

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2024/CLE/gen/00224

B E T W E E N

TOMLINHESS INVESTMENTS INC.

Claimant

AND

LAMALOT LTD

Defendant

Before: The Hon. Chief Justice Sir Ian R. Winder

Appearances: Al-Leecia Delancy with Avrom Thompson for the Claimant
Timothy Eneas KC for the Defendant

Hearing date(s): 11 April 2024 and 13 May 2024

RULING

WINDER, CJ

[1.] This is the Claimant's application pursuant to **Rule 17.1(1)(b)** of the **Supreme Court Civil Procedure Rules, 2022** (the "CPR") and/or the inherent jurisdiction of the Court for the continuation of an interim injunction restraining "the Defendant(s), their servants and/or agents from further construction or use of the dock on the seabed abutting the Claimant's property". The application is made by Notice of Application filed on 21 March 2024.

[2.] On 26 March 2024, I granted an interim injunction on an urgent, without notice basis restraining the "Defendant(s), their servants and/or agents" from undertaking or continuing construction on the dock until the return date. These proceedings were at that point commenced against "Person(s) Unknown in occupation of Lots 10-12, Dick's Point". I have since ordered that the title to the proceedings be amended.

[3.] Upon the inter partes hearing of the application I reserved my decision. The interim injunction that I granted on 26 March 2024 was continued with the Defendant's consent in modified form pending the outcome of the Claimant's application. In its current form, the interim injunction permits the Defendant to continue work on the dock between the hours of 8:00 am and 5:30 pm up to 15 feet from the end of the dock as drawn on a plan contained in the hearing bundle.

[4.] The Claimant seeks to continue or maintain the interim injunction until trial. The Claimant says that the requirements outlined in **American Cyanamid Co v Ethicom Ltd** [1975] AC 396 ("**American Cyanamid**") are satisfied. The Claimant relies principally on the evidence contained in the Affidavit of Wendy Hess filed on 21 March 2024, the Second Affidavit of Wendy Hess filed on 2 May 2024, the Affidavit of Roy Newbold filed on 6 May 2024 and the Affidavit of Maggie Newbold filed on 6 May 2024. The Defendant opposes the interim injunction on the basis that the Claimant has not satisfied the requirements outlined in **American Cyanamid**. The Defendant relies principally on the evidence contained in the Affidavit of Robert Meister filed on 26 April 2024 and the Affidavit of Ava La-Roda filed on 8 May 2024.

Background

[5.] The Claimant is the owner of #2 Lucy's Lane, Dick's Point, a residential property in the Eastern District of New Providence (the "Claimant's Property"). The Claimant acquired the Claimant's Property from Price Quality Services Limited by a conveyance dated 10 February 2014. Wendy Hess ("Hess"), one of the Claimant's directors, is the occupier of the Claimant's Property. She formerly occupied the property with her husband until his demise on 6 March 2024.

[6.] The Defendant is the owner of Lots 10, 11 and the eastern portion of Lot 12 of Dick's Point in the Eastern District of New Providence (the "Defendant's Property"). The Defendant acquired the Defendant's Property in a merger with Petunia Properties Limited on 18 November 2003.

Petunia Properties Limited acquired the Defendant's Property from William and Martha Roberts by a conveyance dated 29 August 1975. Robert Meister ("Meister"), the President and a director of the Defendant, has occupied the Defendant's Property since 2005.

[7.] The Claimant's Property and the Defendant's Property are neighbouring properties which are separated by strip of land (the "Disputed Strip") measuring 25-foot-wide by 346.34-foot-long. The Defendant claims to own the Disputed Strip. The Disputed Strip appears to form a part of the land conveyed by William and Martha Roberts to Petunia Properties Limited under the conveyance dated 29 August 1975, but the Claimant alleges that the Disputed Strip is in fact a government road reservation meant to allow the public access to the sea. There is no claim regarding the Disputed Strip before me. I therefore need not dwell on the issue.

[8.] In outline, the Claimant says that:

- (i) on or about 11 March 2024, Hess became aware that the Defendant had commenced construction of a dock on the seabed directly in front of the Defendant's Property, extending past the Disputed Strip and an undetermined distance into the seabed in front of the Claimant's Property.
- (ii) the dock is being built in the area of a former derelict dock belonging to the Defendant which suffered damage as a result of Hurricane Matthew in or around 2016. Hurricane Matthew pushed a concrete slab from the seabed abutting the Defendant's Property into the seabed abutting the Claimant's Property. Attempts to persuade the Defendant to remove the structure failed.
- (iii) the former derelict dock did not originally extend far beyond the seabed abutting the Defendant's Property but, in or about the 2000s, the dock was extended further eastward from the seabed abutting the Defendant's Property. When the Claimant bought its Property, the Claimant intended to build a dock. However, after surveying the seabed in 2015 at the instance of the Department of Physical Planning, it was discovered that the Defendant had built on the seabed in front of the Claimant's Property.
- (iv) Hess and her husband made a complaint to the Department of Physical Planning about the encroachment of the Defendant's former derelict dock into the front of the Claimant's Property. The Department indicated in a letter to Hess and her husband dated 22 June 2016 that the Town Planning Committee had met on 15 December 2015 and determined the complaint was legitimate based on available evidence and instructed the Department to refer the matter to the Building Control Division of the Ministry of Works for removal of the encroaching structure. As of 2019, Hess and her husband understood that the dock was to be demolished, but no further communication was received.
- (v) the dock extends past the seabed abutting the extended boundary of Lots 10-12 into the seabed abutting the Disputed Strip and extends further into the seabed abutting

