

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2023/CLE/gen/00547

BETWEEN

SAIL ROCK LIMITED

Claimant

AND

OLD FORT BAY PROPERTY OWNERS ASSOCIATION LIMITED

Defendant

Before: Her Ladyship The Honourable Madam Senior Justice
Deborah Fraser

Appearances: Mrs. Christina Davis-Justin for the Claimant
Mrs. Krystal D. Rolle K.C., Mr. Darren Cash and Ms.
Vanessa Carlino for the Defendant

Judgment Date: 02 May 2024

Interim Relief – Access to Right of Way - Interim Declaration – Interim Injunction -
Part 17 of the Supreme Court Civil Procedure Rules, 2022 – Rules 17.1(1)(a) and
17.1(1)(b) of the Supreme Court Civil Procedure Rules, 2022 – Substantive Issue
to be Tried – Legitimate Interest - Balance of Convenience – Adequacy of
Damages – Special Factors

RULING

1. This is an application brought by the Claimant, Sail Rock Limited (“**Sail Rock**”) requesting the following relief: (i) an interim declaration stating that Sail Rock is entitled to a right of way granted pursuant to a conveyance dated 19th October 1996 made between Sail Rock and Gruntsfield Limited, recorded in the Registry of Records in Volume 6855 at pages 164 to 174; and (ii) an interim injunction to restrain the Defendant, Old Fort Bay Property Owners Association Limited (“**Old Fort**”), their agents, employees, workmen or otherwise howsoever from

obstructing, permitting or encouraging obstruction or otherwise interfering with Sail Rock's reasonable enjoyment and use of said right of way.

Background

2. Sail Rock is a company incorporated under the laws of the Commonwealth of The Bahamas and is the owner in fee simple of all those several pieces or parcels of land situate in the community known as Old Fort Bay in the Western District of the Island of New Providence containing 2.840 acres and 4.732 acres (collectively, the "**Property**").
3. Old Fort is a company incorporated under the laws of the aforesaid Commonwealth carrying on the business as a property management company responsible for the maintenance and control of all common areas and roadways in the Old Fort Bay community.
4. Pursuant to an indenture of conveyance dated 29 June 1984 between Old Fort Bay Company Limited ("**OFBCL**") and Gruntsfield Limited ("**GL**"), recorded in the Registry of Records in Nassau, The Bahamas in Volume 4219 at pages 386 to 393 ("**Principal Conveyance**"), OFBCL conveyed to GL property comprising of two adjoining parcels, and granted as appurtenant thereto a right of way over a Fifty (50) foot road reservation ("**Right of Way**") described as follows:

"Together with full and free right and liberty for [GL] its successors and assigns the owners and occupiers for the time being of the said hereditaments (in common with all others who have or may hereafter have the like right) at all times hereafter by day and by night with or without horses or other animals motor cars carts carriages and other vehicles of any description to go pass and repass over upon and along the piece parcel or strip of land comprising a Fifty (50) foot wide Road Reservation shown on the diagram or plan hereto attached and thereon coloured Brown..."

5. By confirmatory conveyance dated 21 December 1992 and recorded in the said Registry of Records in Volume 5955 at pages 329 to 343 ("**Confirmatory Conveyance**") OFBCL and GL allegedly confirmed the dimensions of the adjoining parcels conveyed in the Principal Conveyance. Accordingly, the adjoining parcels measuring 2.840 acres ("**Green Land**") and 4.372 acres ("**Pink Land**") respectively were conveyed to GL.
6. Pursuant to the terms of the Confirmatory Conveyance, OFBCL and GL also agreed to relocate and vary the Right of Way as follows:

"In pursuance of the agreement by [OFBCL] to enter into these premises and for the consideration expressed in the Principal Indenture [OFBCL] as Beneficial Owner hereby grants conveys and confirms unto [GL] ALL THAT the several pieces or parcels of land (hereinafter called the Scheduled Hereditaments) hereinafter described in the Schedule hereto TOGETHER

WITH full and free right and liberty for [GL] and its successors in title the owners and occupiers for the time being of the Scheduled Hereditaments (in common with all others who have or may hereafter have the like right) at all times hereafter by day and by night with or without horses or other animals motor cars carts carriages or other vehicles of any description for all purposes connected with the use and enjoyment of the Scheduled Hereditaments for private residences but not for any other purposes whatsoever to go pass and repass over upon and along the piece parcel or strip of land comprising a Fifty (50) foot wide road reservation on the said plan attached hereto and thereon coloured Brown as a means of access to and from the Scheduled Hereditaments to the hereditaments and premises shown on the said plan hereto attached and thereon coloured Yellow and from there to the public roadway known as Western Road shown on the said plan...”

