BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2011/0038

JIPFA INVESTMENTS LIMITED

Applicant

-and-

NATALIE BREWLEY

1st Respondent

ALRED FRETT

2nd Respondent

B & F MEDICAL COMPLEX LIMITED

3rd Respondent

Appearances:

Mr. Gerard Farara QC and with him Ms. Tamara Cameron of Farara Kerins for the Applicant
Mr. Frank Walwyn and Ms. Astra Penn of Dancia Penn & Co. for the Respondents

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2011: May 12, 17
2011: June 08

Application to continue ex parte interlocutory injunction – Application to vary or discharge on grounds of (1) material non-disclosure; (2) no serious issue to be tried and (3) adequacy of damages as a remedy.

Applicable legal principles – American Cyanamid Co v Ethicon Limited [1975] AC 396, H.L. considered.

On 17 February 2011, the applicant urgently sought and obtained an ex parte interim injunction against the respondents ordering them to cease excavation on their [the respondents] land which comprises a 12-foot right of way to the applicant's property and from further undermining the said right of way. The respondents were further ordered, inter alia, to immediately cease all excavation, construction and other works relating to the proposed development on their land until the determination of the applicant's claim for damages and application for judicial review.

On 2 March 2011, the applicant sought a continuation of the interim injunction. On 3 March 2011, the respondents applied to set aside or vary the interim injunction alleging that (1) the applicants

failed to make full and frank disclosure on the ex parte application; (2) there is no serious issue to be tried as the applicant's sole legal entitlement is a private right of ingress and egress to its property over the respondents' land and there is no interference with that right; and (3) in any event, damages are adequate as a remedy.

HELD:

1. The approach to be adopted by the court in hearing applications for interim injunctions and the principles to be applied are derived from **American Cyanamid Co v Ethicon Ltd** [1975] A.C. 396 (H.L.). The initial question for consideration is whether there is a serious issue to be tried. If there is, a further question arises as to whether damages would be an adequate remedy for the respective parties. If there is doubt about whether damages would be an adequate remedy, the final question is where does the balance of convenience lie?

2. There is a serious issue to be tried between the applicant and the respondents. The affidavit evidence filed thus far is conflicting. The main contentions are whether or not there has been infringement of the easement rendering it precipitous and unsafe; wrongful withdrawal of lateral support and destruction of the fencing; trespass by the respondents on the applicant's property, and whether the respondents acts will result in a diminution in value of the applicant's property.

3. The applicant's claim is for damages. Therefore, damages would be an adequate remedy. The applicant cannot now do a volte face and say that damages are inadequate as a remedy.

4. The balance of convenience lies in the preservation of the status quo: see **Evans Marshall v Bertola SA and Independent Sherry Importers Ltd** [1973] 1 WLR 349; **Jada Construction Caribbean Ltd v The Landing Ltd** [SLUHCV2006/0771], per Edwards J. Judgment delivered on 16 October 2006 [unreported]; **R (on the application of Gavin v Haringey London Borough Council** [2003] EWHC 2591 (Admin.).

5. The court has a discretion to discharge an interim injunction granted at an ex parte hearing for failure on the part of the applicant to give full and frank disclosure but this is not the inevitable consequence of every non-disclosure. The court will have regard to all the circumstances of each case and will assess the gravity of the alleged breach, the degree and extent of culpability with regard to the non-disclosure, the importance and significance of the facts not disclosed to the outcome of the application, any excuse or explanation offered, the severity and duration of any prejudice caused to the respondent and whether the non-disclosure can be and, if so, has been, remedied. The non-disclosures alleged in this case were not material enough to warrant setting aside the original interim injunction: **Kensington Income Tax Commissioners, ex parte Princes Edward de Poligrac** [1917] 1 KB 486, 514; **Edy Gay Addari v Enzo Addari** BVI Civil Appeal No. 2 of 2005 [unreported].

JUDGMENT

Introduction

[1] **HARIPRASHAD-CHARLES J:** On 17 February 2011, JIPFA Investments Limited ("the applicant") urgently sought and obtained an ex parte interim injunction against the respondents wherein they were ordered to cease excavation on their [the respondents] land, Parcel 21, which comprises a 12-foot right of way to the applicant's property, Parcel 22 and from further undermining the said right of way. The respondents were further ordered to immediately cease all excavation, construction and other works relating to the proposed development on Parcel 21 until the determination of the applicant's claim for damages and application for judicial review.

[2] On 2 March 2011, the applicant filed an application seeking the continuation of the interim injunction. A day later, on 3 March 2011, the respondents filed an application to set aside or vary the interim injunction.

The parties

[3] The applicant is a company duly incorporated under the laws of the Virgin Islands and is the registered proprietor of Parcel 22, Block 2938B Road Town Registration Section ("Parcel 22"). It has been the registered proprietor since 9 November 1989 and has enjoyed a right of way over Parcel 21 continuously from that date to present. The said right of way is the only means of ingress and egress to the applicant's property.