the Claimant's Property, as shown on a survey plan dated 16 November 2015 prepared in relation to the former derelict dock (which put the encroachment of the Defendant's dock into the seabed abutting the Claimant's Property at that time at 12.68 feet.) The construction presently being undertaken by the Defendant extends further than the dock destroyed in 2016 and threatens to extend further into the seabed abutting the Claimant's Property.

- (vi) prior to the construction of the Defendant's current dock, Hess' last information was that the Dock Committee was addressing the Defendant's former derelict dock. However, Hess has been more recently advised by the Claimant's attorneys that the Port Department considered the Claimant's/Hess' complaint about the "illegal construction" of the dock to be a "private dispute".
- (vii) the Claimant has been provided conflicting oral, informal positions as to whether the current construction of the dock is duly approved after its attorneys enquired with different Government agencies such as the Department of Physical Planning, Ministry of Works, Department of Lands and Surveys and the Port Department.
- (viii) the certificates and approvals mentioned in the Defendant's affidavits do not correlate with what the Defendant has done. The certificates and approvals refer to the "removal of an existing structure" but the Defendant has simply built over the pre-existing dock structure and not removed it. Furthermore, none of the approvals expressly permit an extension into the seabed abutting the Claimant's Property and the Defendant has provided no evidence of a seabed lease.
- (ix) the construction of the Defendant's dock has caused significant interference with the Claimant's reasonable enjoyment of its land. The construction of the dock on completion would restrict the Claimant's access to the sea, obstruct the Claimant's view and interfere with its privacy. The Claimant has rights as a riparian owner of land which cannot be eliminated based on any government permitting.
- (x) family staying at the Claimant's Property after Hess's husband passed away were disturbed by the machinery used in the construction of the Defendant's dock, which was run at early hours in the morning and outside of the hours of 10:00 am to 6:00 pm (being the period which the Royal Bahamas Police Force indicated to Hess within which heavy equipment can be used in residential areas).
- (xi) the Defendant has refused to cease construction of the dock and has not acted reasonably in having this matter settled outside of court. The Claimant seeks an interim injunction to prevent the threatened continued construction of the dock in view of the environmental concerns, breach of riparian rights and nuisance by the extension of the dock into the waters abutting the Claimant's Property. If the Defendant is not restrained, the work on the dock is likely to be substantively completed in days.
- (xii) the Claimant's complaint does not relate to the previously existing dock but the present ongoing construction. There was no issue prior to Hurricane Matthew with

interference with the seabed abutting the Claimant's Property, so the issues in these proceedings did not arise, and in any event, the construction undertaken by the Defendant extends even further than the dock that was destroyed in 2016.

[9.] In outline, the Defendant says that:

- (i) the dock at the Defendant's Property was originally constructed sometime prior to 1966, per an Affidavit of W. Larry Roberts sworn on 27 May 2019, and was utilized by the Meister family for a period of 41 years without complaint from anyone. The dock comprises a vital component of the use and enjoyment of the Defendant's Property. There are three nearby properties with docks of similar construction and configuration.
- (ii) in October 2016, the dock at the Defendant's Property was severely damaged by Hurricane Matthew. Prior to Hurricane Matthew, the dock was fully functional and in good repair and the dock was used by the Meister family as a means of emergency boat access to the family's business premises on a nearby island, which proved to be vital to responding to emergencies which required immediate attention.
- (iii) since Hurricane Matthew, the Defendant has been endeavouring to restore the dock at the Defendant's Property. However, a (false) complaint made by Hess and her husband about the dock to the Department of Physical Planning obstructed the Defendant's ability to obtain the requisite approval from the Port Department and that, coupled with the intervention of the COVID-19 pandemic, resulted in delay in the reinstatement of the dock.
- (iv) on 20 October 2022, approval in principle for the reinstatement of the dock was received from the Port Department, who informed Meister that final approval from the Minister of Transport and Housing and the Minister of the Environment and Natural Resources was required. Meister thereafter engaged JSS Consulting, an environmental consultant, to assist with obtaining approvals for the project. A Certificate of Environmental Clearance dated 12 April 2023 was obtained and, on 26 September 2023, final approval was given by the Port Department for the construction of the dock.
- (v) on or about 12 December 2023, the Defendant engaged the services of Bahamas Marine Construction Co. Ltd (the "BMC") to complete the dock. Meister was advised by BMC that the reinstated dock would be in the same position as the original dock at the Defendant's Property and would utilize pilings as the support structure on top of the footprint of the original dock. Works commenced on 12 March 2024. A barge with heavy equipment for installing the pilings arrived in the vicinity of the dock on 11 March 2024.
- (vi) following a complaint on 13 March 2024 made by Hess about "awful heavy equipment noise from 7:45 am until about 5:40 pm" the prior day, the Defendant requested that BMC restrict the use of heavy equipment to the hours of 8:00 am to

