runoff to the eastern end of the property, particularly during extreme rainfall events in the rainy season when the permeable ground area is saturated;

(ii) the earthen drain at the eastern end of the First Defendant's Lot is inadequate in size and continuity to prevent the overflow of surface water to the First Defendant's Lot; and

(iii) this problem can be addressed by constructing an engineered stormwater drain which can convey flow to an appropriate municipal drain or natural watercourse.

[23] In response, Mr. Paryag in short submitted that this is not an appropriate case for the grant of a mandatory injunction. He maintained that Mr. Bristol heavily relies on the expert evidence but the expert evidence doesn't say that the nuisance was caused by the Defendants. As aforementioned, the Defendants dispute that the nuisance is caused by them. It is however settled law that (i) a private nuisance may also arise from mere existence of a state of affairs on a person's land, where that person allows the state of affairs to continue;[6] and (ii) liability in nuisance lies where the defendant possesses and controls the land from which the nuisance proceed. It is however undesirable that this Court should become too involved with this issue at this stage.

[6] See Volume 45 (2) of HALSBURY'S LAWS OF ENGLAND (4th ed. Reissue).

The Law on Private Nuisance

[24] These contending submissions must be considered against the backdrop of the legal principles governing the law of nuisance. In **Coventry and others v Lawrence and another** [2014] UKSC 13 a nuisance was defined by the UK Supreme Court as "*an action, **or sometimes a failure to act**, on the part of a defendant, which is not otherwise authorized, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land*." (My emphasis)

[25] Closer to home, in the Vincentian case **Fitzroy Mc Kree v. John Lewis** Civil Suit No. 88 of 1999 Mitchell J (as he then was) cited with approval the following learning from **Clerk & Lindsell on Torts**:-

> "*A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.*
>
> *... Nuisances of the second kind, causing physical damage to land or to something erected or growing upon it, occur when a man allows a drain on his own land to become blocked or makes a concrete paved drive so that the water overflows onto his neighbour's land, maintains a mound of earth or other artificial erection on his own land so as to cause damp to enter his neighbour's land, works the mines under his own land so as to cause the surface of his neighbour's land to subside, allows buildings upon his land to become dilapidated so that they, or parts of them, fall upon his neighbour's land, sets up vibrations on his own land which cause*

damage to his neighbour's buildings, or emits noxious fumes from his land which damage his neighbour's crops or trees."

[26] The nuisance alleged by Mr. Bristol in this case falls within the ambit of the second kind. Without making any definitive finding on the substantive case, having regard to the evidence and in particular the expert evidence I am satisfied that Mr. Bristol has established that there are serious issues to be tried in this matter with regard to the alleged nuisance. Mr. Paryag in any case conceded at the hearing that "*there are serious legal issues as to the cause and creation of the nuisance*." He however maintained that they are issues for trial. I accept that it is not the Court's role to determine same at this stage.

Whether damages are an adequate remedy

[27] It is clear from Mr. Bristol's pleadings that he does not consider damages to be an adequate remedy in that he seeks not only damages but also a mandatory injunction. Mrs. Marshall-Ghust submitted in her written submissions that if the flooding is not remedied immediately there will be irreparable damage to Mr. Bristol's property which cannot be compensated. No cogent evidence was adduced by Mr. Bristol to support this bald assertion regarding the irreparable damage to his property if the flooding is not remedied immediately.

[28] From my own research I unearthed the BVI case **Elisabeth Robertson v. Christina Washburn et al** Claim No. BVIHCV 2011/0158 wherein a mandatory injunction was granted on an interim application**.** The Respondents in that case undertook excavations on their property to construct a driveway. The Claimant who is their neighbor filed proceedings wherein she alleged that this resulted in the undermining of portions of her land thereby causing damage to it. Prior to the filing of this action the parties attempted to resolve the dispute with the assistance of their counsel. The Respondents commenced building a retaining wall but never completed it. A joint site inspection was arranged with personnel from the Public Works Department and the Town and Country Planning Department. During the

inspection the Second Respondent agreed to resume the construction of the retaining wall but failed to do so. The Claimant then filed an action and applied on the same day for a mandatory injunction for the Respondents **to complete the construction** of the retaining wall on their land. The Claimant in her evidence in support referred to three reports providing details of the erosion issues facing her land. The Respondents also adduced expert evidence which the Court found supported the existence of instability on the Claimant's land. **Elisabeth Robertson v. Christina Washburn et al** is thus distinguishable from this case in that there was cogent evidence as to the existence of instability on the Claimant's land. I should also indicate for completeness that the question of delay was not raised in that case.