[4] The 1st and 2nd respondents, who own and operate the 3rd respondent, B & F Medical Complex Limited, are registered as joint proprietors of Parcel 21, Block 2938B, Road Town Registration Section ("Parcel 21") which is immediately adjacent to and adjoining Parcel 22. The respondents have commenced the construction of a large medical complex on Parcel 21.

The grant of the interim injunction

[5] Parcels 21 and 22 are located in a mixed commercial and residential area along the busy James Walter Francis Drive. Both parcels of land are adjacent to Treasure Isle, a well-

established hotel that recently completed most of a major renovation and expansion project, and across the street from the Moorings Charter Company, the largest marina complex in the Territory. Until recently, Parcels 21 and 22 were used as residential lots and each contained a single dwelling house. Last year, the dwelling house on Parcel 21 was demolished in order to facilitate the construction of the medical complex.

[6] On or about 11 February 2011, the applicant, through its director, Dr. Joseph S. Archibald QC alleged that he observed a traxcavator removing soil from the area between the right of way and the public road leaving a precipitous drop of almost 20 feet to the area below. Dr. Archibald QC further alleged that the excavation works being carried out by the respondents on Parcel 21 left the right of way in some parts less than 12 feet and in other parts dangerously and precipitously undercut thereby posing a severe danger for vehicles or pedestrians on the right of way and severely undermining the right of way.

[7] In addition, Dr. Archibald QC deposed that he observed that the excavation being carried out by the respondents came right to the western boundary of Parcel 22 in such a way that it has withdrawn lateral support of the applicant's property and caused the fencing to collapse in parts. As a result, says the applicant, its property is now susceptible to erosion and slippage of the virgin soil on and along the western boundary necessitating a very large and costly retaining wall to be erected.

[8] The applicant, through another of its directors, Faye Archibald deposed that on or about 16 February 2011, she observed a large excavation vehicle, used by the respondents' servants or agents, parked on Parcel 22 and one of the respondents' workmen was sitting on the wall inside Parcel 22 without the lawful authority or permission of the applicant.

[9] As a result of these observations, the applicant became very concerned. On 17 February 2011, it urgently sought and obtained an ex-parte interim injunction ("the Order") in the following terms:

1. The respondents immediately cease excavation of the area of land on Parcel 21 Block 2938B Road Town Registration Section which comprises a 12-foot right of

way to the applicant's property situate at Parcel 22 Block 2938B Road Town Registration Section and the further undermining of the said right of way by excavation below the right of way;

2. The respondents immediately cease excavation of the said right of way to the extent that it undermines and withdraws lateral support for the western boundary of the applicant's Parcel 22;

3. The respondents immediately cease trespassing on the applicant's Parcel 22 by removing all trucks and other heavy equipment which the respondents whether by themselves, their servants or agents placed or caused to be placed on the applicant's Parcel 22;

4. The respondents immediately cease all excavation, construction and other works relating to the proposed development on Parcel 21 until the determination of the applicant's claim for damages and application for judicial review; and

5. The applicant to file the Claim Form and Statement of Claim and the Application for Leave to apply for Judicial Review within 7 days from the date hereof.

6. This injunction is returnable on 4 March 2011 at 9:00 a.m. Should the respondents wish to discharge or vary this Order before the returnable date, they must give 72 hours notice to the applicant.

The claim for damages/ claim for judicial review

[10] In accordance with paragraph 5 of the order, on 23 February 2011, the applicant filed a Claim Form and Statement of Claim seeking (1) damages for trespass; infringement of easement, wrongful withdrawal of lateral support to the applicant's property and destruction to property; (2) costs and such further or other relief. The Claim Form and Statement of Claim were amended the following day to include the third respondent as a party to the suit. The respondents filed their defence on 25 March 2011.

[11] In addition, on 23 February 2011, the applicant made an application in separate proceedings for leave to apply for judicial review contending that the decision by the Honourable Premier & Minister of Planning granting planning permission for the development of the medical complex was unlawful.[1] On 28 February 2011, the court

[1] Claim No. BVIHCV2011/0040.

granted leave to the applicant to apply for judicial review.[2] The applicant filed a claim for judicial review on 1 March 2011.[3]

The present applications

[12] On 2 March 2011, the applicant applied for an order in these proceedings to continue the interim injunction until determination of its claims for damages and judicial review on the grounds that "*if not restrained by the interim injunction the respondents would continue to unlawfully interfere with the applicant's right to use and enjoy the right of way, continue to withdraw lateral support from the western boundary, to preserve the status quo, prevent serious harm to the applicant's right to use and enjoy the right of way and further irreparable damage to the right of way and the applicant's property, substantial prejudice to the applicant's interest in pursuing the claim.*"[4] Also, the respondents had not yet applied to set aside the interim injunction.

[13] On 3 March 2011, the respondents filed an application seeking an adjournment of the return date and an extension of time to apply to vary or discharge the injunction because they needed more time to properly brief their legal practitioners and have material prepared and served.[5]

[14] On 4 March 2011[6], the court gave some directions and set a hearing date for these two applications. The court also ordered the continuation of the interim injunction until the return date or further order.

