IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2024/CLE/gen/00093

Between:

HOLMES COMPANY LIMITED

Claimant

And

ERIC MORLEY

Defendant

Before: The Honourable Justice Darron D. Ellis

Appearances: Camille Cleare for the Claimant

Lessiah Rolle for the Defendant

Hearing Date: 1 October 2024

JUDGMENT

Inter-Partes Injunction – Interlocutory Application – Matters to be considered by the Court in determining whether the balance of convenience lies in favour of granting or refusing relief–Whether damages will be an adequate remedy–Practice and Procedure –Leave to appeal – Stay of execution–Principles on which application should be considered–Grounds of appeal–Whether the grounds have reasonable prospect of success –Whether issue of public importance which requires clarification by the Court of Appeal

On June 10, 2024, the Court granted an interim injunction (the Injunction Order) against the Defendant. This order restrained the Defendant from trespassing on the property, which is the subject of these proceedings (the disputed property), until the substantive claim is heard. Aggrieved by the Court's decision, the Defendant applied for leave to appeal and

requested either a stay or, alternatively, a variation of the Injunction Order. The Defendant advances several proposed grounds of appeal, most of which lack sufficient merit, detail, or clarity. Upon review, the grounds could be summarized as follows: (i) the Court did not provide reasons for its decision, (ii) the order contradicted the weight of evidence and applicable law, and (iii) the Learned Justice was biased and unfair. The Defendant contends that leave should be granted, the Injunction Order stayed, and that the Defendant has a reasonable prospect of success on the appeal. The Claimant fully opposes the application.

HELD: The application for leave to appeal and a stay or variation of the Injunction Order is refused with costs to the Claimant.

1. When an application is made for an interlocutory injunction in the exercise of the Court's discretion, the Court must first consider whether there is a serious issue to be tried. If the answer is yes, a further question arises: whether damages would be an adequate remedy for the aggrieved party if the Court grants or declines to grant an injunction. If there is doubt about the adequacy of damages, the Court must then determine where the balance of convenience lies: **American Cyanamid Co. v Ethicon Limited [1975] A.C. 396 at 407; Dyphany Mortier and Another v. Darnette Weir and Another [2020] 1 BHS J. No. 110; National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd. 2009 UKPC 16; Series 5 Software Ltd v Clarke and Others [1996] 1 All E.R. 853 at 865; Grenada Cooperative Bank Limited v Valma Jessamy Claim No. GDAHCV2013/0313 (unreported); and Cambridge Nutrition Ltd v BBC [1990] 2 All ER 523 Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419; Seaconsar v Bank Markazi [1994] A.C. 438; and Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547; Adderley v Bethel 2021/CLE/gen/1556 referred to.**

2. It is an established legal principle that the burden rests on the applicant to demonstrate a serious issue to be tried. An analysis of the factual and legal evidence confirms that a serious issue exists to be tried—specifically, determining the ownership of the disputed property—and that granting the injunction would serve the interests of justice. Given the nature of the trespass and threats, damages would not be an adequate remedy. The balance of convenience therefore favors the Claimant: **American Cyanamid Co. v Ethicon Limited [1975] A.C. 396 at 407; Dyphany Mortier and Another v. Darnette Weir and Another [2020] 1 BHS J. No. 110; National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd. 2009 UKPC 16; Tetrosyl Ltd v Silver Paint and Lacqueur Co. Ltd [1980] FSR 68; Adderley v Bethel 2021/CLE/gen/1556 relied upon.**

3. When an application is made for leave to appeal an interlocutory injunction decision, the Court must first consider whether the applicant requires leave to appeal to the Court of Appeal. If the answer is yes, two further questions arise: whether the proposed appeal has realistic prospects of success, and whether it raises an issue that should, in the public interest, be examined or clarified by the Court of Appeal. **Ms Amlin Corporate Member Ltd v Buckeye Bahamas Hub Ltd-2020/COM/adm/00016; Smith v Costworth Casting Processes Ltd. [1997]4 All ER 840; Section 11 (f) (ii) of Court of Appeal Act; St. George and Others v Hayward and Others [2008] 5 BHS J. No. 16.**

4. Applying the principles established in **St. George and Others v Hayward and Others [2008] 5 BHS J. No. 16, Section 11(f)(ii) of the Court of Appeal Act, and Smith v Cosworth Casting Processes Ltd [1997] 4 All ER 840**, leave from the Supreme Court is not required when an injunction order is granted or refused. Furthermore, the proposed appeal has no realistic prospects of success, nor has Counsel for the Defendant identified any issue that requires clarification by the Court of Appeal in the public interest.

