SAINT LUCIA

CLAIM NO: SLUHCV 2010/0324

IN THE MATTER OF AN APPLICATION UNDER PART 11 OF THE CIVIL PROCEDURE RULES 2000

AND

IN THE MATTER OF AN APPLICATION FOR AN INTERIM INJUNCTION PURSUANT TO PART 17.1 (1)(b) OF THE CIVIL PROCEDURES RULES 2000

AND

IN THE MATTER OF AN APPLICATION FOR AN INJUNCTION UNDER SECTION 42 OF THE PHYSICAL PLANNING AND DEVELOPMENT ACT 2001

DEVELOPMENT CONTROL AUTHORITY

APPLICANT/INTENDED CLAIMANT

AND

RAYNEAU GAJADHAR

RESPONDENT/INTENDED DEFENDANT

Appearances:

Ms. Bernella Charlemagne for the Applicant/Intended Claimant

Mr. Dexter Theodore for the Respondent/Intended Defendant

Mr. Peter Foster, Ms. Rene St. Rose and Ms. Diana Thomas for the Interested Parties

---

2010: JUNE 8th, 17th, 18th, 23rd.

---

[1] **WILKINSON J.:** The Applicant/Intended Claimant (hereinafter "the Applicant") filed an application on April 22nd 2010 seeking the following orders:

(1) The Respondent/Intended Defendant be restrained with immediate effect whether by himself, his servants, and/or agents or otherwise from using the 4 bin aggregate feeders, the gathering conveyor belt, the tower for concrete storage, the concrete mixer, and the concrete weight hopper erected/constructed on the parcel of land registered as Block and Parcel 1252 B 568 situated at Corinth, Gros Islet until trial of this action or further order of this Court.

(2) The Respondent/Intended Defendant be restrained with immediate effect whether by himself, his servants, and/or agents or otherwise from carrying out any industrial activities, which involves the mixing, storing and distribution of cement, and cement related products and from storing and distribution of construction material (including sand, gravel and concrete ready-mix) until trial of this action or further order of this Court.

[2] The application was supported by 2 affidavits of Mr. Hickson Smith and 1 affidavit of Mr. Shane Ellis, both building officers with the Physical Planning Section of the Ministry of Physical Development and the Environment. The application was served on 1st June 2010.

[3] The Respondent/Intended Defendant (hereinafter "the Respondent") filed an affidavit in reply together with affidavits from 3 employees of Construction and Industrial Equipment Limited (hereinafter "CIE"), 4 from persons resident at Corinth, and 1 from the head statistician at the National Insurance Corporation.

[4] On the first day that the matter came on for hearing, counsel, Ms. Rene St. Rose appeared and stated to the Court that she had a watching brief in the matter for residents at Corinth. At 16th June 2010, an application was filed without notice pursuant to the Civil Procedure Rules 2000 Part 21.2 seeking an order that Cornelius Daniel, Eric Louis, Magdalene Louis, Jennifer James, Patricia Lee, Beverley Du Bois, and Irwin Auguste (hereinafter called "the Residents of Corinth") be appointed to represent all the residents of Corinth who were set out in a schedule (17 persons signed documents confirming the representation), an order that the residents of Corinth be permitted to intervene and be heard as interested parties in the application for the injunction filed by the

Applicant , and an order that the affidavits, certificates and exhibits filed by the interested parties on 8th, 11th and 14th June 2010 be deemed validly filed. On 17th June 2010, I granted all 3 orders.

[5] The Residents of Corinth filed 5 affidavits in support the application of the Applicant for an interim injunction.

The Background

[6] The Applicant is the statutory authority vested with responsibility for physical planning and development at Saint Lucia. Pursuant to the Physical Planning and Development Act Cap. 5.12 (hereinafter "the Act") this includes preparing land use and development plans, granting of permission to develop land, causing to be conducted environmental impact assessments, and carrying out other related matters.

[7] The Respondent is a businessman. He is the owner of 2 parcels of land and which are registered as Block and Parcel 1252 B 568 situate at Corinth, Gros Islet (hereinafter "the development site") and Block and Parcel 1252 B 566 (hereinafter "the adjacent site").

[8] The Respondent is also the majority shareholder of the CIE. There being issued 20,025 common shares of which he holds 20,000 and 25 being held by Luceita Gajadhar.

[9] There is established on the development site an operating cement plant. The development approved 21st May 1997, pursuant to the application 812/94 of the Respondent dated 10th June 1996 for the development site was (a) type of commercial building, (b) owner occupied, (c) auto shop, office, and toilet. There was an application for change of use at 1998. Approval was granted to change from residential to commercial but a cement plant has not been approved as a development for the development site.

[10] At 16th October 2009, building officer, Mr. Hickson Smith, of the Ministry of Physical Development and the Environment observed that "new" development activities were being carried on the development site. The "new" development activities included erection and installation of a 4 bin aggregate feeder with pneumatic doors on concrete columns, a gathering conveyor belt, a pan type concrete mixer, a tower for cement storage, and a cement weighing hopper with pneumatic doors. He also observed felled trees at the development site. The development observed required the

permission of the Applicant, and the Respondent according to the records of the Applicant did not have such permission.