[15] On 16 March 2011, the respondents duly filed two affidavits in support of their application to discharge: the first affidavit of Alred Frett[7] and the second from the respondents'

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[2] See Hearing Bundle Tab 16: Order (Olivetti J) 28.2.2011, entered 28.2.2011.
[3] See Hearing Bundle Tab 17: Claim Form BVIHCV2011/0040 JIPFA Investments Limited v Minister of Physical Planning, filed 1.3.2011.
[4] See Hearing Bundle Tab 6 and 7: Application for Continuation of Interim Injunction, 02.3.2011 along with (Second) Affidavit of Dr. Joseph Archibald QC, sworn 02.3.2011 and Exhibit JSA-1.
[5] Notice of Application 03.3.2011 along with Affidavit of Alred Frett.
[6] See Hearing Bundle Tab 8: Order, (Hariprashad-Charles J) dated 4th March 2011, entered 10th March 2011.
[7] See Hearing Bundle Tab 10: First Responding Affidavit of Alred Frett (In Support of Application to Discharge Injunction), sworn 16.3.2011, filed 16.3.2011.

contractor, James G Frett[8]. Mr. Frett's affidavit was accompanied by an exhibit containing 4 photos of the site, 1 survey plan, 1 diagram of the project and a number of certificates and photos of prior projects which he constructed.

[16] The applicant filed the first affidavit of Faye Archibald[9] and the third affidavit of Joseph Archibald QC,[10] two of its directors.

Issues arising

[17] Learned Queen's Counsel, Mr. Farara appearing as Counsel for the applicant, forcefully submits that it was proper to grant the interim injunction which ought to continue because the applicant has clearly demonstrated that there is a serious issue to be tried and that damages are not an adequate remedy. He further submits that the failure to refer in its application to the demolition of the dwelling house and excavation activities carried out during 2010 was not a material non-disclosure of relevant facts because those activities did not infringe the applicant's rights in any way.[11]

[18] Learned Counsel, Mr. Walwyn appearing for the respondents succinctly submits that the applicant failed to discharge the duty to give full and frank disclosure and failed to meet the test for injunctive relief, thus the interim injunction was improperly obtained and ought to be discharged. In the alternative, Mr. Walwyn seeks an order for a variation of the injunction to permit the carrying out of certain works, specifically, the erection of retaining walls.

[19] Out of these submissions arise the following key issues namely:

1. Is there a serious issue to be tried?
2. Are damages an adequate remedy?
3. Did the applicant fail to give full and frank disclosure?

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[8] See Hearing Bundle Tab 9: Responding Affidavit of James G Frett (In Support of Application to Discharge Injunction), sworn 16.3.2011, filed 16.3.2011.
[9] See Hearing Bundle Tab 11: First Affidavit of Faye Archibald, sworn 23.3.2011, filed 23.3.2011.
[10] See Hearing Bundle Tab 12: Third Affidavit of Dr. Joseph Archibald QC, sworn 23.3.2011, filed 24.3.2011.
[11] Claimant's Skeleton, para. 52 – 54; Brink's Mat Ltd v Elcombe [1998] 1 WLR 1350; **Robelco Limited et al v Svoboda Corporation et al**, BVI Claim No. 311 of 2007 (Hariprashad-Charles J), Judgment 28 January 2008.

The Law

[20] The court has the power to grant an interim injunction in all cases in which it appears to the court to be just or convenient to do so.[12] Such a remedy may be granted whether or not there has been a claim for a final remedy of that kind, and any order made may be made unconditionally or upon such terms and conditions as the court or judge thinks just.

[21] The principles applicable to the grant or discharge of an interim injunction have previously been considered by this court in **Victor International Corporation et al v Spanish Town Development Company Limited et al**.[13] The procedure to be adopted and the tests to be applied are those given by Lord Diplock in the landmark case of **American Cyanamid Co v Ethicon Limited**.[14]

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation 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 argument and mature considerations. These are matters to be dealt with at the trial. …So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[22] 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, where does the balance of convenience lie?

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[12] Eastern Caribbean Supreme Court (Virgin Islands) Act, Cap 80 of the Laws of the Virgin Islands 1991 Revised Edition., section 24(1); Civil Procedure Rules ("CPR") Part 17, 17.1(1)(b) and 17.1(4).
[13] BVIHCV2007/0293 (Hariprashad-Charles J), Judgment 14 February 2008, para. 12 – 14.
[14] [1975] AC 396, 407-8.

[23] Some of the key principles derived from the speech of Lord Diplock in **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.

[24] That key question - is there a serious issue to be tried? - is the threshold requirement. Lord Diplock in **American Cyanamid** said 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.[15]

Is there a serious issue to be tried?