7. The Confirmatory Conveyance outlines terms for varying or relocating the Right of Way. Pursuant to a further supplemental indenture dated 12 May 1993 between OFBCL and GL, recorded in the said Registry of Records in Volume 7797 at pages 367 to 374 (“**Supplemental Indenture**”), OFBCL and GL agreed to vary the terms of the Right of Way in accordance with the Confirmatory Conveyance as follows:

“[OFBCL] hereby grants unto [GL] full and free right and liberty for [GL] and its successors in title the owners and occupiers for the time being of [GL’s] hereditaments and premises (in common with all others who have or may hereafter have the like right) at all times hereafter by day and by night with or without vehicles of any description for all purposes connected with the use and enjoyment of [GL’s] hereditaments and premises for private residences but not for any other purposes whatsoever to go pass or repass over upon and along the piece parcel or strip of land comprising a Fifty (50) foot wide road reservation shown on the said plan attached hereto and thereon coloured Brown as a means of access to and from [GL’s] hereditaments and premises to the hereditaments and premises shown on the said plan attached to the [Confirmatory Conveyance] and thereon coloured Yellow...”

8. From my understanding of the deeds, it appears that reference to “Yellow Land” is referring to the plot of land coloured yellow in the Confirmatory Conveyance. There has been no further variation of the Right of Way since the Supplemental Indenture. The Right of Way’s current location and route is depicted in the plan annexed to the Supplemental Indenture (the route of the Right of Way is from the Green Land and Pink Land by a blue road reservation – adjacent to the Pink Land – allegedly, to provide access to and from the Pink Land and Green Land to and from the Yellow Land, thereby providing access to the public roadway known as the Western Road).

9. The pieces of parcel or strip of land and Right of Way conveyed in the Principal Conveyance and Confirmatory Conveyance were conveyed by GL to Sail Rock in an indenture of conveyance dated 19 October 1996 and recorded in the said Registry of Records in Volume 6855 at pages 164 to 174 ("**Sail Rock Conveyance**").
10. Prior to the Sail Rock Conveyance, the Pink Land and Green Land were developed into lots comprising an area known as Old Fort Bay Villas II by GL. Between 1985 and 1994, a canal was constructed in the vicinity of the Green Land. Due to its location and size, the Green Land to the south of the Pink Land was mostly absorbed by the canal. However, the Pink Land remained intact, and the Right of Way allegedly remained accessible via the blue 50 foot road reservation adjacent to the Pink Land. This, Sail Rock alleges, means access to the Right of Way was not at any time obstructed or interrupted by the canal.
11. Sail Rock presently owns lots 1 through 5 in the area known as Old Fort Bay Villas II, situate on what was conveyed as the Pink Land. Furthermore, Sail Rock owns the strip or parcel of land conveyed in the Sail Rock Conveyance, which is also situate on the Pink Land in Old Fort Bay Villas II.
12. Sail Rock further alleges that GL, by its agents or otherwise, continuously used the Right of Way in its current location for access to and from the Pink Land and the Yellow Land since 1992 until it conveyed the parcels to Sail Rock in 1996.
13. Notwithstanding the aforementioned Right of Way and purported continuous access thereto, Old Fort admittedly erected a locked gate across the Right of Way in or about November 2022 thereby, allegedly, wrongfully obstructing and interfering with Sail Rock's enjoyment and use of the Right of Way.
14. Shortly after becoming aware of the alleged interference, Sail Rock's president, Mr. Sean Farrington, wrote to Old Fort asserting Sail Rock's entitlement to the Right of Way and providing supporting evidence of the root of title. Despite various correspondence between the parties, Old Fort, through its Chairman, Mr. Sean Andrews, stated that it would not remove or open the locked gate.
15. Sail Rock then engaged its present counsel who by email sent a demand letter dated 10 February 2023 ("**Demand Letter**") to Old Fort demanding that Old Fort refrain from any wrongful interference with Sail Rock's entitlement to the Right of Way. Upon request, the chain of title in support of the alleged Right of Way was subsequently sent to Vanessa Carlino, Old Fort's counsel.
16. On or about 23 March 2023, Carlino & Co. acknowledged the grant of the Right of Way but alleged abandonment by Sail Rock and maintained that Old Fort was entitled to close and lock the gate it erected across the Right of Way. Consequently, Old Fort allegedly continues to obstruct and interfere with Sail Rock's Right of Way by preventing access to said Right of Way.