5. When an application is made for a stay of an order, the Court must consider two initial questions: whether the applicant will suffer irreparable harm or be ruined if the stay is not granted, and whether there are reasonable prospects of success on appeal. If the answer to both questions is yes, the Court should exercise its discretion to prevent injustice or to ensure that, if successful, the appeal is not rendered nugatory: **Linotype-Hell Finance Ltd v Baker [1993] 1 WLR 321** as per Staughton LJ where he states at page 323; **Turtle Creek Investments Ltd. v Daybreak Holdings Ltd. SCCivApp. No. 234 of 2018**; **Leicester Circuits Ltd. V Coates Brothers PLC [2002] EWCA CIV 474** per Potter LJ at para 13.

6. Further analysis of the factual and legal evidence demonstrates that the Defendant has not met the threshold requirement for a stay or variation of the Injunction Order. Applying the principles from the referenced cases, the Defendant has not proven that he will suffer irreparable harm or be ruined, nor has he shown that the proposed grounds of appeal have reasonable prospects of success. Furthermore, no evidence has been presented to demonstrate that, without a stay, a successful appeal would be rendered nugatory or that the Defendant will suffer uncompensable loss.

7. Accordingly, the Court should not deprive a successful litigant of the fruits of his litigation by ordering a stay or a variation of the Injunction Order.

Ellis J

Introduction and Background

[1.] On February 12, 2024, the Claimant filed a Fixed Date Claim against the Defendant, seeking damages for trespass, a declaration, and an injunction to restrain the Defendant from trespassing on or using the disputed property.

[2.] The Claimant asserts that it holds the documentary title to 29.822 acres of land (the disputed property), located on "The Cottage in Great Exuma", which was purchased from the late Frederick Freddie Morley (Freddie) in 2008. The Defendant, Freddie's grandson, owns 1.5 acres of land adjacent to the disputed property by way of a Deed of Assent from Freddie. The Defendant also claims ownership of the disputed property by virtue of peaceful and undisturbed possession for more than (12) years, dating from July 22, 2008.

[3.] Since Freddie's death in 2020, the Claimant alleges that the Defendant has trespassed on the disputed property in several ways, including blocking access to the Claimant's buildings, posting "no trespassing" signs, and more recently, clearing vegetation and inserting survey stakes into the ground. The Claimant further alleges that the Defendant has threatened its employees.

[4.] On June 10, 2024, the Claimant applied for an injunction against the Defendant. The Court granted this application, providing oral reasons for doing so. The Court ordered the Defendant to refrain from:

> **"Entering, using, blocking, driving stakes into, or otherwise enjoying the 100-foot-wide road easement over the Claimant's property (the defined easement) other than for ingress and/or egress to his property;**
>
> **Entering or using the Claimant's property, inclusive of the defined easement, for parking, storage, or dumping of any items whatsoever, erecting signs, rebar, clearing/removing structures and/or vegetation, cordoning off, fencing or otherwise effecting changes thereto or howsoever preventing the Claimant from using its property; pending the final determination of this action or until further order of this honorable Court." (the Injunction Order).**

[5.] On June 24, 2024, the Defendant filed a Notice of Application for leave to appeal, and for a stay or variation of the Injunction Order, pursuant to Part 9.8 of the Supreme Court Civil Procedure Rules, 2022 (CPR). The Court heard the Defendant's application on October 1, 2024, and reserved its decision.

[6.] Before I express my reasoning concerning the application for leave, for completeness, I ought to set out more fully my reasoning for granting the Injunction Order.

[7.] Counsel for the Claimant argued at the injunction hearing that the Claimant met and exceeded the threshold by which the Court may grant an interim injunction. The Defendant vigorously opposed the application, arguing that the Claimant did not meet the conditions and that, in any event, damages would suffice instead of an injunctive order.

[8.] The jurisdiction to grant injunctions in support of proceedings is exercisable pursuant to Section 21 of the Supreme Court Act and Part 17 of the CPR. The leading authority on the Court's approach to granting interim relief is found in **American Cyanamid Co. Ltd. v. Ethicon** [1975] AC 396, as highlighted in **Dyphany Mortier and another v. Darnette Weir and another** [2020] 1 BHS J. No. 110, where Klein J. summarized the applicable principles for granting an interlocutory injunction:

> "16. As is made clear by the phrase "just and convenient", the grant of an interlocutory injunction is a matter of discretion. But as is the case with all forms of judicial discretion, it is to be exercised on the basis of judicial principles, the most important of which are those set out in **American Cyanamid Co. Ltd. v Ethicon** [1975] AC 396 by Lord Diplock. They are often explicated by way of a structured four-part test as follows:
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> (i) whether there is a serious issue to be tried;
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> (ii) whether damages would be an adequate remedy for any loss sustained by either party pending the outcome of the trial;
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> (iii) whether the 'balance of convenience' favours the plaintiff or defendant if there is any doubt as to the adequacy of the respective remedies available in damages;
>
> (iv) whether there are any special factors that might affect the Court's consideration of the matter.