[29] Based on the authorities Mr. Bristol's failure to adduce cogent evidence in this regard is fatal as the onus is on him to establish that any damage caused cannot be repaired. I am in the absence of such cogent evidence unable to find that if Mr. Bristol were to succeed at the trial, damages would be an inadequate remedy as the damage cannot be repaired. If I am wrong on this point, I will address the balance of convenience/greater risk of injustice.

Balance of Convenience/Least Risk of Injustice if Injunction is wrongly granted

[30] Mrs. Marshall-Ghust submitted at the hearing that Mr. Bristol was seeking the Court's intervention because of the onset of the rainy season. Mrs. Marshall-Ghust also submitted that Mr. Bristol's land cannot be restored if further destabilization/undermining occurs over the upcoming rainy/hurricane season. Mrs. Marshall-Ghust relies on Mr. Bristol's bald assertion in his affidavit evidence that the water and sewage from the First Defendant's property is flooding his property but also destabilizing it and creating a health hazard. As aforementioned, unlike in **Elisabeth Robertson v. Christina Washburn et al** Mr. Bristol has not

adduced any expert evidence or otherwise in the application at bar to support his assertion that his property is being destabilized and/or undermined.

[31] Moreover, the "engineered stormwater drain" was only recommended by Mr. Smith as a solution to the flooding issue. It was not proposed in respect of the sewage issue. I am fortified in this view as Mr. Smith opines at paragraph 5.2(c) of his Report that the sewage problem "*can be addressed by a competent wastewater professional and, at a minimum by routing all wastewater to the septic tank*." According to Mr. Smith "[*t]here is a misguided practice in Grenada of routing residential greywater to surface drains as a means of reducing the flow to the septic tank. This practice actually reduces the efficiency of wastewater treatment, and results in untreated greywater being applied to the ground surface, usually in close proximity to the building*." Based on this expert evidence, the interim mandatory injunction sought by Mr. Bristol will seemingly not abate the nuisance which he says is caused by the sewage problem.

[32] An issue arose at the hearing as to whether the engineered stormwater drain recommended by Mr. Smith to abate the nuisance by water is to be a concrete drain or an earthen drain. This issue arose because the Court invited Mrs. Marshall-Ghust to indicate the reference for Mr. Smith's recommendation that the engineered drain should be a concrete one. Mrs. Marshall-Ghust conceded that Mr. Smith did not say that it should be a concrete drain. She however contended that it can be inferred that (i) the drain cannot be left as an earthen one given that it would be inadequate for the flow of water; and (ii) an engineered stormwater drain cannot be an earthen drain. Mr. Paryag contended in response that Mr. Smith does not say that a properly constructed earthen drain cannot deal with the nuisance by water issue. In my view, this Court having authorized the calling of expert evidence should not be left to infer or speculate as to the meaning of "*engineered stormwater drain*". This is entirely a matter for the expert and not for submissions from the bar table. **Rule 32.8 of the CPR 2000** permits written

questions to be put to an expert and such course ought to have been employed by the parties.

[33] This Court in weighing the various factors in order to determine where the greater risk of injustice lies must also consider whether the mandatory injunction sought by Mr. Bristol is the sole or best interim remedy available in the circumstances. This Court has the power under Part 38 of the CPR 2000 to dispense with the pre-trial review which is to be held shortly before the trial and to give any other direction that will assist in the speedy and just trial of a claim: see **Rule 27.6(3) of the CPR 2000**. I accordingly invited the parties to address me on whether an order for an expedited trial would be an adequate remedy. Mrs. Marshall-Ghust conceded that it could be but she questioned whether it could be achieved in light of the present situation with the Court. Mrs. Marshall-Ghust also submitted that even if the trial were expedited the Defendants would be able to appeal. It is of note that but for the adjournment of the pre-trial review (which Mrs. Marshall-Ghust says was one of the reasons why Mr. Bristol filed the application at bar) Mr. Bristol would have been content to await the outcome of the trial and any ensuing appeals. It would perhaps be appropriate for me to deal with the question of delay at this juncture.

Delay

[34] It is generally accepted that an applicant seeking an equitable relief must do so promptly. If he does not he must give an explanation in his evidence in support. No such explanation was provided by Mr. Bristol. In **First Montana Services Limited v. Best Concrete Corporation** AXAHCV 2007/0053 George-Creque J (as she then was) stated thus:-

> "*… in the absence of a most cogent explanation … the injunction ought to be refused as apart from other considerations an inference to be drawn from insufficiently explained tardiness is that the urgency and gravity of the applicant's case are less than compelling*."