[11] At 16th October 2009, the Applicant issued a letter addressed to the Respondent and delivered it to Miss Bertha Dovey at the development site. The letter stated:

> " It appears to the Development Control Authority (DCA) that you are carrying out an illegal development, contrary to the Physical Planning and Development Act No. 29 of 2001. Your actions constitute an offence.
>
> You should contact the offices of the DCA immediately and provide proof that you in fact have permission to carry out the development. Otherwise, you are to cease all development activities immediately. If you fail to heed this warning legal action will be commenced against you.
>
> Should you require further advice and information please contact Hickson Smith at telephone number 468 4443."

[12] At 16th October 2009, a number of residents in the vicinity of the development site lodged a formal complaint about the "new" development with the Applicant and the Ministry of Health. A petition to support the formal complaint was signed by 83 residents of Corinth. The residents complained about the deleterious effects of the cement dust from the cement plant and which operated 7days per week, sometimes into to early hours of the morning, was having on their health, that of their families, and the deterioration in overall enjoyment of their properties. They complained about the noise of the heavy equipment, cement trucks and other trucks carrying materials for the cement plant.

[13] On 10th December 2009, at 11.10a.m an enforcement notice and stop notice addressed to the Respondent were served on him by affixing them to a structure on the Site. Service was effected in the presence of Mr. Shane Ellis, another building officer.

[14] The enforcement notice GI/EN40/09 was addressed to the Respondent, and stated:

> " WHEREAS –
>
> 1. You are the Owner of the development described in the First Schedule (hereinafter called "the property")
> 2. It appears to the Development Control Authority that there has been a breach of the provisions of the Physical Planning and Development Act No. 29 of 2001 (hereinafter called "the Act") in that the property has been developed in a manner specified in the

Second Scheduled without the grant of permission required for such development under Part III of the Act and that this development has occurred within a period of four years before the date of service of this Notice; and

3. The Development Control Authority considers it expedient to serve this Notice having regard to material Planning consideration. The annex accompanying this Notice contains important additional information.

NOW THEREFORE TAKE NOTICE THAT –

1. The Development Control Authority pursuant to the powers contained in Section 37 of the Act and all other powers enabling it to do so requires you to take steps specified in the Fourth Schedule within a period of twenty eight (28) days from the date on which this Notice takes effect.
2. **This Notice shall take effect on the 8 day of January, 2010.**(Emphasis is mine)

[15] The First Schedule described the parcel to which the enforcement notice was applicable.

[16] The Second Schedule set out a description of all the development activities that were being carried out in breach of the Act and they were:

1. The clearing of the northern boundary of the said parcel;
2. The excavation of the 3 trenches along the northern and eastern boundaries and measuring 50 ft long by 14 ft wide by 11ft deep; 50 ft long by 14 ft wide by 6 ft deep; 8 ft long by 14 ft wide by 5 ft deep;
3. Construction of retaining walls along the northern and eastern boundaries and measuring 2 by 50 ft. long by 11 ft. deep; 2 by 50 ft. long by 6 ft. deep; 28 ft. long by 5 ft. deep; 14 ft. long by 11 ft. deep; and 14 ft. long by 6 ft. deep;
4. Construction of a concrete base measuring 50 ft. by 50 ft.
5. The placement of a concrete plant consisting of 4 bin aggregate feeder with pneumatic doors supported on concrete columns, a gathering conveyor belt, a tower for cement storage, a cement weighing hopper with pneumatic doors, and a concrete mixer;
6. Construction of a wall to the south of the 4 bin feeder measuring 40 ft long by 8 ft high;

[17] The Third Schedule set out the reason for issuing the enforcement notice as being that the development was being carried out without obtaining prior written permission from the Applicant.

[18] The Fourth Schedule specified the steps to be taken by the Respondent and they were (i) remove the structures, (ii) remove from the land all building material and rubble arising from compliance with the required (i) above, (iii) restore the land to its original condition before the breach took place.

[19] The enforcement notice also notified the Respondent of his right of appeal pursuant to section 38(1) of the Act and advised him that if he failed to appeal then the enforcement notice would take effect on the date specified. It also warned that if he failed to comply with the enforcement notice then the result could be prosecution and or remedial action by the Applicant.

[20] The stop notice GI/ST 07/09 was addressed to the Respondent and dated 10th December 2009. The stop notice took effect 10th December 2009 It was also stated thereon that it was served on 10th December 2009. It provided:

> "STOP NOTICE
>
> 1. On 10/12, 2009 the DEVELOPMENT CONTROL AUTHORITY (DCA) issued an Enforcement Notice (GI/EN 40/09), a copy of which is attached, alleging that there has been a breach of Planning provision on a parcel of land registered as Block 1252B Parcel 568.
> 2. It appears that you are concerned with the carrying on of operation on the development described in paragraph 4 (hereinafter called "THE PROPERTY").
> 3. THIS NOTICE is issued by THE DEVELOPMENT CONTROL AUTHORITY.....