17. On 07 July 2023, the Claimant filed a Standard Claim Form and Statement of Claim against Old Fort seeking, inter alia, a declaration that it is entitled to the Right of Way granted to GL, its predecessor in title, and injunctive relief to restrain Old Fort by their agents, employees or otherwise from obstructing or otherwise interfering with, the reasonable enjoyment and use of the Right of Way.
18. In turn, Old Fort filed a Defence and Counterclaim on 11 August 2023. Old Fort avers that any purported right of way granted to GL was never granted as a general right of way over the Old Fort Bay Subdivision principal right of way. It further avers that the right of way granted to GL was a specific and limited right of way solely for the purpose of moving to and from the parcels of land GL acquired and for no other purpose.
19. Old Fort also avers that the original right of way granted to GL was abandoned and/or extinguished by reason of permanent obstruction of the same. It is further averred that GL acknowledged in 2014 that it had no right of way over the Old Fort Bay Subdivision principal right of way and resultantly entered into a license agreement on its own behalf and on behalf of its successors in title for the purpose, inter alia, of acquiring a right of way over the Old Fort Bay Subdivision principal right of way.
20. In addition, Old Fort contends that Sail Rock itself via its officers, representatives and agents acknowledged in 2009 that it had no right of way over the Old Fort Bay Subdivision principal right of way and entered into an agreement with Old Fort for the purpose of, inter alia, gaining a right of way over the roadways of the Old Fort Bay Subdivision including the Old Fort Bay Subdivision principal right of way.
21. By way of Counterclaim, Old Fort requests several declarations, inter alia, declaring that: (i) the Right of Way was a grant of a right of way specific and limited to the purpose of providing a means of access to, from and between the Blue and Pink Lands and for no other purpose; (ii) that right of way was abandoned; and (iii) Old Fort is entitled to maintain a gate which separated the Pink Land from the Old Fort Bay Subdivision ("**Middle/Intermediary Gate**") to lock the same at its sole and absolute discretion.
22. On 08 September 2023, Sail Rock filed a Reply and Defence to Counterclaim denying the claims made in the Defence and Counterclaim.
23. Thereafter, on 06 November 2023, Sail Rock brought the present application seeking the following relief:

"(a) An interim declaration pursuant to Rule 17.1(1)(a) of the Supreme Court Civil Procedure Rules ("CPR") that the Claimant is entitled to a right of way expressly granted pursuant to a conveyance dated 19 October 1996 made between the

Claimant and Gruntsfield Limited, recorded in the Registry of Records in Volume 6855 at pages 164 to 174,

(b) An interim injunction pursuant to Rule 17.1(1)(b) of the CPR to restrain the Defendant their agents employees or workmen or otherwise howsoever from blocking up or obstructing or permitting or encouraging the blocking up or obstructing, or otherwise interfering with, the Claimant's reasonable enjoyment and use of said right of way."

Issue

24. The issues that the Court must decide are: (i) Whether the Court should accede to Sail Rock's request and grant an interim declaration? (ii) Whether the Court should accede to Sail Rock's request and grant an interim injunction?

Evidence

Sail Rock's Evidence

25. Sail Rock filed the affidavit of Sarah Farrington on 06 November 2023 ("**First Farrington AF**") which provides that: (i) Sarah Farrington is the Secretary of Sail Rock and is duly authorized to make the affidavit; (ii) a history of the matter as noted above (the Sail Rock Conveyance, Confirmatory Conveyance, the Supplemental Indenture, a plan of the 50 foot road reservation coloured blue, the plan depicting the canal by the Pink Land, correspondence between counsel and the Demand Letter, are exhibited to the affidavit); (iii) Sail Rock has had use of the Right of Way since its purchase of the properties since 1996; (iv) the Yellow Land was developed into the area known as Islands at Old Fort Bay. There is no canal constructed or other obstructions which prevented or interfered with Sail Rock's access to the Yellow Land until Old Fort's interference; and (v) Sail Rock has had continued access to the community now present on the Yellow Land, which provides access to the Western Road through the gate known as the western gate.
26. Sail Rock also filed the a supplemental affidavit of Sarah Farrington on 18 January 2024 ("**Supplemental Farrington AF**") which states that: (i) Old Fort persists in its obstruction of the Right of Way (photographs of the gate causing the obstruction is exhibited); and (ii) the gate is erected near the entrance point of the Yellow Land and completely restricts access to and from the Yellow Land via the Right of Way (a plan indicating the location of the locked gate on the Right of Way is exhibited).
27. Lastly, Sail Rock filed the second supplemental affidavit of Sarah Farrington on 22 January 2024 ("**Second Supplemental Farrington AF**") which provides that: (i) Sail Rock carried out a diligent search of its records and have no electronic or physical record of Sail Rock receiving any notice from Old Fort advising of restricted access to Old Fort Bay Islands though the intermediary/middle gate; (ii)