[9.] In **National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd.** [2009] UKPC 16, an appeal from the Court of Appeal of Jamaica, the Privy Council provided further guidance in paragraph 16:

> "...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The Court may order a Defendant to do something or not to do something else, but such restrictions on the Defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."

Further, at paragraph 17:

> ".....the basic principle is that the court should take whichever course of action seems likely to cause the least irremediable prejudice to one party or the other."

[10.] A serious issue must exist before the Court can grant the injunction. Lord Diplock, in **American Cyanamid** (supra), stated that it is sufficient for the Court to ask: Is the Applicant's action "not frivolous or vexatious"? Is there "a serious question to be tried"? Is there "a real prospect of success in the claim for a permanent injunction at trial"? See also **Smith v Inner London Education Authority** [1978] 1 All E.R. 411 at 419, C.A., per Browne L.J.; **Seaconsar v Bank Markazi** [1994] A.C. 438, H.L.; and **Canada Trust v Stolzenberg** (No. 2) [1998] 1 WLR 547.

[11.] At the injunction application hearing, the Claimant submitted that there is a serious issue to be tried between the parties—specifically, the ownership of the disputed property—and that the Claimant has standing to bring this action. As the freehold owner of the property in dispute, the Claimant seeks this interim injunction to preserve and protect the property in dispute.

[12.] The Claimant relied on the dictum of Klein J cited in **Adderley v Bethel** 2021/CLE/gen/1556 at paragraph 26:

> **"Injunctive relief, whether interlocutory or final, is available when "one party to an action can show that the other party has either invaded or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the court..." (South Carolina Insurance Co. v. Assurantie N.V. [1987] AC 24[40])."**

[13.] The Claimant argued that the evidence demonstrates how various unilateral actions by the Defendant derogate from the Claimant's legal rights as the established freehold owner of the disputed land. In some instances of trespass, the Defendant has not only impeded the Claimant but has also altered the character, aesthetic, and intended use of the land. Furthermore, the Defendant has harassed and threatened the Claimant's employees.

[14.] In respect to the Claimant's position, Klein J. is very instructive at paragraph 32 of **Adderley v Bethel** (supra) where he states:

> **" As has been explained by American Cyanamid and subsequent cases, the threshold for establishing a serious issue to be tried is not particularly demanding. While the Court does not delve into the merits or resolve factual issues at the interlocutory phase, <u>it is entitled to form some preliminary view of the claims and must do so in order to exercise its discretion to grant or refuse relief</u>. I have no hesitation in finding that one or more of the issues raised by the defendants constitute a serious issue to be tried."**

[15.] In **The Mayor and Burgesses of Enfield London Borough v Snell and others** EWHC [2024]1206 (KB) All ER, the facts were similar to the present case, as the local authority had a project to develop 10,000 new homes on its freehold land adjacent to a river. Several defendants had been living on a boat along the river for years; another had a boat moored in the river, and

another resided in a structure on the authority's land for several months. The authority later applied for an interim injunction to prevent the defendants from trespassing and causing a nuisance on the land. Justice Auerbach found that obstructing access to the authority's land constituted an actionable nuisance and that there was no evidence of acquiescence. In granting the interim injunction, the Court stated at paragraph 45:

> "Putting it all together, I am therefore satisfied that the Claimant has a very strong, if not unanswerable, case that the continuing presence of all of the Defendants against whom it seeks interim relief, within the area in respect of which that relief is sought, is an actionable trespass, as well as a nuisance"

[16.] The Defendant opposed the granting of the injunction, arguing that there is no serious issue to be tried because the Claimant has not presented substantive evidence demonstrating a real chance of success. The Defendant relies on the dictum of Lord Denning in **American Cyanamid Co.** (supra), where he stated on page 510:

> "So unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to 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"

[17.] Counsel for the Defendant further contends that the Claimant has no chance of success because it has been barred from initiating an action to recover the subject property since July 20, 2020. Counsel cited Section 16(3) of the Limitation Act to support this position.

[18.] Counsel for the Defendant appears to argue that the Court should, at this stage and without a substantive hearing, accept that the Defendant's possessory claim has indeed extinguished the Claimant's documentary title, and therefore, there is no serious issue to be tried. The Court disagrees.

[19.] Whether the Claimant is barred, as the Defendant puts it, is an issue for trial and not a determination the Court is prepared to make at this stage. In this regard, I rely upon the dictum of Charles J. as she then was, in the case of In **the Matter of Bankruptcy Act Re: Collin Wright Et Al** 2017/COM/bnk/00004, at paragraph 53:

> **"I remind myself that it is no part of the Court's function at this stage 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 and mature considerations as these are matters to be dealt with at the trial."**

[20.] The Defendant's attorney further submits, without citing any authority, that the interim injunction application itself is statute-barred. The Court did not find this argument persuasive.

