

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No. 2024/CLE/gen/00088

B E T W E E N

TONY CORNELIUS ALEXANDER KEMP SR.

Claimant

AND

SHERMAN JOHNSON

Defendant

Before: Her Ladyship the Honourable Madam Justice Simone Fitzcharles
Appearances: Mr Sidney Dorsett for the Claimant
No appearance for the Defendant
Hearing: 16 April 2024

RULING

FITZCHARLES J.

1. This matter came before me as the Duty Judge today. Counsel asked that I hear the matter on the papers, and having perused the material filed with the Court, I, at first decided to accede to the mode of hearing requested.

The Application

2. I have read and considered the Notice of Application filed on 02 Feb 2024, the supporting Affidavit of Patricia Jarrett, the Certificate of Urgency filed also on 02 February 2024, the draft Order with it, the Skeleton Argument of the Applicant and the Fixed Date Claim filed on 02 Feb 2024.
3. Having considered the application, the Court decided to visit the situs of the alleged violation or apprehended violation of the Applicant's rights on and to hear Counsel. There, the Court observed from the Claimant's backyard that the neighbouring backyard (said to belong to the Defendant) had a tall 2-storey structure (unfinished), which comes within approximately 2 1/2 feet of the Claimant's rear wall. The 2-storey structure has an opening for a window which easily looms above the Claimant's backyard.
4. The papers contained a portion of the Conveyance by which the Claimant purchased his lot of land from Canzo Properties Limited. There are restrictive covenants which run with the land and it is represented that the neighbouring lot on which the impugned structure sits is also subject to such restrictive covenants. Covenant No. 7 on the Conveyance by which (it is represented) owners of the Highland Estates subdivision are bound states in part as follows:

"7. No building...or projections of any kind shall be built on any lot at a less distance than Twenty (20) feet from the front or rear boundary lines..."
5. The Court observed that, on the basis of the orientation of most of the homes on the street where the Claimant lives, and where the Defendant's lot is situated, the rear of such lots appears to be towards the area where the Claimant has built his back wall, which is also at the closest point between the impugned structure and the Claimant's rear wall.
6. Although further evidence would be necessary to make any findings in this case as to orientation of rear, front and side boundaries, based on observations thus far, the Court is of the view that the Defendant's structure appears to have been built in contravention of this restrictive covenant (No. 7 in the Conveyance of Highland Estates lots).
7. The Claimant states in his application that this constitutes a breach of the restrictive covenant, and that it creates a nuisance which is likely to bring about a devaluation of his property. He feels now that the Defendant's building has given the land a "shanty town-like" appearance. His privacy will be lost with the structure and rear window of the same looming over his back yard. The overhanging eave from the Defendant's roof is quite close to overhanging the Claimant's wall.
8. The Court has observed that due to the closeness of the Defendant's 2nd floor window to the Claimant's wall, there will be easier access to the Claimant's property from the rear

window, and easy access from the wall to the Defendant's window. This could create a security risk. It is not merely aesthetically displeasing.

9. The Claimant avers that he did not simply rush to the Court without first trying to resolve the matter with his neighbor-to-be. He stated that when he first saw the workmen digging the footing for the building so alarmingly close to his rear wall he complained to the building contractor. He tried to notify the Defendant. He wrote a TO WHOM IT MAY CONCERN letter to the defendant (because at that time the Claimant did not know the defendant's name). Nothing was done to stop the building.
10. The Claimant therefore complained to the Building Control section of the Ministry of Works, personnel in charge at the Department of Physical Planning, and the Chairman of the Town Planning Committee. The Claimant felt that these departments are responsible for regulating land use and development, with the power to stop violations of planning laws and regulations. Such complaints bore no fruit.
11. The Defendant's workmen appeared to increase their speed in ensuring that the building was put up. The Defendant has ignored the Claimant's pleas for him to desist. When the Court saw the building it had a roof on it, but the electrical fixtures, windows and walls were not finished with "browning" and paint. The inside was not finished either.