[25] Learned Counsel, Mr. Walwyn submits that the applicant has failed miserably to meet the threshold test for injunctive relief.[16] He submits that an interlocutory injunction may be granted only to protect or assert a legal or equitable right that could be enforced by a final judgment[17] and, in this case, the applicant's legal entitlement is no more than an easement which provides a private right to pass and re-pass over the respondents' land. No action will lie in respect of a private right of way unless the interference with its exercise is substantial.[18] The respondents assert that there has been no interference as the right of way has not been undermined, blocked or reduced in size.[19] Further, Mr. Walwyn submits that the applicant's allegations of trespass amount to only one incident, which ceased immediately upon request, and is therefore trivial at best.

[26] Mr. Walwyn further submits that since there has been no substantial interference with the applicant's sole legal right which is merely to pass over the respondents' land to access its own, and which passage has not been obstructed, there is no serious issue to be tried.

[27] On the contrary, Mr. Farara QC points out to the conflicting affidavit evidence filed on behalf of the parties. He submits that there are a number of factual issues to be tried, the

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[15] Smith v Inner London Education Authority [1978] 1 All E.R. 411 at 419, CA *per Browne L.J* See also Seaconsar v Bank Markazi [1994] A.C. 438, H.L., Canada Trust v Stolzenberg (No. 2) [1998] 1 WLR 547.
[16] Skeleton Argument of the Respondents, pages 12 – 17.
[17] Siskina (Owners of Cargo Lately Laden on Board) et al v Distos Compania Naviera SA [`979] AC 210 (HL), 256; Geoffrey Croft v Joseph W Horsford ANUHCV2008/0559 (Blenman J) Judgment 29 January 2009.
[18] See Megarry and Wade, The Law of Real Property,, 7th ed. (2008), para. 30-004.
[19] Skeleton Argument of the Respondents/Defendants (In Support of Discharge of Injunction) lodged 29.3.2011, page 17.

veracity of which cannot be determined at this interlocutory stage.[20] In summary, the main contentions concern whether or not there has been infringement of the easement rendering it precipitous and unsafe; wrongful withdrawal of lateral support and destruction of the fencing; trespass by the respondents on the applicant's property, and whether the respondents acts will result in a diminution in value of the applicant's property. There is also the issue of the pending judicial review proceedings which seeks to quash planning permission granted to the respondents.[21]

[28] The respondents have categorically denied committing the alleged acts and put the applicant to strict proof thereof. In respect of the applicant's claim that it had suffered damage or diminution in value of its property, the respondents deny the allegation, but says that any such damage or diminution is as a result of the applicant not maintaining its property properly, its failure to maintain fences along boundary lines and the natural forces of nature, both severe and over time.

[29] Whether or not the acts complained of as infringement ever took place are questions of fact, and whether such infringement is substantial interference is a question of law. It is not the function of the court to resolve these contentions at this stage of the proceedings. The question to be asked is whether, assuming the allegations in the affidavits to be true, the applicant would be entitled to obtain the remedy sought in its statement of claim.[22] The plain answer must be in the affirmative.

[30] Therefore, as I see it, the applicant has shown that there is a serious issue to be tried and I so hold.

Are damages adequate as a remedy?

[31] The applicant says that damages are inadequate as a remedy because the magnitude of the damage resulting from the continuation of the respondents' unlawful activities cannot

[20] Claimant's Skeleton (filed 29.3.2011), para. 17.
[21] Claimant's Skeleton, para. 30 – 39.
[22] Seaconsar Far East Ltd Appellants v. Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 451-452.

be quantified.[23] The applicant further says that there is a valid concern that the construction of the proposed medical complex would represent an over-development of Parcel 21 which would be detrimental to the surrounding land uses and would radically change the user of the area from residential to commercial resulting in increased traffic to Parcel 21 along the right of way. The applicant asserts that the planning permission which the respondents obtained is illegal and it [the applicant] will suffer irreversible damage if the respondents are allowed to proceed with the development which will adversely affect the applicant's continued use and rental of Parcel 22 as a residence and will adversely affect the market value of that property. The applicant further submits that the respondents' are "not entitled to ask the court to sanction their wrong-doing by purchasing the applicant's legal rights on payment of damages"[24] and "it would not be just, in all the circumstances"[25] to confine it to its remedy in damages.

[32] The respondents say that the applicant's amended claim seeks only damages and does not even pray for an injunction. They say that the applicant has not made a claim for a continuing trespass and rightly so, because the evidence shows one isolated instance of trespass which ended immediately upon request, for which damages would be nominal at best.[26] To the extent that any alleged diminution in value of the applicant's property occurs, it can be quantified. Therefore, damages are an adequate remedy.

[33] The answer to this question resides in the applicant's amended statement of claim. Its substantial claim is for damages against the respondents. The other two claims for costs and such further and other relief are ancillary. All lawyers use these terminologies to bolster up their main claim.

[34] Therefore, the applicant faces that insurmountable hurdle to show that damages are not an adequate remedy when its claim is for damages.