[21.] In **Mothercare Ltd. v Robson Books Ltd** [1979] FSR 466, at page 474, Sir Robert Megarry VC provided further guidance on the concept of a "serious issue to be tried." He stated:

> "The prospects of the Plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the Plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the Plaintiff, unless they are so long that the Plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the Plaintiff fails, for he can point to no question to be tried which can be called "serious" and no prospect of success which can be called "real."

[22.] The Claimant asserts ownership of the property in dispute and has submitted numerous documents in affidavit evidence to support this position, including:

- A registered survey plan of the disputed property;
- A conveyance dated July 21, 2008, transferring the disputed property from Frederick Freddie Morley to the Claimant;
- A permit issued to the Claimant by The Investments Board;
- A Deed of Assent to Eric Morley.

[23.] In its evidence, the Defendant admits that the disputed property was conveyed to the Claimant. However, the Defendant further submits that its possessory title has extinguished the Claimant's documentary title.

[24.] It is an established legal principle that the burden rests on the applicant to demonstrate a serious issue to be tried. I find that the Claimant has met this requirement, as the ownership dispute between the parties constitutes a serious issue for trial. The competing positions of the parties underscore that a serious issue exists for determination by this Court.

[25.] The Claimant submitted that this is not a case where damages would be an adequate remedy. The types of trespasses complained of serve to prevent the Claimant from using the disputed property as it sees fit and, in certain regards, destroy the nature and character of the land (clearing and staking the ground). Counsel for the Claimant submits that damages cannot compensate for such clearing and that restoring the natural scrub vegetation takes years. The Claimant also submitted that its employee is being threatened, bullied, and impeded in performing caretaking duties on the disputed property.

[26.] The Claimant has also provided an undertaking in damages to the Defendant should the Defendant suffer any harm as a result of the Injunction Order.

[27.] Counsel for the Defendant states that the Defendant's actions on the disputed property—such as posting "no trespassing" signs, blocking the Claimant's access, placing stakes, and

constructing various structures—do not constitute evidence of irremediable prejudice or substantial destruction of vegetation. He further argued that damages would be an adequate remedy and, therefore, the injunction should not be granted.

[28.] After hearing arguments from both sides, the Court found that an award of damages in this case would be inadequate. The type of trespass alleged appears to alter the nature and character of the property, which in some cases may not be compensable by damages or may take years to restore. Additionally, the Claimant's affidavit evidence indicates that, on multiple occasions, the Defendant threatened the Claimant's employee while he was caretaking on the property in dispute.

[29.] The case of **National Commercial Bank of Jamaica** (supra), as cited by Klein J. at paragraph 45 in **Adderley v Bethel** (supra), is highly instructive in this regard. In this case the Privy Council defines the test for assessing the balance of convenience as the course that "seems likely to cause the least irremediable prejudice to one party or the other." It is unsurprising that both parties contend the balance should favor their respective interests.

[30.] Counsel for the Claimant submits that the Claimant holds the undisputed documentary title to the disputed property. She further submits that the Defendant's recent acts—blocking access, altering the nature and character of the disputed property, and threatening the Claimant's employee—shift the balance of convenience squarely in favor of the Claimant and support granting the injunction. It is submitted that the Claimant would suffer irremediable prejudice if the injunction were not granted, allowing the Defendant free rein to damage the disputed property and threaten the Claimant's employees.

[31.] It was further submitted that the Defendant would suffer no prejudice if he were confined to his land and permitted only to use the access easement in the usual way. Additionally, the Claimant has provided an undertaking in damages.

[32.] Counsel for the Defendant submits that any documentary title claim has been extinguished and, therefore, the balance of convenience favors the Defendant. Counsel further argues that if the Court grants the interim injunction, the operation, survival, and goodwill of the Defendant's business would be irreparably harmed. The Court noted that no substantial evidence was provided to support this position.

[33.] The Court has broad discretion in determining which party the balance of convenience favors and may consider various factors. This case clearly involves a property dispute. However, the evidence also indicates that one party has taken actions that may have damaged or altered the disputed property and may continue to do so if not restrained. The purpose of the injunction is to preserve the status quo pending the Court's determination of property ownership.

[34.] The balance of convenience favors the Claimant. Based on the evidence, the Defendant suffers no injustice if he is restrained. The injunction prevents the Defendant from treating the disputed property as his own. There is no evidence of any financial or other loss to the Defendant. Conversely, if no injunction is granted and the Court ultimately determines that the disputed property belongs to the Claimant, the Defendant would have been allowed to continue damaging and altering the property's nature, as well as threatening the Claimant's employees. If the disputed property belongs to the Defendant, the injunction preserves the property, allowing the Court to make a substantive ruling on ownership. It is presumed that all parties would welcome this outcome.