no alternate route to access the Western Road was agreed and the Right of Way was not varied in accordance with the terms of the Confirmatory Conveyance; (iii) the proposed alternative route is problematic because: (a) in order to access the route, Sail Rock and/or its agents must exit through one electronic gate, maneuver around that gate and enter Old Fort Bay Islands through another electronic gate; (b) the electronic gates are intended as service gates, and are frequently congested by large trucks carrying debris or cement for projects within the respective communities; and (c) access to Old Fort Bay Islands is limited by the proposed route as the gates are intended as service entrances, operated by security personnel who are only there during work hours. Therefore, there is no access through these gates outside of work hours; and (iv) without the interim injunction restraining Old Fort's obstruction and interference with Sail Rock's entitlement to the Right of Way, it is believed that such interference/obstruction will continue.

Old Fort's Evidence

28. On 18 January 2024, Old Fort filed the affidavit of Sean H.D. Andrews ("**Andrews Affidavit**") which states that: (i) Mr. Sean H.D. Andrews is a Director and Chairman of Old Fort; (ii) Sail Rock has no existing Right of Way which is capable of enforcement as the Right of Way has been abandoned; (iii) Sail Rock has emphasized the words "*and from there to the public roadway known as Western Road shown on the said plan*" were included in the grant of the Right of Way in the Confirmatory Conveyance. However, the Right of Way granted by the Supplemental Indenture does not include these words; and (iv) GL released the Right of Way which had been granted to it by the Confirmatory Conveyance prior to the Sail Rock Conveyance.
29. Furthermore, the Andrew Affidavit provides that: (i) Sail Rock does not and never had a Right of Way which extended to the Western Road and also by reason of the fact that Old Fort has from time to time at its sole discretion and without reference to Sail Rock or its predecessor GL restricted access through the Middle/Intermediary Gate; (ii) a notice has been posted on the Islands of Old Fort Bay side of the Middle/Intermediary Gate which provides: "**NOTICE – THIS IS NOT A THOROUGHFARE. UNLESS YOU HAVE SPECIFIC LICENCE YOU MAY BE REFUSED ACCESS BEYOND THIS POINT.**" ("**Notice**"). The Notice has been posted for at least 20 years (the Notice is exhibited to the affidavit); and (iii) Old Fort contends that it has the sole and exclusive right to close the Middle/Intermediary Gate and that the past and current closures of the gate have been lawfully done, consistent with such right.
30. The Andrews Affidavit also states that: (i) there exists an alternative means of gaining access to the Western Road which does not require passage through the Middle/Intermediary Gate. It is in close proximity to the Middle/Intermediary Gate (photographs depicting the alternative route of access to the Western Road and

its close proximity to the Middle/Intermediary Gate are exhibited to the affidavit); (ii) access to the Western Road can be gained from Old Fort Bay Subdivision and from Islands of Old Fort Bay without traversing through the Middle/Intermediary Gate; (iii) to Mr. Sean H.D. Andrews' knowledge, nothing prevents Sail Rock or its agents from utilizing this alternative means of access to the Western Road pending the final determination of this matter and indeed thereafter; and (iv) Old Fort is prepared to proceed expeditiously with the trial of this action and agree to a speedy trial of the matter should the Court refuse Sail Rock's application.

Discussion and Analysis

(j) Whether the Court should accede to Sail Rock's request and grant an interim declaration?

31. The Court is imbued with the power to grant an interim declaration by virtue of **Rule 17.1(1)(a) of the Supreme Court Civil Procedure Rules, 2022** ("CPR"), which reads:

"17.1 Orders for interim remedies: relief which may be granted

(1) The Court may grant interim remedies including –

(a) an interim declaration..."

32. Interim Declarations are rarely granted as there is a school of thought that believes this pre-empts the substantial trial and therefore declares and determines the rights of the parties prematurely. The Court is typically reluctant to grant such relief. Old Fort's counsel submits that the Court's general reluctance to grant interim declarations is manifested by the pronouncement of various circumstances where interim declarations will be refused. The pronouncements, counsel contends, as to the numerous circumstances where an interim declaration will be refused demonstrates the limited and extraordinary nature of the jurisdiction. Sail Rock's counsel, conversely submits, that the evidence (being the title deeds furnished) clearly proves Sail Rock's entitlement to the Right of Way and is therefore an unassailable right that ought to be declared until the trial.