[21] The Annex to the stop notice informed the Respondent that the notice took effect on the date specified in paragraph 7, (10th December, 2009) that there was no right of appeal, and it was an offence to contravene a stop notice. The penalty was set out on conviction.

[22] Mr. Hickson Smith and Mr. Shane Ellis jointly signed affidavits of service pertaining to service of both the enforcement notice and the stop notice. They deposed that service was effected by affixing the documents to a structure at the development site.

[23] Despite service of the notice dated October 16th 2009, the subsequent enforcement notice, and the stop notice at 10th December 2010, development continued on the development site.

[24] This was not the first occasion on which an enforcement notice and stop notice were served on the Respondent. Mr. Smith exhibited enforcement notices and stop notices dated 5th February 1998, 14th April 1998, 11th December 2008, 31st March 2009, and an abatement notice dated 11th December 2008. Despite these several enforcement notices and stop notices, the development which ought to have ceased, continued on the development site.

[25] Post service of the enforcement notice and stop notice, a meeting with the Applicant was requested by Mr. Zephryrin Descartes, the business development executive of CIE. A meeting occurred on 23rd December 2009 at 10.00a.m. Minutes of the meeting were exhibited to Mr.Smith's affidavit. Present at the meeting for CIE were 2 business development executives, an architect, and an architectural technician, and for the Applicant were the chairman of the Applicant, the deputy chief planner, the physical planning officer, the development control officer, and the district building officer.

[26] The Minutes of the meeting reveal that the duration of the meeting was 1 ½ hours and the decision recorded was stated as:

> " Decision
>
> The Delegation from CIE agreed to resolve all outstanding unauthorized developments (those for which Notices had been served) and to inform the DCA on the way forward in resolving those outstanding developments by 8th January 2010. However, regarding the concrete plant, the DCA informed CIE's delegation that the only option is to relocate the concrete plant to their site at Ferrand, Castries or to a more suitable site for industrial activity of that nature **and to be approved by the DCA.**(Emphasis is mine)
>
> **The delegation indicated that the relocation of the concrete plant was not an option they considered as they intend to keep the plant in its present location.** To facilitate the operations of the plant in its present location it had upgraded to an environmentally friendly development where by the nuisance of noise, dust, etc. had been minimized. (Emphasis is mine)
>
> **They also proposed that the entire operations could be enclosed to further enhance its coexistence within the area. This option was not accepted by the DCA since it would result in a visually intrusive building.** (Emphasis is mine)
>
> To date the concrete plant had been completed."

[27] The Applicant also exhibited an epidemiological report prepared at February 24th 2010 by Dr. Alina Jaime. The conclusions recorded by Dr. Jaime were as follows:

> " Conclusions
>
> There are clearly undesirable impacts to the residents from the operation of the cement plant in the community of Corinth.
>
> Clear evidence of dust pollution was detected in the houses visited

Other environmental pollutants are causing discomfort on the residents like noise and exhaust fumes.

The area under study appears to have an unusually high prevalence of respiratory illnesses, especially among children.

The complaint of the residents is consistent with long term exposure to such emissions and pollutant that have been found in relation to the operation of the plant.

Recommendations

1. The working activities conducted at the cement mixing plant of Corinth shall be stopped immediately in order to eliminate the pollution of the environment and to preserve the health of the residents."

[28] At 11th January 2010, Mr. Shane Ellis, building officer, and Miss Liza Victor, development control officer visited the development site. Ellis observed that the unauthorized structures and buildings erected on the parcel of land and which were referred in the enforcement notice and stop notice remained on the development site. He also observed that the 4 bin aggregate feeders, along with the materials for the concrete mix were present on the development site.

[29] The affidavits of the Residents of Corinth revealed that they moved into Corinth and near to the development site between 1978 and 1996. A common thread running through all of the affidavits and the petition signed by the 83 residents is affected health, in some cases more serious than others, and general discomfort from dust and noise in a place where one should be most comfortable, the home.

[30] Mr. Eric Louis largely set out the overall discomfort that he, his family, friends, and persons staying with him as paying guests experienced because of the dust and noise. His wife has medical issues directly related to the dust and noise. As a direct result of the dust and noise, he says that he has lost substantial income from paying guests. Himself and his wife spoke to the Respondent about the dust and noise. He has noticed that the employees of CIE are on the street with masks and rags throughout the day. His paying guests have not only complained to him about the dust and noise but they also complained to the Ministry of Physical Planning and the Environment. He also wrote to the Minister of Health. Copies of the letters were exhibited and a medical report by Dr. Aleida de Melo for his wife.

[31] Ms. Patricia Lee, a retired civil servant, has been residing at Corinth since 1987 with her husband, and 3 children. She complained about the noise starting from early morning and which would

continue into the evening and sometimes into the night. Her house she says is bombarded with dust because she lives a mere 30 to 70 feet away from the development site. She suffered from asthma as a child, it receded but in recent times she has experienced a tightening in her chest and wheezing. She exhibited a medical report wherein Dr. Segum Tobias diagnosed acute exacerbation of bronchial asthma secondary to environmental factors, and acute rhinitis.