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[23] Claimant's skeleton, para. 40 – 44.
[24] Regan v Paul Properties Ltd [2007] Ch 135.
[25] Evans Marshall & Co Ltd v Bertola SA [1973] 1 WLR 349
[26] **Asot A. Michael v Astra Holdings Limited**, Antigua & Barbuda Civil Appeal No. 15 and 17 of 2004 (Saunders JA, Gordon JA, Rawlins JA [Ag]) Judgment 23 May 2005, at para. 55.

[35] The legal principles are clear: if damages are an adequate remedy then the test for injunctive relief has not been passed.[27]

[36] In my considered opinion, the applicant has failed to discharge the burden that damages are not an adequate remedy. Having made this finding, I could very well dispose of the applications and discharge the interim injunction. However, there is a further matter that needs consideration.

Balance of convenience

[37] Another question relates to the balance of convenience. Mr. Farara QC asserts that the balance of convenience lies firmly in favour of the continuation of the interim injunction in order to preserve the status quo until the issues in dispute are determined at trial.[28] According to learned Queen's Counsel, the respondents have not asserted that the delay in construction would cause any substantial damage or loss and **IF** continued excavation and construction results in diminishing the rentability and market value of [the applicant's] Parcel 22 on the open market, the applicant would have suffered irreversible damage which will render the claim for judicial review otiose.

[38] Mr. Farara QC submits that given the potential loss and damage to be sustained by the applicant, the balance of convenience lies in restraining the respondents from continuing excavation and construction works until the applicant's claims are determined.

[39] The respondents argue that the balance of convenience favours them as they obtained planning approval for the construction of the medical complex and they have not interfered with the applicant's legal right to access its property over the right of way. They further say that completion of the works and retaining walls will address all of the concerns of imminent danger and harm alleged by the applicant.

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[27] American Cyanamid Co v Ethicon [1975] 1 All ER 504, at 509-511.
[28] Series 5 Software Ltd v Clarke [1996] CLC 631; Claimant's Skeleton, para. 47 – 51.

[40] The applicant relied on the case of **Evans Marshall v Bertola SA and Independent Sherry Importers Ltd**[29] where, reflecting upon the approach that should have been taken by the trial judge who refused to grant an interlocutory injunction upon the grounds that the permanent injunction sought by the plaintiff would likely be refused at trial, Sachs LJ observed:

> The line of approach to the exercise of the court's discretion as to whether or not an interlocutory injunction should be granted is that stated by Lord Denning in *Hubbard v Vosper* [1972] 2 QB 84, 96:
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> > "In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead… The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

[41] Mr. Walwyn countered by submitting that **Evans** is distinguishable on its facts, as demonstrated in the judgment of Edwards J [as she then was] in **Jada Construction Caribbean Ltd v The Landing Ltd**.[30] The learned judge had this to say:

> [60] "This is not a case in which the risk of damages to JADA is such that the injunction should continue regardless of the strength of the parties' cases. This is not a commercial agreement between trading Companies, as was the case in *Evans Marshall & Co Ltd v Bertola S.A.* and *Independent Sherry Importers Ltd* [1973] 1 W.L.R. 349.
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> [61] The judicial pronouncement of Sachs L.J. in this case, at page 380 (reproduced at paragraph 30 - B (1) of this judgment) has to be viewed within the context of the type of contractual relationship existing between the parties, in my opinion. Both the Court and Counsel for the parties in **Evans Marshal** recognized that the Agreement in question was not a service agreement or an agreement for services to be rendered. Although the Court accepted that like a service agreement, it required co-operation and confidence between the parties, the Court observed that the absence

[29] [1973] 1 WLR 349.
[30] SLUHCV2006/0771, (Edwards J), Judgment 16 October 2006, at para. 66 – 70.

of mutual co-operation or confidence in the existing relationship between the parties does not by itself preclude the Court from granting a negative injunction designed to encourage a party to perform their part of the agreement. Sachs L.J. prior to making that pronouncement that Mr. Foster has relied on, had rejected the view posited by Counsel for Independent Sherry Importers Ltd (I.S.I.) that ISI would suffer immeasurable/unquantifiable damage to its goodwill and reputation held for 3 weeks, in contrast to Evans Marshall & Co. Ltd's loss of goodwill and disruption of trade, and the litigation with its sub agents, which would be inflicted on Evans Marshall Co. Ltd, by an abrupt unjustified termination of an agreement by Bertola with 14 years to run, Sachs L.J. found that in such circumstances damages would not be adequate. Sachs L.J. had also considered whether a judgment could be satisfied by Bertola which was a Spanish Company, and he concluded that with Bertola's financial status in Spain being unknown, and given that the share capital of the English company ISI was £5000, the chances of a judgment for the sums canvassed by the parties, were questionable. On this ground also Sachs L.J. found that damages would prima facie not be adequate.

[62] The injunction in **Evans Marshall** was granted by the Court to **". . . set its face against those who seek abruptly to break contracts"** on the basis that such an injunction works **"in the interests of justice and also in the interests of the proper conduct of commercial relations."**

[63] It is important to note also Sachs L.J. had considered the allegations in the Affidavit evidence before the Court, and had concluded that the Plaintiffs seemed to have a reasonable prima facie case which could lead to success, whilst the defences raised were not impressive.