33. This Court provided a comprehensive discourse on the law of interim declarations in the case of **Tyson Strachan v Anthony Simon et al – 2021/CLE/gen/00863**. There I made the following pronouncements:

*"72 According to the **Practice Guide** under the explanatory note for Part 17.1(1)(a) (at page 116) Lord Woolf LCJ considered in detail the availability and appropriateness of the making of an interim declaration in **Bank of Scotland v A Ltd & Ors [2001] EWCA Civ 52**. In that case, the following observations were made:*

*“In his first Hamlyn lecture given in 1949, "Freedom Under the Law", Sir Alfred Denning, as he then was, identified the challenge facing the court as being to develop "new and up-to-date machinery" (p. 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a [declaration] (or 'declaration of right') was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see Guaranty Trust Company of New York v Hannay [1915] 1 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. **The development of declaratory relief has not however been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. It was at one time thought, that an interim declaration could have no practical purpose. The developments in other jurisdictions showed this was not the situation. Now the CPR acknowledges that just as interim injunctions can be granted so can interim declarations...**(emphasis added).”*

73 In the Jamaican Supreme Court case of **Ralph Williams and Others v Commissioner of Lands and Another [2012] JMSC Civ 118** Justice Mangatal made the following observations in relation to interim declarations:

“53 Rule 17.1(1) (b) of the CPR provides that the Court may grant interim remedies, including an interim declaration. By virtue of an amendment to the Crown Proceedings Act in 2002, the CPR are incorporated into the Crown Proceedings Act. The CPR being incorporated into this Act constitute statutory authority empowering the court to grant interim declarations against the Crown - see the unreported decision of Marsh J. in Claim No. 2008 HCV 05710, Caribbean Cement Co. Ltd. v. The AG et al, delivered 16th July 2010.

54 Interim declarations still fall into largely unexplored territory in this jurisdiction. Indeed, in the English jurisdiction, Lord Diplock in International General Electric Company of New York v. Customs and Excise Commissioners [1962] Ch. 784 at page 790 expressed the view that by its nature an interim declaration is really a contradiction in terms. See also Hale J. in Re S (Hospital Patients) Courts Jurisdiction [1995] Fam 26, where she stated that 'it was axiomatic that there was no such thing as an interim declaration.' These statements appear to have been made at a

time when there was not yet express statutory authority for making interim declarations. However, they nevertheless express some conceptual discomfort with the creature of an interim declaration which in my view to some extent still lingers. Interim declarations have not yet proven popular either with our courts or with Counsel in Jamaica.

55 In the English decision of R v. Ministry of Agriculture, Fisheries and Food [2001] 1 C.M.L.R. 826, it appears to have been suggested that the courts will apply principles similar to those applicable to interim injunctions. At paragraph 49, it was stated that an interim declaration as to the legal position would have the same practical effect as an interim injunction, since the relevant Ministry could be expected to observe its terms. The court was reluctant to grant an interim declaration in that case because it would not maintain the status quo and might have led to confusion in relation to related final rights that were still pending and awaiting decision.

56 In the Caribbean Cement case, Marsh J., in determining that there was no justification for setting aside an interim declaration which Morrison J. had made ex parte, rejected the argument of the respondents that the interim declarations amounted to final orders having the effect of determining the issues between the parties being sought in the substantive application. **My learned brother Marsh J. at page 20 pointed out that the declarations being sought in the substantive hearing were different from the interim declarations granted to the applicant.** At pages 19-20 Marsh J. quoted with approval from “English Civil Procedure” page 1035 (per Neil Andrews), where it was stated:

‘Interim declarations should be granted only where the claimant has a prima facie casewhen considering the balance of convenience test; relevant factors and the strength of the claimant’s case and the respective detriment to the parties should the interim declaration be granted or denied.’(emphasis added)

74 Furthermore, the English Court of Appeal in ***Milebush Properties Ltd v Tameside Metropolitan Borough Council [2011] EWCA Civ 270*** addressed factors to consider when granting an interim declaration:

“88 In my view the authorities show that the jurisprudence has now developed to the point at which it is recognized that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings....The most important consideration is

likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court (emphasis added)."

75 Lastly, in the more recent English Court of Appeal decision of **N v Royal Bank of Scotland plc [2017] WLR**, the court also explored the law in relation to interim declarations. There, Hamblen LJ opined:

"81 CPR r 25.1(1)(b) [the English equivalent to our 17.1(1)(a)] provides that the court shall have the power to grant an interim declaration.