[35.] Counsel put forward no acceptable special factor for the Defendant that would prevent the Court from granting the interim injunction application.

[36.] In light of the circumstances, I was convinced that there is a serious issue to be tried between the parties, that an award of damages would not be adequate for the Claimant, and that the balance of convenience favors the Claimant. As no special factors were identified that would prevent the Court from acceding to the application, I granted the interim injunction sought, pending the substantive Fixed Date Claim hearing.

<u>Leave to Appeal / Stay Application</u>

The Issues for Consideration

[37.] The issues for consideration are:

1) Does the Defendant require leave to appeal the Injunction Order?
2) Has the Defendant met the threshold for a stay or variation of the Injunction Order?

<u>Is Leave Required?</u>

[38.] Counsel for the Claimant raised a preliminary argument, asserting that leave is unnecessary to appeal Supreme Court decisions that grant or deny interim injunctions. Conversely, Counsel for the Defendant contended that leave is indeed required. The Court subsequently heard the application for leave.

[39.] Counsel for the Defendant relied upon the dictum of Klein J in **Lucayan Towers South Condominium Association v H. Godfrey Waugh and Another; Lucayan Towers South Condominium Association v Gregg Waugh and Another; Lucayan Towers South**

Condominium Association v Julie Glover and Another [2022] 1 BHS J. No. 128, where he stated at para 4:

> "Appeals to the Court of Appeal from interlocutory rulings or orders can only be done with the leave of the Supreme Court or, failing that, the leave of the Court of Appeal (s.11(f) of the Court of Appeal Act). In this regard, Rule 27 (5) of the Court of Appeal Rules provides that:
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> Wherever under the provisions of this Act or of these Rules an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below".

[40.] However, the cited case addressed summary judgment decisions and the general position on interlocutory rulings or orders concerning appeals. It did not cover exceptions to the general position, such as interlocutory decisions on injunction applications. With this context, Counsel for the Claimant opposed the Defendant's submission, citing the case of **St. George and Others v. Hayward and Others** [2008] 5 BHS J No. 16, where Adderley J succinctly and helpfully opined at paragraph 8:

> "Section 11 of the Court of Appeal Act provides an exception to obtaining leave even when the order is interlocutory. It reads:
>
> **11. No appeal shall lie-**
>
> ...
>
> **(f) without the leave of the Supreme Court or the Court from an interlocutory order or interlocutory judgment made or given by a Justice of the Supreme Court except:**
>
> ...
>
> **(ii)where an injunction or the appointment of a receiver is granted or refused."**

[41.] I prefer the submissions of Counsel for the Claimant. Although the general rule requires leave to appeal interlocutory Supreme Court rulings, such as summary judgment decisions, leave is not required for interlocutory decisions involving the granting or refusal of an injunction, as clarified by Adderley J in the **St. George** case (supra).

[42.] Consequently, the Defendant is entitled to appeal the Injunction Order to the Court of Appeal without further recourse to this Court. The application, insofar as it pertains to leave to appeal, was therefore unnecessary.

Stay Application Pending Appeal

[43.] By its application, the Defendant seeks a stay of the Injunction Order. Counsel for the Defendant cites Rule 12(1)(a) of the Court of Appeal Rules which provides:

> "(1) Except so far as the court below or the court may otherwise direct: (a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below."

[44.] Counsel also cites Part 9.8 of the CPR, which provides:

> "(1) A defendant who contends that the Court should not exercise its jurisdiction in respect of any proceedings may apply to the court for a stay and a declaration to that effect"

The Test for A Stay

[45.] The test as to whether a court should grant a stay was discussed in **Linotype-Hell Finance Ltd v Baker** [1993] 1 WLR 321 as per Staughton LJ, where he states at page 323:

> **"It seems to me that, if the Defendant can say without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for a stay of execution."**

[46.] This threshold was further explained in **Turtle Creek Investments Ltd. v Daybreak Holdings Ltd.** SCCivApp. No. 234 of 2018, where Jones JA, sitting as a single judge of the Court, provided the following guidance by stating:

> "10. This Court recently considered an appeal against the refusal of application for stay of proceedings after judgment in the Supreme Court. In Esley Hanna v Bradly Hanna SCCivApp No. 182 of 2017 [Delivered August 7 2018] in a judgment delivered by Madam Justice Crane Scott we said at paragraph 11 on page 5:
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> 'Section 12 of the Court of Appeal Act mirrors the provisions of O 59. r. 13 of the former English Rules of the Supreme Court 1965. It is therefore useful to advert to the following portions of Practice Note 59/13/1 found at pages 1076- 1077 of Volume 1 of the 1999 Edition of The English Supreme Court Practice:
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> 'Stay of execution or of proceedings pending appeal...Neither the Court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled," pending an appeal (The Annot Lyle (1886) 11 P.D. 114, p.116, C.A.; Monk v. Bartram [1891] 1 Q.B. 346); and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from - for example, inquiries (Shaw v Holland [1900] 2 Ch. 305) or an account of profits in a passing off action (Coleman & Co.

v. Smith & Co. Ltd. [1911] 2 Ch. 572) or the trial of issues of fact under a judgment on a preliminary question of law (Re Palmer's Trade Mark (1883) 22 Ch. D. 88).