[64] Unlike the **Evans Marshall Case**, the present case is not one where in the absence of an injunction, L.L. can take advantage of its breach, and enjoy the fruits of any time, effort or money which JADA has expended during the last 7 to 8 months of the Contract. The Construction Management Contract is akin to a contract of personal service in my view or a contract of agency. JADA has no vested interest under this Contract."

[42] Likewise, Mr. Walwyn submits that the applicant here has no legal interest that is being disturbed by the respondents – the right of way always was and remains passable.

[43] The question which now arises is: should the prospect that the applicant may be successful in the pending claim for judicial review in completely separate proceedings against a defendant who is not a party to this claim, mean that this court should decide that it is best to maintain the status quo, in this action, where the applicant is ostensibly not

entitled to interim injunctive relief, until the outcome of the judicial review which could potentially vitiate any planning permission the respondents have?

[44] In **R (on the application of Gavin) v Haringey London Borough Council**[31] one of the factors weighing upon Mr. Justice Richards' decision not to quash the grant of planning permission was the prejudice which would be caused to the landowner who had the benefit of the planning permission. At para. 59 – 61, Richards J. noted:

> I take the view that it was reasonable for Wolseley not to stop the works, even though it can be characterised as having taken a calculated commercial risk in proceeding as it did. It had an apparently valid planning permission. The time limit for a legal challenge to that permission had expired well over 2 years previously. It had had one false start in August 2002 with the contractor which went into liquidation. It had then entered into a legal commitment with Brennan on 1 April 2003 which, whatever its precise analysis, would expose it to a substantial claim if the works were stopped. In those circumstances I do not think that a complaint about the validity of the permission or the threat of proceedings to challenge it were sufficient to make it unreasonable to continue with the works. No doubt contractors are faced not infrequently with complaints about developments that do not mature into actual challenges. In the present case, moreover, the claimant's own explanation for the time spent in April and May before a claim for judicial review was lodged is that, especially in view of the lapse of time since the grant of planning permission, it was necessary to carry out detailed investigations and give careful consideration to whether a claim was justified. Wolseley cannot fairly be criticised for carrying on with the works while the claimant was considering his position.
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> The lodging of the claim for judicial review made Wolseley's position more problematic. There was then a more clearly defined risk that the planning permission would be quashed with the result that any work done under it would be unlawful. On the other hand, Wolseley had substantial grounds for resisting the grant of permission to apply for judicial review and thereafter, when permission was granted by Elias J on 23 June, for resisting the grant of relief. At no time did the claimant seek an injunction to prevent the continuation of the works. This was entirely understandable, given that he would have been required to give a cross-undertaking in damages and the sums involved were very large. But the absence of a cross-undertaking meant that any loss arising out of the cessation of the works would fall on Wolseley alone. Taking all those matters into account, it was in my view not unreasonable of Wolseley to carry on with the works even after the commencement of proceedings.

[31] [2003] EWHC 2591 (Admin).

> It follows that I reject the claimant's submission that the costs incurred since, at the latest, the date when the claim for judicial review was lodged should be left out of account when considering the hardship or prejudice that Wolseley would suffer if the planning permission were now quashed. But even if I did confine my attention to the costs incurred as at the date when the claim for judicial review was commenced, the sums would still be large (precise figures are not given, but the costs as at 11 June are indicative) and the difference would not in my view affect the way in which the balance came down."

[45] Thus, it seems that failure to seek interim relief against the developer may have the potential to result in prejudice to a claimant seeking judicial review of a decision to grant planning permission.[32]

[46] In **Gavin v Haringey**, the injunction against the developer was sought within the judicial review proceedings proper. The developer there had been notified of proceedings upfront and was actively involved as an interested party to those proceedings. In the instant case, the applicant seeks an interim injunction by way of an entirely separate proceeding against the respondents. Mr. Walwyn submits that:

> The attempt to bootstrap the judicial review proceeding that was commenced subsequent to the *ex parte* order to this Claim, and to use it as support for continuing the injunction should not be tolerated. No injunction is claimed in the judicial review proceeding. If the applicant is ultimately successful in its judicial review proceeding, so be it. The respondents move forward with the project at their peril. But, it is humbly submitted that there is simply no evidence of irreparable harm in either proceeding that warrants the granting of extraordinary relief in the form of an injunction.[33]

[47] Considering the provisions of CPR 56.1(4), CPR 56.8 and CPR 19.2(3), perhaps the route taken by the applicant was not the most elegant approach to preserving the status quo pending the outcome of the claim for judicial review. However, cumbersome though it may be, nothing militates against it. I believe that the court is entitled to take judicial notice of the existence of claim for judicial review which challenges the legality of planning permission granted to the respondents to construct a medical complex on Parcel 21.

[32] David Lock (9 April 2009), New Law Journal, 'A balancing act', http://www.newlawjournal.co.uk/nlj/content/balancing-act
[33] Skeleton Argument of the Respondents, para. 58.