[32] Cornelius Daniel resides at Corinth with his wife and 3 children Mahla, Corintha and Kevin ages 28, 14 and 2 respectively. He has been on his property since 1990. His son, Kevin, who was born at Corinth, has bronchial asthma, allergic rhinitis and allergic conjunctivitis. He started suffering shortly after he was born and has to visit the hospital regularly. His doctor has diagnosed dust as a trigger. There is continuous dust in his home because of the CIE's operations. He said "We clean the place and the next hour there is dust around it." He exhibited the medical report of Dr. Ira N.J. Simmons which stated that Kevin was a known case of chronic bronchial asthma, allergic rhinitis and allergic conjunctivitis from the first year of his life. He is allergic to dust, smoke and air pollutants and is on continuous medication to prevent frequent hospitalization and general discomfort to his air passages.

[33] Patsy Walcott lives with her 3 children at Corinth, a 3 month old granddaughter and a 6 year old grandson. She has resided as Corinth since 1978. Her house is 2 houses away from the development site. She says that initially the area was solely residential and quite tranquil. It was the perfect location to settle and raise a family. She enjoyed living there and observed that the area blossomed into a suburb. She finds it disturbing to realize that despite extensively documented health risks posed by prolonged exposure to Portland Cement Concrete and other construction materials that the activities on the development site have been allowed to continue in the community. Her family suffers from a range of health issues including headaches, sinusitis, and lung infections which require hospitalizations. Her 6 year old grandson who was 2 years ago hospitalized for lung infections 3 times is now on medication to help him breathe. She complains that she is no longer able to enjoy the exterior of her home as her motor vehicle is constantly dirty, clothes which she hangs to dry out become dirty. She is not able to use her Jacuzzi. There is constant loud banging noise produced by the construction trucks and heavy equipment into the night. She recalled several nights last month coming out of her house at approximately 11.00p.m because it was so noisy and seeing dust coming out of the development site like a halo under the

fog lamp that is located at the development site. She has seen the dust created halo several times since that night. Sometimes at night stones are dumped at the plant and this noise unbearable. The road is constantly dusty and so the employees at the development site keep it wet. In the past year she has not been able to drive past the development site with her motor vehicle windows down. She exhibited the medical report of Dr. Martin Plummer made at 10th April 2010, and which confirms that her grandson, Kobe Gustave has acute lower respiratory tract infection with bilateral creps and ronchi. He has in the past 3 years been seen on various occasions for treatment of exacerbation of wheezing resulting in daily use of Ventolin and Becotide inhalers.

[34] The Respondent stated that he had leased the development site more than 15 years ago to CIE. The Respondent did not produce a copy of a lease to support this statement.

[35] The Applicant says that a search of the Land Registry does not reveal a recorded lease.

[36] The Respondent asserts that since 1995 CIE has been mixing concrete on the development site and from that time he has insisted that CIE should operate efficiently and not cause any harm and inconvenience to the community. He deposed that just before Cricket World Cup he was informed of complaints by his neighbours about dust and noise but he has never received any formal complaint from his neighbours, the wider community or the Ministry of Health. He further states that in or about October 2009, he went to CIE and had the company install environmentally friendly computer-controlled concrete mixing equipment. According to him, the plant is also now a fully enclosed and he believes that this has caused an irrational panic from "one or two" of the residents and this is the reason for this suit. He also says that since installing new equipment there has hardly been any dust, if at all, generated during concrete mixing and the equipment works silently.

[37] Mr. Martin Satney, describes himself as an agriculture engineer and business consultant. He deposed to an affidavit on behalf of CIE. He is employed by CIE as an internal consultant. He said that CIE rented the development site from the Respondent.He too never exhibited a copy of a lease.

[38] He said that since 1995 CIE has been mixing cement and distributing ready-mixed concrete from the development site. The original equipment used at 1995 cost about $600,000.00. Over time the company has grown to become one of Saint Lucia's prominent construction companies employing

over 500 persons with a further 2000 indirectly benefitting from the Company. Again no evidence was tendered to support the statement as to size of the work-force.

[39] In 2006 during preparations for Cricket World Cup, people in the area complained about the dust and noise emanating from the operations. CIE addressed the situation by installation at the end of last year environmentally friendly computer-controlled equipment and since this time there has been hardly any dust.

[40] He said that the interim injunction sought would cripple the business of CIE which does not have any other place of business at present and it would take a minimum period of 2 years to set up the business He listed several projects that CIE was involved in. He says that the Applicant has "unreasonably taken no action since 1995 and led CIE to believe that it could continue its operations. ". He tendered no evidence to support this statement.

[41] He says that generally with regards to the nature of the business and the ultimate production of concrete, there has been "no significant material change in use of the land" The method of production changed, making the operations more efficient and environmental friendly but there has been no change of use.

[42] He seeks to refute the complaints of the residents of Corinth by attacking the Ministry of Health's report which was exhibited to Mr. Smith affidavit. Notwithstanding that he is an agriculture engineer, he attacked the methodology of the report and complained that it was very limited.