5:30 pm. So far as Meister is aware, that instruction was complied with by BMC. No other complaints were made by any other person in Dick's Point or any relevant government department in relation to the manner in which the Defendant's dock was being constructed.

- (vii) between 12 March 2024 to 27 March 2024, BMC undertook construction works in accordance with industry standards and practices for the construction of the dock as approved by the Port Department. The drilling and driving of pilings necessarily requires the use of heavy equipment and the time and period within which work can be performed is dependent on the tides, which fluctuate daily. The method used by BMC to perform the construction works is the standard method used and invariably involves the nuisance complained of.
- (viii) the area on which the dock is situated, the seabed, belongs to the Crown and does not abut any portion of the Claimant's Property. The Claimant's northeastern boundary is described in the Claimant's conveyance and extends only to the sea and abuts the foreshore, which is owned by the Crown. Accordingly, the hypothetical extension of the Claimant's boundary lines seaward into the seabed is irrelevant and immaterial to the issues in dispute. The Crown, as the owner of the seabed, has approved the Defendant's use of the seabed by virtue of the Port Department's approval.
- (ix) the Defendant's dock does not restrict the Claimant's access to the sea, obstruct its view or interfere with its privacy. The original dock was in existence for a period exceeding 50 years without complaint and the reinstated dock occupies the same footprint. There has been no material change to the location or dimensions of the dock. No part of the dock encroaches on property owned by the Claimant or the foreshore abutting the Claimant's property and there is no obstruction caused by the dock.

The statements of case

[10.] On 21 March 2024, the Claimant filed a standard claim form seeking the following relief:

- a. An injunction to restrain the Defendant(s) from causing nuisance on land located at Lot 2, Lucy's Lane, Dick's Point on the island of New Providence one of the islands of the Commonwealth of The Bahamas.
- b. Further and/or alternatively, an injunction to restrain the Defendant from commencing and/or continuing construction on a dock in breach of the Claimant's riparian rights insofar as the construction extends to the waters directly in front of the Claimant's land and/or interferes with the Claimant's right to privacy.
- c. Damages against the Defendant, either directly or through its servants and/or agents for nuisance and/or trespassing or interfering with the Claimant's property rights, including riparian rights.
- d. Such further or other relief
- e. Costs

[11.] The statement of claim indorsed on the claim form provides:

2. The Claimant is Tomlinhess Investments Inc. [...]. The claimant is the owner of the property and land located at 2 Lucy's Lane, Dicks Point in the Eastern District of the island of New Providence one of the islands of the Commonwealth of The Bahamas.

3. The Defendant(s) is the owner and/or occupier of property located at Lots 10 – 12, Lucy's Lane, Dick's Point in the Eastern District of the island of New Providence aforesaid.

4. The Defendant's property abuts the Claimant's property on the southern border, separated by a 25ft. road reservation which is presently occupied by the defendant. Both the claimants and the Defendant(s) property are abutted on the eastern border by the sea.

5. On 11 March 2024 the Defendant(s) wrongfully caused or permitted the construction of a dock leading to the Defendant's property, which dock commences on that part of the sea abutting the Defendant's property and which said construction extends onto that portion of the sea abutting the Claimant's property.

6. This construction and resulting dock represent a substantial interference to the claimant's use and enjoyment of its premises:

PARTICULARS – Nuisance

a. Excessive noise and vibrations in relation to construction which commenced on 11 March 2024 and on days commenced from 7:00 am until 6:00 pm

b. The Defendant has permitted their dock construction to extend to the sea in front of the Claimant's property.

c. The dock causes interference with the Claimant's reasonable enjoyment of their land by obstructing their access to the sea and obstructing their view and privacy. This significantly hinders the Claimant's enjoyment of their land and as they did before the construction.

d. The Defendant's construction extending to the sea abutting the Claimant's property prevents the claimant from constructing a dock for access to its property from the sea.

e. The matters complained of constituted nuisance and at all material times the Defendant(s) knew or ought to have known of the nuisance but permitted it to remain.