82 It was introduced following recommendations made in Law Commission Report Administrative Law: Judicial Review and Statutory Appeals (1994) (Law Com No 226) (Cmnd 669). Para 6.21 of that report stated as follows:

"Interim declarations

*The advantages of these are that they are not coercive, they specially address the interim position and are better suited to clarify the position of third parties. There is no reason why they should not be granted on the same basis as interim injunctions. In New Zealand there is provision for interim declaratory relief in judicial review proceedings against the Crown in lieu of injunctive relief which is not available, and such relief is more generally available in Canada. Such declarations would refer to a right or obligation that exists prima facie and are not therefore illogical. In making a merely interim declaration, the judge reserves his or her right and admits an obligation to re-examine the question after a substantive hearing at the trial. **In our view this consideration also meets the argument that a declaration in an interim form may inappropriately suggest that the court has already made up its mind as to the likely grant of final relief.**"*

85 On behalf of N it is submitted that the interim declaration operates in much the same way as an interim injunction. It is both provisional and suspensory in nature, making a temporary declaration as to the state of the law or a party's rights whilst leaving the state of uncertainty to be determined at a full trial. Just as with any other interim remedy, whilst it is provisional in nature, actions carried out while it is in force will enjoy its protection for all time. Thus it will be an abuse of process to prosecute a party who has acted with the protection of an interim declaration,

notwithstanding that the declaration is subsequently set aside. **It is submitted that the remedy is essentially pragmatic in nature and that considerations of justice and convenience should lie at the foundation of its availability.**

76 As I understand it, an interim declaration is a form of declaratory relief where the Court makes a declaration in relation to an issue, which would assist the parties in determining rights as between them in the interim until final determination on the matter. If, after considering the substantive merits of the case, it is determined that the interim declaration ought not to have been granted, then the interim declaration will be set aside, a final declaration would then be made and an appropriate costs order would be granted.

77 **In relation to the relevant factors that ought to be considered when granting an interim declaration, the authorities all seem to agree that the court should bear in mind factors for granting an interim injunction and consider the following: (i) Whether the parties have a legitimate interest in obtaining the relief sought? (ii) Whether to grant relief by way of declaration would serve any practical purpose? (iii) Whether to do so would prejudice the interests of parties who are not before the court (i.e. where does the balance of convenience lay)?**

78 **In addition to the usual factors to be considered for interim injunctions, it seems apparent that additional factors (as outlined in the above paragraph) must all be considered. In other words, I must be satisfied that all three limbs of the test are addressed together and answered in Mr. Strachan's favor, with no prejudice or unfairness to any other party resulting from such interim relief being granted (emphasis added).**

34. Accordingly, similar factors to the well-known decision of **American Cyanamid v Ethicon [1975] AC 396** should be applied by the Court when considering whether or not an interim declaration ought to be granted.
35. Applying the factors as mentioned above, I believe Sail Rock has a legitimate interest. It is concerned with access to the Right of Way and protecting its rights as provided for in the Sail Rock Conveyance. It is not denied that the right existed by Old Fort. Old Fort's counsel, however asserts, inter alia, that the right has been abandoned/extinguished and subsequent agreements have made the right of way fall away. Old Fort also asserts that access of the Right of Way does not extend to the Yellow Land. These, of course, are matters for the substantial trial. I do however, rule that Sail Rock does have a legitimate interest based on the pleadings and evidence before me. From Sail Rock's perspective, it wishes to protect its right as provided for in its title deed.
36. In relation to whether granting the relief would serve a practical purpose, it certainly would. Sail Rock wants entitlement to the Right of Way declared as, it

alleges, is guaranteed and expressly provided for in the Sail Rock Conveyance. It, however, cannot be refuted that it will almost invariably confirm the rights of one party as opposed to another pre-emptively before a full blown trial without fully considering the evidence at trial and applying the law to the issues of the trial.

37. With respect to where the balance of convenience lay, I am of the view that granting an interim declaration would very likely prejudice Old Fort as it would virtually usurp their right to call evidence and provide legal submissions on a legal right, which it alleges it has – based on agreements mentioned in the Andrews Affidavit – which was not refuted by Sail Rock. Sail Rock’s position is that the agreement which they signed is not in reference to the Right of Way which is the subject matter of this action. This is a matter for the trial. What has not been refuted is that an agreement has been signed in relation to access to a Right of Way by Sail Rock acknowledging that it is subject to certain restrictions. Therefore, the balance of convenience lays in favor of Old Fort.

38. Considering all of the above and the evidence before me, I believe it would not be appropriate to grant an interim declaration. To do so, in my view and based on what evidence has been presented, seems to pre-emptively determine a live issue which is best left for trial. I am not prepared to rule on a matter so substantive at an interlocutory stage. I am therefore not prepared to grant the interim declaration sought by Sail Rock.

(ii) Whether the Court should accede to Sail Rock’s request and grant an interim injunction?

39. The law in relation to interim injunctions is well established. The Court derives its powers to grant an interim injunction by virtue of **section 21(1) of the Supreme Court Act, 1997**. That section reads:

“21. (1) The Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so.”

40. The Court’s power to grant an interim injunction is also enshrined by virtue of **Rule 17.1(1)(a) of the CPR**. The rule provides:

“7.1 Orders for interim remedies: relief which may be granted.