[43] He says that while the report speaks of the potential adverse effect due to the proximity of houses, the direction of prevailing winds, and that there has been a follow up assessment at February 2010, which reached a similar conclusion, there is no clear verification exercise by the investigators of the exact location of abode of the many signatories to the petition and their relative proximity, or otherwise, to the facility, and indeed the possibility of the alleged impacts.

[44] He says the report refers to a subjective, and qualitative assessment with no definitive, objective, verifiable measure of impact or likely impact. Moreover he says that that the investigation was very limited and biased from inception as it makes no reference to other verifications, investigations or internal home, workplace and or school environment where persons spend approximately 40 – 50 percent of their time. He expressed an opinion on the prevailing winds. He also stated that the

report confined itself to impact based on long term exposure. He complained that there were no physical measurements of air quality, or dust, or noise completed and so the report lacked objectivity.

[45] According to him when the Ministry of Health conducted its investigation at October 2009, the timing coincided with the period of transition, this was when the company was upgrading its production process and therefore conditions were abnormal.

[46] He says that the follow-up undertaken by the Ministry on 15th February 2010, was at a time the new plant was being tested and commissioned while the old plant was still in operation. The old plant was removed towards the end of March 2010.

[47] He also said that the conditions which exist now at the development site have improved immeasurably due to the policy of continuous improvement.

[48] 4 residents and an employee of CIE swore affidavits making diametrically opposite statements to those made by the Residents of Corinth. In general they stated that they experienced no problems from the development site and occasionally heard a heavy truck. One such deponent seeks to shift the complaint about dust to the Valmont Development which he says has been going on for quite a while and has dirt roads. He adds that all of Corinth roads are "chip and spray roads" not asphalt and these type of roads are usually dusty

The Law

[49] The Civil Procedure Rules 2000 provides:-

"17.1 (1) The Court may grant interim remedies including-

(a) an interim declaration;
(b) an interim injunction;
(c) ....

17.2(1) An order for an interim remedy may be made at any time, including –

(a) after judgment has been given; or

(b) before a claim has been made.

(2) Paragraph (1) is subject to any rule which provides otherwise.

(3) The court may grant an interim remedy before a claim has been made only if –

(i) the matter is urgent: or

(ii) it is otherwise necessary to do so in the interests of justice

[50] The Physical Planning and Development Act Cap. 5.12 provides:

" 2. INTERPRETATION

(1) In this Act –
"development" in relation to any land means the carrying out of building engineering, mining or other operations in, on, over or under any land, the subdivision of any land, and "develops" and "developer" shall be construed accordingly.

16. PERMISSION REQUIRED TO DEVELOP LAND

(1) Subject to this Act, a person shall not commence or carry out the development of any land in Saint Lucia without the prior written permission of the head of the Physical Planning and Development Division.

(2) For the purposes of subsection (1), a person shall be deemed to have commenced the development of land until the contrary is proved, the burden of which shall lie on any person charged, if that person commenced the laying out of roads, the laying of water pipes, the clearing of or leveling of land, the filling of ravines or swamps, the construction of any building or any preparatory work which might indicate an intention thereby to improve the land or increase its value or make it in any way ready for any type of development, except those to which section 18 applies.

17. USES AND OPERATIONS NOT CONSTITUTING OR CONSTITUTING DEVELOPMENT

(1) The following operation or uses of land shall not be deemed for the purposes of this Act to involve the development of land –

(a) the carrying out of works for the maintenance, improvement or other alteration of any building, if the works affect only the interior of the building or do not materially affect the external appearance of the building;

(b) ...;

(c) ...;

(d) ...;

(e) ...;

(f) ...;

(2) For the avoidance of doubt it is hereby declared that –

(a) the carrying out of building, engineering, mining or other operations in, on, over or under any land within the cartilage of a dwelling house involves development of that land;

18. PERMITTED DEVELOPMENT

Despite the provisions of section 16, the classes of development specified in Schedule 3 are permitted and may be undertaken without the permission of the Head of the Physical Planning and Development Division, but such development shall be subject to any conditions or restrictions imposed by any regulations made under section 56.

37. ENFORCEMENT NOTICES

(1) Where it appears to the Head of the Physical Planning and Development Division that –

(a) any development of land has been carried out after this Act comes into force without the grant of permission required under Part 3; or

(b) the developer has not complied with any condition subject to which permission was granted in respect of any development,

the Head of the Physical Planning and Development Division may, if it appears to be expedient to do so having regard to the provisions of the development plan for the area, if any, and to any other material considerations –

(i) in a case to which paragraph (a) applies, within 4 years of the development being carried out, or
(ii) in a case to which paragraph (b) applies, within 4 years of the date of the alleged failure to comply with the condition,

serve an enforcement notice on the owner and the occupier of the land and any other person who has a registered interest in the land.