f. The circumstances surrounding the construction of the dock including its location and impact on the Claimant's property ... [sic]

7. The construction and resulting dock extending to the sea abutting the claimant's property has interfered with the claimant's riparian rights:

PARTICULARS – Interference with Riparian Rights

a. Riparian rights include the right to reasonable access to and use of the water body adjoining the property. The construction of the dock obstructs the Claimant's riparian rights by limiting the access to the sea directly in front of their property.

b. The Defendant's construction extending to the sea abutting the Claimant's property prevents the Claimant from constructing a dock for access to its property from the sea.

c. The Defendant's use of the sea is not in accordance with the principle of a reasonable user and exceeds what is necessary for the common and ordinary use and occupation of land.

8. By letter dated 19th March 2024 and served on the Robert Meister, the Claimant demanded that the Defendant(s) cease its construction of the dock. The Defendant(s) indicated their refusal to cease construction. The defendant still continues and threatens and intends unless restrained by injunction to continue to create nuisance and interfere with the Claimant's rights.

[12.] On 24 April 2024, the Defendant filed a defence which provides *inter alia*:

1. As regards paragraph 2 of the Statement of Claim Lamalot Ltd. ("the Defendant") admits that the Claimant is Tomlinhess Investments Inc. The remainder of paragraph 2 is not admitted and the Defendant puts the Claimant to strict proof of the same.

2. As regards paragraph 3 of the Statement of Claim the Defendant admits that it is the owner of Lots 10, 11 and the Eastern portion of Lot 12 situate at Dick's Point in the Eastern District of the Island of New Providence together with a strip of land twenty-five (25) feet wide which adjoins the entire southern boundary of the other parcels of land hereinbefore mentioned (collectively "the Defendant's Property"). The current occupiers of the Defendant's Property are Mr. Robert Meister and Mrs. Kelly Meister.

3. Regarding paragraph 4 the Statement of Claim the Defendant admits that the Claimant's alleged property (Lot #2 Dick's Point) is situate along the southern boundary of the Defendant's Property with both properties being bounded on their respective eastern boundaries by the sea.

4. The Defendant denies paragraph 5 of the Statement of Claim and contends that the construction undertaken by the Defendant commenced on the 12th March, 2024. The location of the construction works related to the reinstatement of an existing dock which adjoins the northern portion of the eastern boundary of the Defendant's Property ("the Dock") and continues in an eastward direction over the foreshore and seabed comprising the property of the Crown.

5. The Defendant denies paragraph 6 of the Statement of Claim in its entirety including the particulars thereof and contends as follows:

(a) The hours of operation for the construction works were at all material times reasonable and within the times customary and acceptable for the marine construction work required to be performed.

(b) The site of the reinstated Dock is situate on top of the footprint of the existing Dock structure in accordance with the approval granted to the Defendant on the 23rd September, 2023 pursuant to its application dated 20th April, 2023.

(c) The Dock is situate on the seabed immediately east of the Defendant's Property and in no way interferes with the Claimant's access to the sea nor does it in any way howsoever interfere with any legally recognized and enforceable right of the Claimant.

(d) The Defendant denies the Claimant's contention that the Dock or any portion thereof prevents the Claimant from constructing a dock adjoining its property utilizing a standard design or a design with a similar configuration to the docks in the vicinity.

(e) The Defendant denies each and every allegation of nuisance on the grounds set out herein and puts the Claimant to the strict proof of the matters and circumstances giving rise to the alleged nuisance.

(f) The allegation set out in the particulars in paragraph 6(e) of the Statement of Claim is incomplete and ought to be struck from the claim.

6. The Defendant denies that the Claimant's alleged property constitutes a riparian tenement and contends that the same is incapable of giving rise to the riparian rights asserted by the Claimant. Furthermore, the Defendant relies upon the approval obtained from the Port Department dated 23rd September, 2023 and section 7 of the Port Authorities Act which authorizes the construction of the Dock.

7. The Defendant denies paragraph 8 of the Statement of Claim and contends that neither it nor its authorized representatives communicated expressly any intention regarding the construction of the Dock to the Claimant as alleged.

8. Furthermore, the Defendants contends that any alleged claim, cause of action, right or entitlement to relief or damages pleaded in the Statement of Claim resulting from any alleged tort including nuisance or any other right whether tortious or otherwise including the alleged interference with riparian rights prior to the 21st March, 2018 is barred by the provisions of the Limitation Act, 1995 or in the further alternative by the doctrine of laches.

9. Save as expressly admitted the Defendant denies each and every allegation of fact contained in paragraphs 1 to 8 of the Statement of Claim as if the same were set forth herein and specifically traversed.