(1) The Court may grant interim remedies including —

(b) an interim injunction...”

41. The *locus classicus* on the law of injunctions is **American Cyanamid v Ethicon [1975] AC 396** (“**American Cyanamid**”). According to **American Cyanamid**, the factors which the Court must consider when granting an interim injunction are:

(i) Whether there is a serious issue to be tried?

- (ii) Whether damages would be an adequate remedy for any loss sustained by either party pending the determination of the trial?
- (iii) Whether the balance of convenience lay in favor of the Claimant or the Defendant?
- (iv) Are there any special factors to consider?

42. Old Fort's counsel submits that the **American Cyanamid** principles do not arise until there is first a basis for the Court's interim intervention, whereas Sail Rock's counsel asserts that there is a prima facie and obvious case which entitles Sail Rock to an interim injunction.

43. I agree with Old Fort's counsel that there are live issues of fact. There are several conflicts of fact which I will address at the substantive trial. For the purposes of this application, I will rely on facts which appear to be accepted and what the evidence before me reflects. I also note that the main issues appear to be legal issues. I will not delve deeply into this until after the trial of this action.

44. In any event, I have taken the submissions of counsel into consideration and will now apply the principles emanating from **American Cyanamid**.

Whether there is a serious issue to be tried?

45. Essentially, the main issue for the trial appears to be whether or not Sail Rock has a Right of Way which entitles it and/or its agents to traverse the Properties and the Yellow Land, without any obstruction. From the pleadings, it appears that the obstruction is a gate across the Right of Way and near the Yellow Land. Not every interference is actionable. It must be substantial. This was observed by Mummery J in the case of **West v Sharp (2000) 79 P & Cr 327**, where he opined:

"Not every interference with an easement, such as a right of way, is actionable. There must be substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction."

46. In relation to whether or not a gate can constitute a substantial interference with enjoyment of property, Humphreys J in **Fitzpatrick v Ligoniel Developments Ltd [2020] [2020] NICH 16** helpfully stated:

"[17] The evidence before the Court at this interlocutory stage was that the Plaintiffs and their family had regularly used the laneway both to access the premises at Glenview Avenue and also to walk to the former Glenside Farm. There was no dispute between the parties that the fencing erected by the Defendant prevented any access beyond point D on the map, whether by vehicle or on foot."

[18] I have concluded that this represents a substantial interference with the enjoyment of the right of way. The prevention of access at point D means that the right cannot be exercised as conveniently as it was prior to the erection of the fence..”

47. It too was noted that intermittent access could constitute a substantial interference. This was noted in the case of **Page v Convoy Investments Ltd [2015] EWCA Civ 1061**. There, the respondent acquired a right of way over the appellant's land. The right of way led from farmland to a public highway. The appellant erected an electric gate on the right of way that required a four digit code in order to open. The appellant offered the Respondent a fob and the code for the gate, but the Respondent declined to accept it. The judge at first instance held that the Appellant had unlawfully interfered with the right of way by installing the electric gate. On appeal, the appellate court upheld that decision. The Court made the following pronouncements:

“44 Of course, it is not just that the entrance is gated, but that it is gated in the particular way at issue. He concluded that the installation of the electronic gates did constitute a substantial interference. Mr Harpum's argument is that the correct comparison is between the position with electronic gates, on the one hand, and with effective manually operated gates, on the other, on the basis that, because of the existence of the old gates, albeit no longer usable, Mr Page could not have objected to the reinstatement of gates of that kind..

At the time of the conveyance there were no practicable gates. If the servient owner chose to install or reinstate manually operated gates, the issue would be whether those gates, as constructed and used, would themselves constitute a substantial interference with the exercise of the right of way...

47 If, instead, the servient owner chooses to install electronic gates the question should be the same, and should start from the same point: a comparison between the position with the given gates installed and in operation, and the previous position without gates in place. Accordingly, it does not seem to me that the judge either applied the wrong test or applied the right test in the wrong manner. It is not relevant or helpful, when considering whether a particular obstruction constitutes a substantial interference with a right of way, to ask whether a hypothetical different obstruction would do so.

48 For that reason I do not accept Mr Harpum's submission that, so far as the gates are concerned, the judge was in error and that his order should be set aside so far as it was based on interference with the right of way.

49 Accordingly, Mr Page is entitled to require that the gates be kept open.”

48. In relation to the instant case, it appears that the erection of the gate may very well be considered a substantial interference with the Right of Way. Old Fort's

counsel submits that Old Fort is entitled to erect the gate due to abandonment/extinguishment of the Right of Way by Sail Rock's predecessor in title and that representatives of Sail Rock signed an agreement acknowledging that no such Right of Way exists over the 50 foot road reservation to the Yellow Land. This appears to be a triable issue. Accordingly, this is a serious issue that ought to be tried.