(2) An enforcement notice shall specify the development that is alleged to have been carried out without the grant of permission or the matters in respect of which it is alleged that the development does not comply with the conditions subject to which permission was granted, as the case may be, and may require such steps as may be specified in the notice to be taken within such period as may be specified for restoring the land to its condition before development took place or for securing compliance with the conditions, as the case may be.
(3) An enforcement notice shall be served no less than 14 days before it takes effect and, except as otherwise provided in this section, shall take effect at the expiration of such period as may be specified therein.
(4) **The fact that the Head of the Physical Planning and Development Division fails to serve an enforcement notice on either one of the persons mentioned in**

subsection (1) shall not invalidate any proceedings under the enforcement notice against the other one of those persons. (Emphasis is mine)

(5) When, before the enforcement notice takes efect, an application is made to the Head of the Physical Planning and Development Division for permission for –

(a) the retention on land of any buildings or works to which the enforcement notice relates; or

(b) the continuance of any use of the land to which the enforcement notice relates,

the operation of the enforcement notice shall be suspended pending the determination of that application and, if the permission applied for is granted by the Head of the Physical Planning and Development Division, the enforcement notice shall not take effect.

(6) When, before the enforcement notice takes effect, an appeal is made to the court under section 38 by a person on whom the enforcement notice was served, the operation of the enforcement notice shall be suspended pending the final determination or withdrawal of the appeal.

38. RIGHT OF APPEAL AGAINST ENFORCEMENT NOTICES

(1) If any person upon whom an enforcement notice is served is aggrieved by the enforcement notice, that person may, at any time before the enforcement notice takes effect, appeal against the enforcement notice to the Appeals Tribunal.

39. STOP NOTICES

(1) Where the Head of the Physical Planning and Development Division has served an enforcement notice in respect of any land, the Head of the Physical Planning and Development Division may also serve a stop notice in respect of that land, prohibiting any person on whom it is served from carrying on or continuing any specified operations on the land which are alleged in the enforcement notice to have been carried out without permission or in breach of the conditions subject to which permission was granted, or are so closely associated with those operations as to constitute substantially the same operations.

(2) A stop notice served under subsection (1) must contain a reference to, and have annexed to it a copy of, the enforcement notice served in respect of the development to which the stop notice relates.

(3) A stop notice may be served by the Head of the Physical Planning and Development Division on any person who appears to have an interest in the land to which it relates or to be concerned with the carrying out of any operation thereon.

(4) A stop notice shall take effect on its date of service and, without prejudice to the provisions of subsection (6), shall cease to have effect when –

(a) permission is granted for the retention of the development to which the enforcement notice relates; or

(b) the enforcement notice to which the stop notice relates is revoked by the Head of the Physical Planning and Development Division or quashed by the Appeals Tribunal or the Court of Appeal; or

(c) the Head of the Physical Planning and Development Division enters upon the land under section 40.

(5) A stop notice shall not be invalid by reason that the enforcement notice to which it relates was not properly served on the owner and occupier of the land as required by section 37, if it is shown that the Head of the Physical Planning and Development Division took all such steps as were reasonably practicable to effect proper service. (Emphasis is mine)

41. NON-COMPLIANCE WITH ENFORCEMENT OR STOP NOTICE

(1) Where –

(a) an enforcement notice has been served on a person who was, when the enforcement notice was served on that person, the owner of the land to which the enforcement notice relates; and (Emphasis is mine)

(b) within the period specified by the notice or such extended period as the Head of the Physical Planning and Development Division may allow any steps required by the enforcement notice to discontinue any operations or to remove, demolish or alter any buildings or other works on that land have not been taken,

that person commits an offence and is liable on summary conviction to a fine of $10,000.00 and, in the case of a continuing offence, to a further fine ....

42. INJUNCTIONS

In addition to any other remedy provided by this Act, the Head of the Physical Planning and Development Division may in any case institute a civil action for an injunction by way of a fixed date claim to prevent any person from violating the provisions of this Act, or to enforce any enforcement notice or stop notice, whether or not the Head of the Physical Planning and Development Division has exercised or proposes to exercise any of his or her other powers under this Act. (Amended by Act 3 of 2005)

49. SERVICES OF NOTICES

Any notice or other document required or authorized to be served or given under this Act, or under any statutory instrument made under this Act, may be served or given either –

(a) by delivering it to the person on whom it is to be served or to whom it is to be given, or
(b) by leaving it at the usual or last known place of abode of that person, or in the case where an address for service has been furnished by that person, at that address; or
(c) by sending it by prepaid registered letter addressed to that person at that person's usual or last known place of abode, or in the case where an address for service has been furnished by that person, to that address; or

(d) in the case of an incorporated company or body, by delivering it to the Secretary or clerk of the company or body at their registered or principal office, or sending it by prepaid registered letter addressed to the Secretary or clerk of the company or body at that office;
(e) by placing it in a conspicuous area on the building or other development. (Amended by Act 3 of 2005) (Emphasis is mine)

50. LIABILITY OF LANDOWNERS

If the development of any land is commenced or carried out without the written permission of the Head of Physical Planning and Development Division, or carried out in a manner not in accordance with plans submitted or resubmitted to and approved by the Head of Physical Planning and Development, every owner of such land within the meaning of section 2 is liable therefore.