Law

[13.] Injunctions are an equitable, discretionary remedy. **Section 21** of the **Supreme Court Act** codifies the jurisdiction of the Court to grant injunctions whenever it is “just and convenient” to do so. **CPR 17.1(1)(b)** makes provision in the **CPR** for the Court to grant interim injunctions as part of the panoply of interim remedies that are available to an applicant before trial.

[14.] Both parties submitted that the Court should apply the principles for the grant of interim injunctions established in **American Cyanamid**. Neither party suggested that this is a case that falls within the various exceptions to **American Cyanamid** that have been recognised by the courts. It was therefore common ground that, before the Court grants or continues an interim injunction, the Court must be satisfied that:

- (i) there is a serious issue to be tried;
- (ii) damages would not be an adequate remedy for the applicant; and
- (iii) the balance of convenience favours the grant of an injunction,

[15.] **In Re: Colin Wright** [2018] 1 BHS J. No. 62, *Charles J* (as she then was) provided a useful distillation of some of the “key” **American Cyanamid** principles at paras [26] to [28]:

[26] According to *American Cyanamid*, when an application is made for an interlocutory injunction, in the exercise of the Court's discretion, an initial question falls for consideration, i.e. whether there is a serious issue to be tried. If the answer to that question is yes, then a further question arises: would damages be an adequate remedy for the party injured by the Court's grant of, or its failure to grant, an injunction? If there is doubt as to whether damages would not be adequate, the Court then has to determine where does the balance of convenience lie?

[27] Some of the key principles derived from the speech of Lord Diplock in the *American Cyanamid* (at pages 406- 409) may be listed as follows:

1. The grant of an interlocutory injunction is a matter of discretion and depends on all the facts of the case.
2. There are no fixed rules as to when an interlocutory injunction should or should not be granted. The relief must be kept flexible.
3. The evidence available to the Court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.
4. 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. These are matters to be dealt with at the trial.
5. The object of the interlocutory injunction is to protect the claimant against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty was resolved in his favour at the trial; but the claimant's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.
6. Some additional factors that the Court needs to bear in mind are: (a) the extent to which damages are likely to be an adequate remedy for each party and the ability of the other to pay; (b) the balance of convenience; (c) maintenance of the status quo, and (d) any clear view the court may reach as to the relative strength of the parties' cases.
7. Unless the material available to the Court at the hearing of the application for an interlocutory injunction fails to disclose that the claimant 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.
8. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious issue to be tried.

[28] These key principles were adopted and re-stated in *Series 5 Software Ltd v Clarke and others* [1996] 1 All E.R. 853 at 865; *Grenada Co-operative Bank Limited v Valma Jessamy* --Claim No. GDAHCV2013/0313 (unreported) and *Cambridge Nutrition Ltd v BBC* [1990] 2 All ER 523; authorities referred to by Mr. Glinton QC. Interestingly though, none of these cases has diminished the key principles derived from the House of Lords decision in *American Cyanamid* which, to date, remain the locus classicus on interlocutory injunctions.

[16.] In ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** [2009] 5 LRC 370, *Lord Hoffmann*, giving the advice of the Judicial Committee of the Privy Council, discussed the approach that a court should take when deciding whether to grant an interim injunction. At paras [16] to [21], His Lordship stated:

[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. As the House

of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

[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 irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in *American Cyanamid* [1975] 1 All ER 504 at 511: 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

[19] There is, however, no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey of Tullichettle in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 All ER 70 at 127. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772 at 780–781. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1970] 3 All ER 402 at 412, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted'.

[20] For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1986] 3 All ER 772. What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a 'high degree of assurance' was required, while if it was prohibitory, all that was needed was a 'serious issue to be tried'. Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it.

[21] Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction. Factors which the court might have taken into account in this case if there had been a triable issue were, first, that the injunction required the bank to continue against its will to provide confidential services for the plaintiffs; secondly, that the injunction would require the bank to continue to incur reputational risks and possible exposure to legal action; thirdly, that it was by no means clear that the plaintiffs would be able to satisfy a claim under the cross-undertaking in damages; fourthly, that the plaintiffs' case was, even if not (as their Lordships think) hopeless, certainly very weak, and, fifthly, that the plaintiffs could no doubt have obtained alternative banking services from any bank whom they could persuade that they were not running a fraudulent scheme. It is unnecessary to say what should have been the outcome of a weighing of these factors because that was a matter for the discretion of the judge but they suggest that, even if there had been a serious issue to be tried, it is by no means obvious that Jones J was wrong to refuse an injunction.

Discussion and analysis

[17.] As *Klein J* explained in **Lucayan Towers South Condominium Association (a statutory non-profit body Corporate) v Grand Bahama Utility Company Limited and another** [2022] 1 BHS J. No. 125 at para [37], it continues to be a requirement in the “vast majority of claims for injunctive relief” that an injunction will only be granted to protect against the invasion or threatened invasion of a legal or equitable right of the applicant.