But the Court is likely to grant a stay where the appeal would otherwise be rendered nugatory (Wilson v. Church (No.2) (1879) 12 Ch. D. 454, pp. 458, 459, C.A.), or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is entirely in the discretion of the court. (Becker v. Earl's Court Ltd. (1911) 56 S.J. 206; The Retata [1897] P. 118, p. 132; Att.-Gen. v. Emerson (1889) 24 Q.B.D. 56, pp. 58, 59) and the Court will grant it where the special circumstances of the case so require...... 6 "Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the Court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (Atkins v. G.W. Ry. (1886) 2 T.L.R. 400, following Barker v. Lavery (1885) 14 Q.B.D. 769 C.A.;......Nowadays the Court may be prepared (provided that the appeal has sufficient merit) to grant a stay, even where that test is not satisfied, if enforcement of the money judgment under appeal would result in the appellant's house being sold or his business being closed down. But if such a stay is granted the Court should impose terms which (so far as possible) ensure that the respondent is paid without delay, if the appeal fails, and that appellant is prevented from depleting his assets in the meantime, except for any and necessary expenditure. This approach was endorsed in Linotype-Hell Finance Ltd v. Baker [1992] 4 All E.R. 87(Straughton L.J., sitting as a single Lord Justice). It was also endorsed in Winchester Cigarette Machinery Ltd v. Payne (No. 2) (1993) The Times, December 15, but the Court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The Court also emphasized that indications in past cases do not fetter the scope of the Court's discretion."

Whether the Defendant will be Ruined?

[47.] Counsel for the Defendant submits that the Defendant would be ruined if the injunction is not stayed. Counsel also submits that the appeal has a reasonable prospect of success. On this point, Counsel relies upon the case of **Linotype-Hell Finance Ltd v Baker** (supra).

[48.] Counsel also cited **Leicester Circuits Ltd. V Coates Brothers PLC** [2002] EWCA CIV 474 per Potter LJ at para 13:

> **"The proper approach is to make the order which best accord with the interest of justice. Where there is a risk of harm to one party or another, whichever order is made, the Court has to balance the alternatives to decide which is less likely to cause injustice."**

[49.] It must be noted that Counsel has not specified how or in which way the Defendant would be ruined.

[50.] The Defendant's Counsel further submits through affidavit evidence and oral arguments that the Injunction Order is destroying evidence critical to the Defendant's possessory claim to the land. However, Counsel for the Defendant failed to identify this evidence that is being destroyed. Counsel appears to be implying that the grant of the injunction will, in effect, extinguish the competing possessory claim of the Defendant by interrupting the time necessary to ground a quieting of the title of the property in dispute.

[51.] The Court does not accept this argument by Counsel for the Defendant. The Court believes that this is an entirely flawed premise. If anything, the Injunction Order serves to *preserve* evidence of activity on the property because the Defendant is not allowed to add or remove any structure or object to or from the subject property. In fact, one of the reasons the injunction was ordered was to preserve the status quo pending a resolution of the substantive issues between the parties.

[52.] Conversely, Counsel for the Claimant opposed the application, arguing that the Defendant has failed to demonstrate financial ruin or other significant harm if the stay is not granted, and has not established any prospect of success on appeal or otherwise.

Realistic Prospects of Success

[53.] To assess whether the Defendant has realistic prospects of success on appeal, the Court must review the Defendant's proposed grounds for appeal.

[54.] The Affidavit of Melanie Rolle, filed on June 24, 2024, in support of the Defendant's application for leave, includes a draft Notice of Appeal outlining the intended grounds, which can be summarized as follows:

1. **The decision was against the weight of the evidence;**
2. **The Judge misapplied the American Cyanamid factors;**
3. **The Judge was biased and unfair;**
4. **The Judge was unfair and unjust in rejecting the Applicant's (Defendant's) version of the draft interim Injunction Order as it would have preserved the status quo and been fair to both parties; and**
5. **The Judge failed to give a reason for his decision.**

<u>Ground 1</u>

The Decision Was Against the Weight of the Evidence

[55.] Melanie Rolle, an affiant for the Defendant, declares in her affidavit that the Defendant claims ownership of the property in question by virtue of long possession, asserting that this possession has ousted the Claimant's interest and extinguished its documentary title. Based on this declaration, Counsel for the Defendant urges the Court to consider that there is a reasonable prospect that the Court of Appeal will overturn the interim injunction and rule in favor of the Defendant's appeal.