SCHEDULE 3

PERMITTED DEVELOPMENT

(a) Garden huts, other than garages, in approved residential areas and not used for human habitation or for the conduct of any activity of a commercial nature.
(b) Gates, fences...
(c) Agricultural out buildings...
(d) Repairs to roads, bridges...
(e) Repairs to services
(f) Internal alterations to buildings not involving changes to the basic structure or façade of the buildings.
(g) ....(Amended by Act 3 of 2005)

[51] The applicable principles to be applied in granting an interim or interlocutory injunction are still to be found in the case of American Cyanamid Co. v. Ethicon Ltd. [1975] 1 ALL E.R.504 which can be said to be the locus classicus. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case. The matters to which I am to have regard in determining whether or not to grant the interim injunction sought and must be satisfied are:

(a) the applicant has established a serious issue to be tried;
(b) damages are not an adequate remedy;
(c) the balance of convenience lies in favour of granting such relief (that is, the grant of an injunction will do more good than harm); and
(d) the applicant is able to compensate the respondent for any loss which such injunction may cause him in the event that it is later adjudged that the injunction ought not to have been granted.

[52] In Francome v Mirror Group Newspapers Ltd. [1984] 2 ALL E.R.408 at 413 ... Sir John Donaldson MR, stated that "the balance of convenience" might be more properly called "the balance of justice".

[53] Another principle is from Associated British Ports v. Transport and General Worker's Union [1989] 3 ALL E.R. 822 and which is in that in considering whether or not to grant an injunction on the balance of convenience, a relevant factor is the public interest.

[54] The case of Official Custodian for Charities v. Mackey [1984] 3 ALL E.R. 689 is authority there may be instances or circumstances where the balance of convenience may not be relevant, such as where there is no arguable defence. In such an instance, the court will not consider the balance of convenience but grant the injunction.

[55] In Bendles Motors Ltd. v. Bristol Corporation and Another [1963] 1 W.L.R. Lord Parker C.J. said:

> " This is an appeal against a decision of the Minister of Housing and Local Government dated August 31, 1962, upholding an enforcement notice served by the Bristol Corporation, the local planning authority, on Bendles Motors Ltd., the site-owners, requiring them within seven days to remove an egg-vending machine from the forecourt of their garage premises....
>
> It is to be observed from that that the inspector himself made no finding that there had been a material change in use which would constitute development. The Minister in his decision of August 31, 1962, recited the relevant part of the inspector's report, and went on: "3. The Minister has considered the evidence and the arguments put forward at the inquiry on the issues of law. He notes that the machine is not attached to the freehold and is moveable, though it is of substantial size and construction and is not normally intended to be moved about the site. It appears to the Minister that its stationing on the site involves a change of use of the land on which it stands. It is now necessary to consider whether the change of use is material....
>
> The Minister having, therefore, properly directed himself on the law, **this court could in my judgment only interfere if satisfied that the judgment was perverse in the sense that the evidence could not support it. That is going a very long way when one is dealing with planning considerations**. I confess that at first sight, and indeed at last sight, I am somewhat surprised that it can be said that the placing of this small machine on this large forecourt can be said to change the use of these premises in a material sense from that of a garage and petrol filing station by the addition of a further use. It is surprising, and it may be, if it was a matter for my personal judgment, that I should feel inclined to say that the egg-vending machine was a de minimis; **but it not a question of what my opinion is on that matter, it is for the Minister to decide."** (Emphasis is mine)

[56] In Westminster Council v. Great Portland Estates PIC. [1985] AC 661 Lord Scarman had this to say:

> " My Lords the principle of the law is now well settled. It was stated by Lord Parker C.J. in one sentence in East Barnet Urban District Council v. British Transport Commission [1962] 2 Q.B.484. The issue in that case was whether the use of a parcel of land constituted development for which planning permission is required. The justices found that it did not and the Divisional Court, holding that the question of change of use was one of fact and degree, refused to intervene. In the course of his judgment, with which the other members of the court agreed, Lord Parker C.J.said at p.491, that when considering whether there has been a change of use "what is really to be considered is the character of the use of the land, not the particular purpose of a particular occupier." These words have rightly been recognized as extending beyond the issue of change of use: they are accepted as a statement of general principle in planning law. They apply to development plans as well as to planning control....
>
> However, like all generalisations Lord Parker C.J.'s statement has its own limitations. Personal circumstances of an occupier, personal hardship, the difficulties of businesses which are of value to the character of a community are not to be ignored in the administration of planning control. It would be inhuman pedantry to exclude from the control of our environment the human factor. The human factor is always present of course, indirectly as the background consideration of the character of land use. It can, however, and sometime should, be given direct effect as an exceptional or special circumstance. But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If a planning authority is to give effect to them, a special case has to be made and the planning authority must give reasons for accepting it. It follows that, though the existence of such cases may be mentioned in a plan, this will only be necessary where it is prudent to emphasise that, notwithstanding the general policy, exception cannot be wholly excluded from consideration in the administration of planning control....
>
> **There remains the point on the Landlord and Tenant Act 1954. It is, in my judgment, based upon a misconception of the relationship between the planning legislation and private law. Rights to the use and development of land are now subject to the control imposed by the planning law. The rights of landlords, as of others interested in land, take effect subject to planning control.**"(Emphasis is mine)