[18.] To obtain an interim injunction in the absence of special circumstances, an applicant must demonstrate that there is a “serious issue to be tried”. If there is no serious issue to be tried, the balance of convenience does not arise, and an interim injunction ought not to be granted. In **Re: Colin Wright**, *Charles J* explained the requirement to demonstrate that there is a “serious issue to be tried” at para [29] in the following way:

29 This question is the threshold requirement. Lord Diplock in *American Cyanamid* said that it is sufficient if the Court asks itself: is the applicant's action “not frivolous or vexatious?”; is there “a serious question to be tried?”; is there “a real prospect that he will succeed in his claim for a permanent injunction at the trial”? These may appear to be three subtly different questions but they are intended to state the same test: *Smith v Inner London Education Authority* [1978] 1 All E.R. 411 at 419, C.A. per Browne L.J. See also *Seaconsar v Bank Markazi* [1994] A.C. 438, H.L. and *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547.

[19.] Whether there is a serious issue to be tried is a low threshold that falls short of requiring the applicant to demonstrate a *prima facie* case. To grapple with whether there is a serious issue to be tried, the Court is required to examine the statements of case and the evidence filed to gain an understanding of what is in dispute between the parties. However, it is no part of the Court’s function to resolve conflicts of fact on affidavits or to decide difficult questions of law which call for detailed and mature consideration.

[20.] The Claimant’s pleaded claim as it is currently formulated can be divided into the following parts:

- (i) claim in nuisance for excessive noise and vibration (para 6(a) of the statement of claim).
- (ii) claim in nuisance for the Defendant permitting its dock to extend to the sea in front of the Claimant's Property (para 6(b) of the statement of claim).
- (iii) claim in nuisance based on the Defendant's dock obstructing the Claimant's access to sea and obstructing its view and privacy (para 6(c) of the statement of claim).
- (iv) claim in nuisance based on the Defendant's dock preventing the Claimant from building a dock (para 6(d) of the statement of claim).
- (v) claim for interference with riparian rights by limiting the Claimant's access to the sea directly in front of the Claimant's Property (para 7(a) of the statement of claim).
- (vi) claim for interference with riparian rights by preventing the Claimant from constructing a dock for access to its property from the sea (para 7(b) of the statement of claim).
- (vii) claim for interference with riparian rights because the Defendant's use of the sea is not in accordance with the principle of reasonable user and exceeds what is necessary for the common and ordinary use and occupation of land (para 7(c) of the statement of claim).

[21.] The "planning/environmental issues" raised by the Claimant in its evidence and submissions do not assist it in establishing that there is a serious issue to be tried because the Claimant's pleadings do not make any allegation of breach of regulatory provisions, failure to obtain necessary approvals, or damage to the environment and the Claimant has not expressed any considered and detailed intention to amend. As Counsel for the Defendant submitted, the pleadings mark out the parameters of each party's case and the issues that are in dispute: **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018.

[22.] Having considered the Claimant's pleaded claims and the competing submissions of the parties, I do not accept the Defendant's submission that it is only the allegation in paragraph 6(a) of the Claimant's statement of claim that satisfies the "serious issue to be tried" threshold. I am satisfied that there are serious issues to be tried in relation to whether the Claimant's alleged riparian rights have been or will be infringed as well. It suffices to say that I would not characterise the Claimant's pleaded claim as frivolous or vexatious.

[23.] This is not the occasion to embark on an extensive consideration of riparian rights. Briefly, riparian rights are common law private property rights enjoyed by the owner or occupier of land

bounding a body of water (“riparian land”) in relation to that body of water. In **National Fisherman Producers Co-operative Society v Brown Sugar Market Place (formerly River Duty Free Limited)** Claim No. 540 of 2006 (“**National Fisherman Co-operative Society**”), *Awich J* (as he then was), sitting in the Supreme Court of Belize, considered riparian rights in some detail. He noted at para [23] that the rights of the owner of riparian land (a “riparian owner”) include:

- (i) a right of egress to and regress from the water to the riparian land separate from the public right of navigation;
- (ii) a right to land and depart from the riparian land, and pass and repass over the shore or bed at all times even if the shore or bed is vested in someone else;
- (iii) a right to moor vessels adjacent to the riparian land for such period as is necessary to load and unload, but this must not interfere with the right of access of another riparian owner, or with the public right of navigation;
- (iv) a right to have the water of the river flow in its natural state and flow without sensible diminution or increase; and
- (v) a right to take and use the water that abuts the riparian land for ordinary use, and for restricted extraordinary use, subject to the same rights of other riparian owners.