Supreme Court Act and Supreme Court Civil Procedure Rules, 2022

12. Pursuant to **section 21 of the Supreme Court Act (Chapter 53)**, in all cases where it is just and convenient, the Court has jurisdiction to grant an injunction, whether it is interlocutory or final and on such terms as the Court thinks fit. This provision is supported by **Part 17 section 1(b) of the Supreme Court Civil Procedure Rules 2022** which provides that an order for an interim injunction is amongst interim remedies which the Supreme Court may grant. By **Part 17.3**, an order for an interim remedy may be made at any time.
13. According to **CPR Rule 17.4 (3) and 17.3 (4)**:

“(3) The Court may grant an interim remedy on an application made without notice if it appears to the Court that there are good reasons for not giving notice.

“(4) The evidence in support of an application made without giving notice must state the reasons why notice has not been given.”
14. The Claimant has not been able to serve the Defendant save by substituted service. He does not know how to contact the Defendant directly, save that he had a telephone call with the Defendant who claimed to be “out of town”. The fixed date claim and other

documents supporting the same were left with one Mr Cochinmogoulos, an agent or acquaintance of the Defendant, who promised to give them to the Defendant. The Claimant could not find the Defendant to serve the papers for the injunction.

American Cyanimid v Ethicon Ltd [1975] AC 396

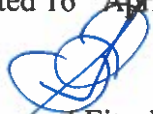
15. The criteria the Court considers in granting an interlocutory injunction are:
- (1) whether there is a serious issue to be tried;
 - (2) whether damages would be an adequate remedy for any loss suffered by either party as a result of the injunction;
 - (3) whether the balance of convenience lies in favour of the plaintiff or the defendant (if damages would not adequately compensate either party); and
 - (4) if the balance of convenience is balanced between the parties, the Court should maintain the status quo.

Disposition

15. There is an apparent breach of a restrictive covenant and tort of nuisance issues to be tried. These are sufficiently serious. On the question of damages being adequate, if the building process is stopped and it is found this was not justly done, the Defendant's inconvenience for a temporary halt in his project can be compensated in damages.
16. As for the Claimant, the Defendant's actions threaten to cause the Claimant and his wife a lifetime of unhappiness and inconvenience. Moreover, the plummet in value of the property and enhanced security and privacy issues do not seem to be unreal prospects at this stage. While some of these issues may be remedied by damages others may not.
17. The balance of convenience at this stage must favour a cessation of the building of this structure until the Court determines the matter finally or until further Order. Any hardship to the Defendant is brought about by the Defendant's own actions in willfully ignoring the restrictive covenants and hastening the completion of the building after the Claimant brought the Defendant's alleged infractions to his attention.
18. In the circumstances, I grant the Claimant's application for an interim injunction and in doing so make the following Order:
 - (1) An interim injunction is granted restraining the Defendant, his building contractor, workmen, servants and/or agents, until the determination of this matter by the Court or until further order, from continuing construction of any building on Lot 18 of the Plan of Highland Estates, which is situated less than 20 feet from the boundary of Lot 16 of the Plan of Highland Estates subdivision in the Western District of the Island of New Providence, one of the Islands in the Commonwealth of The Bahamas;

- (2) This Order shall be served by:
- (i) posting a copy of the same conspicuously on the disputed structure under construction; and
 - (ii) publishing the Order in a newspaper of general circulation on the island of New Providence 2 times over a period of 14 days, with a 7 day interval between publication;
- (3) Within 7 days after the last publication of this Order, the Defendant is to give the Claimant an address where the Claimant can serve him with the Affidavit in support of this injunction;
- (4) Within 28 days after the last publication of this Order, the Defendant shall file and serve upon the Claimant an affidavit setting forth his evidence on the facts of this matter;
- (5) The parties shall have liberty to apply;
- (6) Costs shall be in the cause.
- (7) Undertaking: The Claimant hereby undertakes and the Court accepts such undertaking of the Claimant to pay any damages that may be awarded as a result of the discharge of the injunction where it is found the same was not warranted.

Dated 16th April 2024



Simone I Fitzcharles

Justice