Allowing the respondents to continue unhindered with the development while the judicial review proceeds to its conclusion could have the effect of rendering the fruits of any subsequent judgment nugatory. No doubt, this is a consideration which weighs heavily in the interest of maintaining the status quo.

[48] Reflecting upon whether or not to quash the unlawful planning permission issued to a developer in **Gavin v Haringey,** the court said:

> "Nor does the point on enforcement action avail the claimant. It would be a matter of judgment for the council how to proceed with regard to enforcement. The powers conferred by s.173 of the Town and Country Planning Act 1990 would give it considerable flexibility. It is possible that something less, even far less, than demolition and removal of the entire development would be required. But all this is speculative and it is not possible to form any measured assessment of the actual outcome. The fact is that if the planning permission were quashed and no new permission were forthcoming, the entire development would be unlawful and Wolseley would be at risk of being required to demolish and remove it all. It is a risk which cannot be dismissed as insignificant."

[49] Despite the differing state of proceedings, I believe that similar considerations are relevant in this case.

[50] In the event that this injunction continues, but the claim for judicial review is then unsuccessful and the planning permission is validated, the respondents have not alleged that they could not be compensated in damages. On the face of it, I would imagine that it is undoubtedly the case that they could be so compensated. That said, the respondents have not yet given evidence in these proceedings of the likely amount of damages. If the claim for judicial review drags on for too long, I can only imagine that such damages are likely to be substantial.

Adequacy of the undertaking in damages

[51] The respondents say that the applicant has not provided them with an undertaking as to damages.

[52] Mr. Walwyn has challenged the efficacy of the applicant's undertaking in damages. Mr. Farara QC says that the necessary undertaking was given in accordance with the practice of this jurisdiction. I agree.

Duty to give full and frank disclosure

[53] The learned authors of Gee on **Commercial Injunctions** state:[34]

> "Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so, on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider."

[54] These principles were recently canvassed before Thom J in **Paul Lewis and ors v Canouan Resorts Development Ltd and ors**.[35] I gratefully adopt the summarization set out below:

> [16] "Ralph Gibson LJ in **Brink's Mat Ltd v Elcombe et al** [1988] 1 WLR 1350 outlined the principles by which a Court should be guided when considering whether there was material non-disclosure on an application for interlocutory relief. This approach was adopted by the Court of Appeal in **Edy Gay Addari v Enzo Addari** No.2 of 2005 where the Court said:
>
> > "In considering whether there has been non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:
> >
> > (1) The duty of the applicant is to make "a full and fair disclosure of all the material facts." See **Rex v Kensington Income Tax Commissioners, Ex parte Princes Edward de Poligrac** [1917] 1 KB 486,514 per Scrutton LJ.
> >
> > (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisors. See **Rex v Kensington Income Tax Commissioners**, per Lord Cozens-Hardy M.R. at p. 504, citing **Dalglish v Jaruie** [1850] 2 Mac G 231,238

[34] Steven Gee, *Commercial Injunctions* 5th ed. (2004), para. 9.001.
[35] SVGHVC2010/408 (Thom J), Judgment 3 May 2011.

and Browne - Wilkinson J. in **Thermax Ltd. V Schott Industrial Glass Ltd**. [1981] F.S.R. 289,295.

(3) The applicant must make proper inquiries before making the application: see **Bank Mellat v Nikpour** [1985] F.S.R. 87.The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see for example the examination by Scott J. of the possible effect of an Anton Pillar Order in **Columbia Picture Industries Inc. v Robinson** [1987J Ch. 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade I.J in Bank **Mellat v Nikpour** p. 92-93.

(5) If material non-disclosure is established the Court will be "astute to ensure that a plaintiff who obtains [an exparte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty": see per Donaldson L.J in **Bank Mellat v Nikpour**, at p. 91 citing Warrington L.J. in the **Kensington Income Tax Commissioners** case [1917J 1 K.B. 486, 509.

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non- disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded: per Lord Denning M.R. **Bank Mellat v Nikpour** p. 87, 90. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the exparte order, nevertheless to continue the order, or to make a new order on terms:

> "...when the whole of the facts, including that of the original non-disclosure, are before the Court it may well grant ...a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been

disclosed": per Glidewell L.J. in L10yds **Bowmaker Ltd v Britannia Arrow Holdings Pic**;"

[55] These principles were also re-adopted in **Robelco Limited et a v Svoboda Corporation et al**,[36] where I said:

> [54] "It is common ground that an injunction could be discharged if there is material non- disclosure. A consequence of applications for interim injunctions being made without notice is that the applicant who seeks the injunction is under a duty to give full and frank disclosure of any defence or other fact going against the grant of the relief sought. The case of **Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac**[37] is supportive of the point that the applicant has a duty to make "a full and fair disclosure of all the material facts." The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made inquiries. The extent of the inquiries that will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which the application is made and the probable effect of the order on the defendant.
>
> [55] In deciding in a case where there has been non-disclosure whether or not there should be a discharge of an existing injunction and a re-grant of a fresh injunction, it is important that the Court assess the degree and extent of culpability with regard to the non-disclosure, and the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the Court. If the duty to disclose is not observed, the Court may discharge the injunction."