[24.] The private riparian right of access must be distinguished from the public right of navigation. In **Attorney-General v Conservators of the River Thames** 1 H&M 1, *Wood VC* discussed and applied the distinction at pages 33 to 34:

Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right. ... The Fishmongers’ Company say that they have a right of access to this wharf, coupled with a right of access to the river; and I agree that, if this access were taken away, they would be within the provisions of the 179th section, and would be entitled to an injunction. But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access. Persons who frequent either this or any other wharf will be impeded, to a certain extent, in the navigation of the river; but that is an injury to the general right of navigation. It amounts only to this, that the Plaintiffs’ goods will have to take a longer and less convenient course in coming up to their wharf; an inconvenience the same in kind, though not in degree, as that which the rest of the public will be exposed. The right

interfered with is not the private right of access, which still remains, but the right of approaching from a distance, which forms part of the public right of navigation.

[25.] In his discussion of riparian rights in **National Fisherman Co-operative Society**, *Awich J* noted that a riparian owner must not construct or put down anything which disturbs the foreshore or riverbed which he does not own, or which will interfere with the right of the public to navigation. It appears to be clear on the authorities that a riparian owner is not entitled to construct or put down a dock or pier which disturbs the foreshore or riverbed without the consent of the Crown as the owner of the same: **Halsbury's Laws of England** (5th edn), **Volume 100** (2018) [para 129] and **section 7** of the **Ports Authorities Act**. The prospects of the Claimant establishing a right as a riparian owner to “wharf out” by building a dock are therefore poor.

[26.] Nevertheless, it is arguable that the Defendant’s dock has interfered with or will, when completed, interfere with, the Claimant’s right of access to the sea. Paragraph 7(a) of the Claimant’s statement of claim invokes a general right to reasonable access to the sea. It is arguable that a riparian owner is entitled to reach navigable waters from any point on its property without obstruction. The point can be gleaned from the discussion of the right of egress and regress and the right of public navigation in **National Fisherman Co-operative Society** at para [28]. The principle is more explicit in several Canadian authorities. In **Day v Valade** [2017] NSSC 175, for example, as the case was summarised by *Speyer J* of the Ontario Supreme Court in **Sanderson v Joan Jay** [2019] ONSC 2117 at para [38]:

...the riparian right of access was held to entitle a property owner to place a boat in the lake at any point along their shoreline and to travel directly out from the shore to reach navigable water. A wharf and dock installed on an adjacent property that obstructed the property owner from doing so, would amount to a breach of their riparian rights. The trial judge in *Day v. Valade* found that a direct line out from the shore refers to a line that travels in a direction that is perpendicular to the shore, and rejected the argument that such a line refers to an extension of the property line.

[27.] The photograph at page 18 of Affidavit of Wendy Hess filed on 21 March 2024 suggests that the Defendant’s dock may in fact extend into the seabed in front of the Claimant’s Property and may potentially obstruct passage to navigable waters from the Claimant’s Property depending upon what is meant by “navigable waters”. The Defendant suggests that the position is otherwise based on photographs but the true footprint of the Defendant’s dock and whether the Defendant’s dock is being extended from its previous configuration are not issues that I can resolve based on the affidavits that have been filed. Whether the Claimant is a riparian owner and whether there has in fact been an actionable interference or will be an actionable interference with its riparian rights upon the completion of the Defendant’s dock is a question for the substantive trial of the Claimant’s claim.

[28.] I have found support for the approach I have taken in the decision of the Court of Appeal of Belize in **Michael Feinstein and others v Carlos Romero and another** Civil Appeal No. 10 of 2003 (“**Michael Feinstein**”). In **Michael Feinstein**, the Court of Appeal of Belize considered whether an interlocutory injunction had been correctly granted where it was in dispute whether the construction of a boardwalk 4 feet above a part of Haulover Creek with a drawbridge would amount to an obstruction such as to interfere with the access to the respondents’ premises adjacent to Haulover Creek from Haulover Creek. The interlocutory judge granted the injunction on the basis that the boardwalk *could* curtail the respondents’ right of access and regress. Both *Mottley P* and *Carey JA* held that the question of the extent of the respondents’ riparian rights and whether they were infringed were questions properly to be determined at the substantive trial.

[29.] Insofar as the Defendant relies on the defence of statutory authorisation and **section 7 of the Ports Authorities Act**, I am not satisfied at this stage that **section 7 of the Ports Authorities Act** affords the Defendant a complete defence to the Claimant’s claim for interference with its riparian rights. I accept that a distinction can be made between a statutory authorisation and a grant of planning permission. However, it is noteworthy that the defence of statutory authorisation was rejected in **National Fisherman Co-operative Society** on the basis that private riparian rights could not be denied by a governmental authority without compensation. There is, to my mind, some force in that position. Whether the defence of statutory authorisation can be successfully invoked is a matter which warrants mature consideration and ought not to be decided summarily.