Mr. Bristol ought to have explained his delay since as he frankly testified "a *heavy stream of water [was] coming from the First Defendant's property unto my property* ***as it has always done****."* (My emphasis). As he did not address this issue in his evidence or even the submissions filed on his behalf, I invited the parties to address me on the question of delay at the hearing.

[35] Mrs. Marshall-Ghust belatedly sought to explain Mr. Bristol's tardiness from the bar table. She submitted that Mr. Bristol did not receive the expert evidence which confirmed his assertions regarding the inadequacy of the drainage and sewage issue until the 8th June 2017. It is of note that Mr. Bristol did not seek the leave of the court to file such expert evidence until February 2017 which was 1 year and 9 months after he filed his claim. His applications were heard in early March 2017 and he was granted the permission he sought.

[36] Mrs. Marshall-Ghust in response to a comment by the Court that the expert evidence was available in June 2017 but he waited some six months to file this application indicated that it was not the rainy season. Whilst no evidence has been adduced as to when the rainy season begins and ends, Mrs. Marshall-Ghust says in her written submissions that the rainy/hurricane season is upcoming. It can be reasonably inferred from this that the 2017 rainy/hurricane season was imminent when Mr. Bristol received the Report in early June 2017. The Court is in any case empowered by **section 54 of the Evidence Act** to take judicial notice of facts which are generally known with the limits of its jurisdiction. It is a notorious fact which is not reasonably open to question that the hurricane season typically starts in June of each year. On the evidence before me, Mr. Bristol being armed at the official start of the 2017 hurricane season with the expert report which his counsel says confirmed his claim, did nothing. This is in my view very telling and weighs against the grant of the exceptional remedy that he now seeks.

[37] Mrs. Marshall-Ghust also submitted that Mr. Bristol felt that it was necessary to ask for the Court's intervention because the pre-trial review was delayed on two occasions because of the Defendants' lack of cooperation. This Court is not minded to give any weight to such 'evidence' from the bar table. I however pause to note that the record reveals that the pre-trial review which was to be held on 16th November 2017 was adjourned "*due to the unpreparedness for Pretrial review.*" The adjournment on that occasion was therefore as a result of both parties. Moreover whilst Mrs. Marshall-Ghust averred that the Defendants conduct of the case had caused delay, the record reveals that the CMC was adjourned on the 27th September 2016 and then on the 29th November 2016 through no fault of the Defendants. There was no proof that the Jollys had been served with notice of the first CMC. The second adjournment was to facilitate the service of the amended claim on the First Defendant. The CMC was held 4 months after it was originally scheduled.

[38] Mr. Paryag submitted in response that Mr. Bristol's delay, which is fatal, was not caused by the Defendants. He further submits that the delay has not been satisfactorily explained. I agree that the unexplained delay is fatal to the application at bar. As things presently stand, the matter is ripe for trial. The Court was concerned that the 30 days suggested by Mr. Bristol for the construction of the concrete drain does not appear to be a reasonable period to the extent that Mr. Smith recommends that it should be an "engineered stormwater drain". Mrs. Marshall-Ghust submitted that the period could be extended to 60 days for proper implementation. Mr. Bristol's delay is such that the matter is now ripe for trial and an expedited trial could well take place during that 60 day period.

Conclusion

[39] The Court's discretion must be exercised with the greatest possible care. I am not satisfied that it is just and convenient in the circumstances of this case to grant the exceptional remedy which Mr. Bristol seeks. The balance of convenience to my

mind favours the maintenance of the *status quo* and that the trial be expedited. For the reasons set out above, whilst I am grateful to Mrs. Marshall-Ghust for her helpful submissions, I feel constrained to dismiss the application at bar. I however make no orders as to costs since the Defendants did not file any evidence or submissions in opposition in this matter.

Order

[40] In all the circumstances of this case and for the reasons above, I make the following orders:-

(i) The application for an interim mandatory injunction is dismissed.

(ii) The pre-trial review is hereby dispensed with pursuant to Rule 38.2 of the CPR 2000.

(iii) The trial of this matter is to be expedited with a view to it being heard in June or July 2018 and the parties are to cooperate in facilitating such speedy trial.

(iv) The estimated length of the trial is two (2) days.

(v) Trial Bundle is to be prepared, filed and served by the Claimant in accordance with Rule 39.1 of the CPR 2000.

(vi) No order as to costs.

Jean M. Dyer
High Court Judge (Ag.)

By the Court

Registrar