[56.] Counsel for the Defendant is urging the Court to determine the central issue between the parties at the injunction hearing. This position is without merit. The Defendant's claim of adverse possession, as the primary issue in dispute, can only be resolved at the substantive hearing. The Court rightly held that it could not make a conclusive finding of fact or law determinative of the entire matter, on the Claimant's application for an interim injunction.

[57.] The affidavit evidence of the Claimant provides documentary proof of ownership of the property in dispute by the Claimant along with evidence of abuse of the property by the Defendant. The Court rightly applied the factors in **American Cyanamid v Ethicon** (supra) wherein Lord Diplock held that it is unnecessary for the Applicant to establish a *prima facie* case and it is no part of the Court's function at this stage to resolve conflicts of evidence, all that is necessary to show is that there is a serious question to be tried; thus, the reason for the undertaking in damages in the event the injunction ought not to have been granted.

[58.] This ground of appeal goes against the weight of the evidence and has no realistic prospect of success.

Ground 2

The Learned Justice Misapplied the American Cyanamid Factors;

[59.] The Defendant submits that the Court erred in its determinations on the following legal issues: whether there is a serious issue to be tried; whether damages would provide an adequate remedy; and whether the balance of convenience favors the Claimant or the Defendant.

[60.] The Court remains confident in its decision on this ground and has already expressed its reasonings above at paragraphs 13 through 39. Counsel for the Defendant has not convinced the Court to resile from its earlier position.

Ground 3

The Learned Justice Was Unfair and Biased towards the Defendant.

[61.] The Defendant presents a list of alleged acts of misconduct by the Court during the hearing, asserting that they amount to bias and unfairness against the Defendant and proffering them as grounds for appeal against the Court's decision.

[62.] The Court rejects the assertion that it acted unfairly or was biased against Counsel for the Defendant. Foremost, these allegations were not raised during the hearing for the Injunction Order, making it improper for Counsel to present issues to the Court of Appeal that were not first brought before this Court. In this regard, the Court relies on the dictum of Frasier SJ in **Strachan v. Simon et al.** 2021/CLE/gen/No.00863, where she opined:

> **[30] In relation to the alleged bias and impropriety, such grounds are baseless, and not substantiated by corroborating evidence. Based on both the Rahming and Second Rahming Affidavits, Mr. Strachan's Counsel seeks to rely on hearsay evidence from opposing Counsel regarding purported communication with him and the Court. Furthermore, such submissions related to any purported bias were not placed before this Court through a formal application. It was therefore, not properly canvassed before me. Counsel is reminded to conduct themselves with professionalism and respect when addressing the Court or providing any legal documents or evidence for the Court's consideration.**
>
> **[31] Not only that, but no formal application in relation to any alleged bias or impropriety has been placed before this Court. It appears that Mr. Strachan's Counsel seeks to have the Court of Appeal consider matters that have not first been properly considered by this Court and, thus, irrelevant to an appeal of the Costs Ruling. Such accusations need to be formally placed before the Court in a separate and distinct application for consideration and investigation before the Court of Appeal may hear such matters. Such purported grounds of appeal are, in the circumstances, irrelevant and unsustainable.**
>
> **[32] I am comforted by this reasoning based on the Court of Appeal decision of Smith v Coalition to Protect Clifton Bay - BS 2017 CA 78. At paragraphs 28 and 29, the Court opined:**
>
>> **"28 As I stated earlier, the Applicant seeks to challenge Ruling No. 11 which only goes to, inter alia, extending the time for the Applicant to pay costs. Thus, all other issues or matters raised in the grounds of appeal not arising out of that Ruling may be discounted and ignored for the purposes of this application inasmuch as they are not relevant to the decision we have to make.**
>>
>> 29 Unfortunately, the Applicant did not appeal Ruling No. 11 within the appropriate time. Further he participated, without objection, in the taxation of the costs. By doing so he may be said to have accepted his liability to pay the respondent's costs. It was not now competent for him to raise in his grounds of appeal, issues which he did not argue before the learned Judge and to seek to canvass matters which, in any event are not of any consequence to the Ruling appealed against."

[63.] As in **Strachan v. Simon** (supra), the claims of bias and unfairness are baseless, lacking proper evidence, and no formal application was submitted to the Court regarding them. Consequently, if leave were granted, the Court of Appeal would be reviewing matters not previously adjudicated by either Counsel or the Court of first instance, where the alleged bias occurred. This is simply improper. The Court's questioning of Counsel for the Defendant to clarify submissions, or its disagreement with Counsel's position, should not readily give rise to accusations of bias and unfairness. Such serious allegations should not be made solely due to dissatisfaction with the Court's decision. This ground of appeal is irrelevant and has no realistic prospect of success.