[30.] The Claimant’s submissions in support of its application for an interim injunction devoted little attention to its claim in nuisance for excessive noise and vibration arising out of the construction of the Defendant’s dock. That is unsurprising, because it appears on the evidence that the complaint is largely historical and peripheral to the Claimant’s grievance about its riparian rights. It may have been responded to by the Defendant already through an alteration in the hours between which work has been undertaken. Whatever the case, the claim raises several issues of fact that can only be determined at trial.

[31.] Even if there has been objectionable levels of noise and vibrations, the Defendant is correct in its submission that an occupier of land is not liable in nuisance for inconvenience caused by temporary construction work unless the work was unreasonably carried out and the Claimant has not pleaded negligence. The Defendant rightly referred to **Andreae v Selfridge & Co Ltd** [1938] Ch 1, the *locus classicus* for the principle, but the point was touched upon more recently in **Fearn v Board of Trustees of the Tate Gallery** [2023] UKSC 4. There, *Lord Leggatt* said at para [37]:

The right to build (and demolish) structures is fundamental to the common and ordinary use of land, involving as it does the basic freedom to decide whether and how to occupy the space comprising the property. It follows that interference resulting from construction (or demolition) works will not be actionable provided it is, in *Bramwell B*’s phrase, “conveniently done”, that is to say, in so far as all reasonable and proper steps are taken to ensure that no undue inconvenience is caused to neighbours: see *Andreae v Selfridge & Co Ltd* [1938] Ch 1.

[32.] Whether “all reasonable and proper steps” have been taken in the present case to ensure that no undue inconvenience is caused to neighbours by the Defendant and its agents is a matter that will have to be determined at trial if the Claimant tidies up its statement of claim to allege negligence. Whether the defence of statutory authorisation under **section 7** of the **Ports Authorities Act** is available to the Defendant on the facts will also have to be determined at trial.

[33.] There is, in my assessment, no serious issue to be tried in relation to the claim that the Defendant’s dock causes interference with the Claimant’s reasonable enjoyment of its land by “obstructing its view and privacy”. The Defendant correctly submitted that the law does not recognise a right to a prospect or view: **Phipps v Pears** [1965] 1 QB 76 per *Lord Denning MR* at page 83. The Defendant also correctly noted that there is, ordinarily, no liability in nuisance for mere overlooking or visual intrusion: **Victoria Park racing and Recreation Grounds Company Ltd v Taylor** (1937) 58 CLR 479 per *Dixon J* at page 507.

[34.] As I understand the current state of the law, while it is possible that visual intrusion on a neighbouring property of sufficient duration and intensity can be actionable as a nuisance, it is only in rare or exceptional cases that this will be so: **Fearn v Trustees of the Tate Gallery** [2023] UKSC 4 per *Lord Leggatt* at para [103]. There is nothing credible in the evidence which suggests that there is any realistic prospect of visual intrusion to such an extent as to be actionable. Nothing suggests that there was extensive visual intrusion when the Defendant’s dock was functional prior to Hurricane Matthew.

[35.] As I have held that there are serious issues to be tried, the question that I must next determine is whether granting or withholding the interim injunction is more likely to produce a just result in this case. Having considered the submissions and evidence of the parties, I am satisfied that, balancing the competing considerations, granting an interim injunction in favour of the Claimant is the course of action that is most likely to enable the Court to do justice after a determination of the merits and least likely to produce irreparable prejudice.

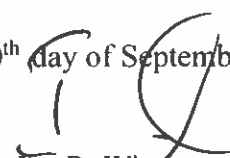
[36.] The Claimant has a tenuous but arguable claim. The authorities emphasise that riparian rights are valuable property rights. If an interim injunction is not granted, the Defendant will complete its dock. Damages would not be an adequate remedy for the Claimant because the appropriate award of damages would be difficult to quantify. Damages would, on the other hand, be an adequate remedy for the Defendant because, if an interim injunction is granted, the only clear consequences for the Defendant will be delay, inconvenience and loss of amenity. The Claimant has given an undertaking in damages and its wherewithal has not been challenged. The Defendant’s dock has been derelict since Hurricane Matthew and there is no real evidence to suggest that any irreparable prejudice would accrue to the Defendant from further delay in the completion of the dock.

Conclusion

[37.] For the foregoing reasons, the Claimant's application is allowed. The Defendant, whether acting by itself, its servants or agents, is restrained pending trial or further order from further construction of its dock beyond 15 feet from the end of the dock as drawn on the plan appearing at page 47 of the electronic hearing bundle provided to the Court in relation to the Claimant's application. Any construction activity related to the dock falling outside of that restriction shall only take place between the hours of 8:00 am to 5:30 pm. The costs of the Claimant's application are reserved to the trial of the action.

[38.] I will adjourn this matter for immediate case management and for an accelerated trial date.

Dated the 30th day of September 2024



Sir Ian R. Winder
Chief Justice