[56] Mr. Walwyn argues that there is no compelling reason why the application for the injunction had been made without notice. The applicant's affidavit stated: "… *it is feared that upon receiving notice the respondents will significantly accelerate the pace and scope of the excavations to the further detriment of the applicant's property*."

[57] Mr. Walwyn says there is no evidence provided to support this fear, and in the circumstances, the statement is misleading.

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[36] Robelco Limited et a v Svoboda Corporation et al, BVI Claim No. 311 of 2007 (Hariprashad-Charles J), Judgment 28 January 2008.

[37] [1917] 1 K.B. 486, 514, per Scrutton LJ.

[58] Mr. Walwyn further submits that the applicant failed to make full and frank disclosure on the ex parte application in that it failed or neglected to disclose:

a) That a significant amount of the demolition and excavation works complained about was conducted on Parcel 21 between March 2010 and December 2010, months before the applicant moved for the Injunction Order;

b) The excavation up to the western boundary of Parcel 22 north of the access path that is complained about occurred in 2010, months before the applicant moved for the Injunction Order;

c) The trespass it relied on was a single instance that was remedied immediately by the unknown driver of the truck / equipment; and

d) Faye Archibald spoke with James Frett about the construction before it commenced.

[59] The respondents say that the most significant demolition and excavation work commenced in 2010 and resulted in hundreds of truckloads of rock, dirt and debris being removed from parcel 21.[38] Much of that work was on the western boundary of Parcel 22. Mr. Walwyn submits that the materials on the ex-parte injunction were misleading especially with respect to the urgency of the application and the need to move for an ex parte injunction, consequently, the injunction should be discharged as a result of these actions of the applicant.

[60] Be that as it may, I am of the opinion that the non-disclosure is not material to discharge the interim injunction. As I said in **Robelco** [supra], the court has a discretion whether or not to grant an injunction and in doing so, it must bear in mind not only the legal test but other factors including the applicant's motivation for the injunction and its duty to make full and frank disclosure. At paragraphs 56 -57, I said:

> "In addition, the Court must take all the relevant circumstances into account when it is determining the consequences for the breach of the duty to make full and frank disclosure. The circumstances should include the gravity of the breach. It

[38] See in particular Responding Affidavit of James G Frett (In Support of Application to Discharge Injunction), sworn 16.3.2011, filed 16.3.2011 at Hearing Bundle Tab 9.

should also include the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant. This latter should involve the consideration whether the consequences of the breach were remediable and were in fact remedied. The Court must also bear in mind the overriding objective and the need for proportionality in accordance with the overriding objective of CPR 2000.

Suffice it to say, the discharge of the order is not automatic on a finding of any material non-disclosure. The Court has a discretion to discharge the order or not to discharge it. It may also decide to grant fresh injunctive relief if it determines that justice requires it to protect the applicant. The Court should note that, by its very nature, an application without notice usually requires a lawyer to take instructions and prepare drafts and pleadings in some haste. The Court should weigh this against the need to uphold and enforce the duty to disclose as a deterrent to those who withhold material facts. Ultimately, an interlocutory injunction may be discharged for serious and culpable non-disclosure."

Conclusion

[61] It is apparent that there is a serious issue to be tried between the parties; however, the applicant otherwise fails to discharge the burden placed upon it. While final injunctive relief is not a requirement upon an application such as this, the applicant's claim is substantially one for damages, therefore, damages are plainly an adequate remedy.

[62] However, this does not bring the present applications to an end as there is a pending claim for judicial review. If the applicant is successful in that claim and the court were to permit the respondents to continue with construction works on the medical complex, the result will be catastrophic for both parties in the sense that the applicant will have a "paper" judgment and/or the respondents may be placed at risk of demolition of the structure. The court loathes these uncertain situations. Considering that the respondents could also be adequately compensated in damages and that the applicant has expressed its willingness to enter into such an further undertaking if required by the court; these considerations weigh strongly in favour of maintaining the status quo pending the outcome of the claim for judicial review.

[63] In the premises, I hereby order the following:

1. The application to continue the interim injunction is dismissed.

2. The interim injunction is discharged on condition that the respondents give an undertaking to the court to refrain from engaging in any further construction and excavation activities, save and except for the works necessary for carrying out of the erection of retaining walls along the southern, northern and eastern boundaries of Parcel 21, and the backfilling of these areas, subject to obtaining all requisite governmental and other consents and taking such steps as are necessary to facilitate the said construction.

3. The respondents are encouraged, but are not required to obtain the applicant's agreement or consent for the construction of any retaining wall which works take place wholly within the boundaries of Parcel 21.

4. The applicant will pay the respondents' costs on this application.

5. The claim for judicial review is to be given a speedy hearing during this current term or shortly thereafter.

Indra Hariprashad-Charles
High Court Judge