Ground 4

The Learned Justice was Unfair and Unjust in Rejecting the Defendant's version of the Draft Interim Injunction Order.

[64.] The Defendant's position on this matter is entirely misconceived and lacks merit. Following the grant of the Injunction Order, the Claimant's Counsel provided a draft order reflecting the Court's decision to both the Court and the Defendant. The Defendant, however, submitted a competing draft order that did not align with the Court's decision, and it was rightly rejected. Acceptance of the Defendant's draft order would effectively negate the injunction. This ground, too, is bound to fail.

Ground 5

The Judge Failed to Give Reasons for his Decision.

This ground lacks merit. At the conclusion of the injunction hearing, the Court provided oral reasons for granting the injunction, later documented in paragraphs 13 to 39 of this Ruling. In summary, the Court found that there is a serious issue to be tried between the parties, the balance of convenience favors the Claimant, and that damages would not be an adequate remedy under the circumstances. Accordingly, the interests of justice require that the injunction be granted on a temporary basis.

Decision

[65.] It is judicial notice that the Court has broad discretion concerning granting stay orders. The learned authors of **Odgers on Civil Court Actions** at page 460 wrote:

> "Although the court will not without good reason delay a successful plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection [...] [The] court has wide powers under the Rules of the Supreme Court."

[66.] Further guidance is found in **Linotype-Hell Finance Ltd. v Baker** (supra), wherein Staughton L.J. opined at page 323:

> "It seems to me that, if the defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

[67.] In my view, the Defendant has not met the threshold required for a stay of the Injunction Order. The law is clear on this matter: the Defendant must demonstrate, with evidence, that without a stay, he faces ruin and that his appeal has a reasonable prospect of success. Meeting this threshold requires substantiated evidence, not mere assertions. The Defendant cannot rely solely on the claim that he will face ruin without a stay; the law mandates evidence to support any alleged ruin, as bare assertions are inadequate.

[68.] The Court prefers the submissions of Counsel for the Claimant. The Court is of the opinion that the application for a stay order should be dismissed. The normal rule is for no stay. The Court will not make a practice of depriving a successful party of the fruits of the judgment in his or her favour on a bare assertion. Additionally, the Defendant has not demonstrated a realistic prospect of success regarding the proposed grounds of appeal. Based upon the above reasoning, the Court is of the opinion that the Defendant's case is misconceived and bound to fail.

<u>The Application for a Variation</u>

[69.] Counsel for the Defendant proffered an alternative draft order to Counsel for the Claimant and the Court after the Injunction Order was granted. This proposed variation is found in the Defendant's draft order. The draft order was rightly rejected then on the basis that it was antithetical to the Injunction Order that was given and did not reflect the Court's decision. This variation was akin to setting aside the Injunction Order. For the reasons already traversed, this application also fails.

CONCLUSION AND DISPOSITION

[70.] Based on the above principles, I conclude as follows:

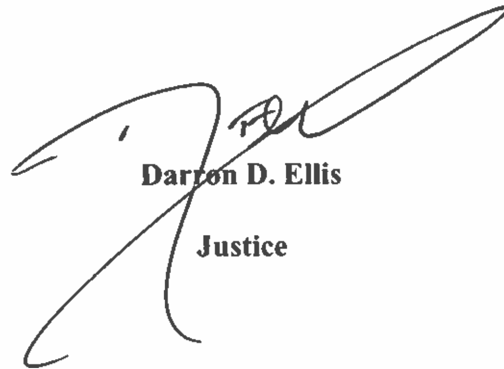
i. The Injunction Order granted is an interlocutory order that falls within the exception of Section 11 of the Court of Appeal Act; therefore, leave is not required to appeal the Injunction Order to the Court of Appeal.

ii. After detailed analysis, and having concluded that the Defendant's proposed appeal is misconceived and bound to fail, along with the other reasons outlined above, the application for a stay or, alternatively, a variation of the Injunction Order is denied.

iii. Out of an abundance of caution and for clarity of the Court's intention, the Injunction Order filed on June 10, 2024, should be amended as follows. Where there is a reference to "***Claimant's property***," the following words should be substituted: ***"the property which is the subject matter of the dispute as described and set out in the conveyance dated July 21, 2008, between the late Freddie Morley and the Claimant which is recorded at the Registry of Records in volume 10650 at pages 021 to 029."***

[71.] In the premises, I order that the Defendant's application seeking leave to appeal and a stay or a variation of the Injunction Order is dismissed with costs to the Claimant. I propose to summarily assess these costs and invite submissions, as to the appropriate amount of such costs, within 14 days hereof.

Dated this 8th day of November 2024



Darron D. Ellis

Justice