Whether damages would be an adequate remedy for any loss sustained by either party pending the determination of the trial?

49. I do not see how damages could possibly remedy any loss suffered by Sail Rock if the injunction was not granted. This case involves access to a Right of Way. It is the loss of the benefit of the Right of Way that would be suffered by Sail Rock.
50. Whereas assessment of damages may not be impossible, it certainly would be quite difficult. The potential loss suffered would be quite challenging to quantify.
51. In relation to Old Fort, it is unlikely that damages may remedy any loss it may suffer. Both parties are concerned about rights over the Right of Way. I do not see how damages can remedy the situation for either party. In the premises, damages would not be an adequate remedy.

Whether the balance of convenience lay in favor of the Claimant or the Defendant?

52. In ***American Cyanamid***, Lord Diplock made the following pronouncements in relation to the balance of convenience:

"...the object of the interlocutory injunction is to protect the Plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the Plaintiffs need for such protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from having been prevented from exercising his own legal rights for which he could not be adequately compensated under the Plaintiffs undertaking in damages if the uncertainty were resolved in the Defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.

53. In the Privy Council decision of **National Commercial Bank of Jamaica v. Olint Corp. Ltd. [2009] UKPC 16**, Lord Hoffman opined:

"[17] In practice, however, it is often hard to tell whether either damages or the cross undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out the injunction should not have been granted or withheld, as the case may be. The basic principle is the same, namely, the court should

take whichever course of action seems likely to cause the least irreparable prejudice to one party or the other.”

54. Furthermore, in the case of **Fellowes v Fisher [1976] Q.B. 122**, Sir John Pennycuik considered the balance of convenience. He made the following pronouncements on the subject:

“It is where there is doubt to the adequacy of the respective remedies in damages... that the question of balance of convenience arises.... The extent to which the disadvantage to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.”

55. In my view, the balance of convenience lay in Old Fort’s favor. Based on the facts, the gate is presently closed and locked, and may only be opened at the sole discretion of Old Fort. Based on the evidence, this gate has remained locked and undisturbed since 2022 and homeowners have all agreed to/consented to the gate being closed by virtue of a Rent Agreement and through their titled deeds - save and except Sail Rock. Whereas I acknowledge Sail Rock’s counsel admirably and relentlessly submitting that access to the Right of Way is a clear and unassailable right based on Sail Rock’s title deeds, I am of the view that this is a matter to be decided at the substantive trial – particularly because there are allegations that Sail Rock executed an agreement in relation to a right of way (which may or may not be referencing the Right of Way that is the subject of this action). This, inter alia, may evidence abandonment/extinguishment as the Old Fort alleges in its Defence. Based on the evidence before me, I am not satisfied that any irreparable harm or prejudice would be suffered by Sail Rock if the present circumstances were to remain as is. There is no evidence which suggests or proves there is no alternative means of access, merely that the alternative access is cumbersome. I believe the present circumstances should remain the same until I render a determination of the matter after the trial of this action.

Whether there are any special factors to consider?

56. I do not believe there are any special factors that I should consider in the present circumstances.

57. On 15 April 2024, the Bahamian Court of Appeal rendered a judgment relating to: (i) common areas within the Old Fort Bay Subdivision; (ii) the rights of the Developer of the Old Fort Bay Subdivision and the Old Fort Bay Property Owners Association (“POA”); and (iii) ownership of certain lots within the Old Fort Bay Subdivision and a few lots outside of the subdivision, which belong to the Developer of the said Subdivision styled and titled **Old Fort Bay Company Limited v Old Fort Bay Property Owners Association Limited et al – SCCiv App No. 12 Of 22 and Old Fort Bay Property Owners Association Limited v**

Old Fort Bay Company Limited et al SCCiv App No. 34 of 2022 (“COA Judgment”). Whereas I acknowledge that the COA Judgment makes certain determinations, such determinations would have been made after having reviewed all relevant evidence (including witness statements and documentary evidence along with the initial judgment of the court of first instance). I appreciate Sail Rock’s counsel’s submissions on the point, but I am not prepared to make any determinations until this Court has had an opportunity to review the evidence and circumstances unique to this specific action.

58. In light of the foregoing, I am not prepared to grant an interim injunction.

Conclusion

1. Based on the present law, circumstances and the evidence before me, I am not prepared to grant an interim declaration or an interim injunction. I therefore, refuse relief sought and dismiss Sail Rock’s application.
2. Old Fort shall have its costs, to be assessed by this Court, if not agreed.

Senior Justice Deborah Fraser

Dated this 02 day of May 2024