[57] In South Bucks District Council v. Porter and Another [2003] 2 AC 558, the local authorities applied successfully to the court under the Town and Country Planning Act 1990 for injunctive relief against the defendants, who were gypsies, to prevent them from living in mobile homes and caravans on land acquired by them for that purpose but for which planning consent had been refused. The defendants appealed on the ground that in granting the injunctions the court had failed to consider, in addition to any relevant planning consideration, the likely effect of the orders on their human

rights in accordance with section 6(1) of the Human Rights Act 1998 and the Conventions scheduled to the Act. Section 187B which was inserted into the Planning and Compensation Act 1991 came on for consideration. It provided:

> "Injunctions restraining breaches of planning control. (1) Where a planning authority considers it necessary or expedient for any actual or apprehend breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part."
>
> "(2) On an application under subsection (I) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach.
>
> (3) Rules of court may provide for such an injunction to be issued against any person whose identity is unknown.
>
> (4) In this section "the court" means the High Court or the county court."

The House of Lords dismissed the appeals. Lord Scott said:

> "100. **In deciding whether or not to grant an injunction under section 187B the court does not turn itself into a tribunal to review the merits of the planning decision that the authority, or the Secretary of State, has taken. The purpose of the injunction would be to restrain the alleged breach of planning controls and the court could not in my opinion properly refuse an injunction simply on the ground that it disagreed with the planning decisions that had been taken.** If the court thought that there was a real prospect that an appeal against an enforcement notice or a fresh application by the defendant for the requisite planning permission might succeed, the court could adjourn the injunction application until the planning situation had become clarified. **But where the planning situation is clear and apparently final the court would, in my opinion, have no alternative but to consider the injunction application without regard to the merits of the planning decisions.** (Emphasis is mine)
>
> 101. It does not, however, follow that once the planning situation is clear and apparently final it is not open to the court to take into account the personal circumstances of the defendant and hardship that may be caused if the planning controls are enforced by an injunction. Planning controls are imposed as a matter of public law. The local planning authority in seeking to enforce those controls is not enforcing any private rights of its own....But an application for an injunction under section 187B, or any other application for an injunction in aid of the public law is different. As Lord Wilberforce said in the Gouriet case, the jurisdiction to grant such injunctions is one of great delicacy and to be used with caution.
>
> 102. I respectfully agree with the criticism expressed by my noble and learned friend, Lord Steyn,.... The hardship likely to be caused to a defendant by the grant of an injunction to enforce the public law will always, in my opinion, be relevant to the court's decision

whether or not to grant the injunction. **In many, perhaps most, cases the hardship prayed in aid by the defendant will be of insufficient weight to counter balance a continued and persistent disobedience to the law. There is strong general public interest that planning controls should be observed and, if not observed, enforced. But each case must depend upon its own circumstances."** (Emphasis is mine)

[58] The issue of delay was raised by counsel for the Respondent. In this regard, I am guided by George-Creque, J.A in Court of Appeal HCVAP2008/012 Alfa Telecom Turkey Limited v. Teliasonera Finland OYJ where she said:

> "[41] The maxim of equity that 'delay defeats equities' is well known and is sometimes stated in the expression – a person who sleeps on his rights losses them'. Delay in seeking interim relief is that much more critical. This is because the grant of interim relief is predicated on a state of urgency. **Snell** at 16-25 states it thus:
>
> "... a lesser degree of acquiescence or laches suffices to debar a claimant from interlocutory relief than from obtaining a perpetual injunction, the refusal of an interlocutory injunction... 'amounts to a decision that a right has once existed is absolutely and forever lost". Moreover, interim relief is granted only in matters of urgency, so that a claimant who delays thereby demonstrates the absence of urgency requiring prompt relief. Even a month's delay between the assertion of a right and the commencement of proceedings may debar the claimant if in the meantime the Defendant has contracted to let the subject property matter to third parties."

Findings:

[59] Counsel for the Respondent submitted that he accepted the principles of American Cyanamid. However, he was of the view that the enforcement notice, and the stop notice on which the Applicant's application was hinged was a nullity.

[60] He submitted that for proper service to have been effected, the enforcement notice and the stop notice ought to have been served on both the owner and the occupier.

[61] A fact is, the Respondent is the owner and although he says he is a landlord as he leased the development site to CIE and therefore it is not him doing the development, he has not produced a copy of the lease, although this arrangement is supposed to be some 15 years old.

[62] CIE says, it is the tenant of the Respondent, but it too does not produce a copy of the least or even some other document as a balance sheet, which would inform as to the tenancy arrangement.

[63] There is no lease recorded which according to the Land Registration Act Cap. 5.01 section 45 ought to have been given the duration of the alleged lease. Such registration would aside from

protecting the parties, would certainly have served notice to the whole world about the tenancy arrangement.

[64] Without such notice to the whole world, a party conducting a search of title or determination of who an occupier is at the development site is stumped. The only fact recorded is that the Respondent is owner of development site and it is mortgaged.

[65] Looking at section 49(e) it is clear that placing the enforcement notice and the stop notice on a conspicuous area on the building or other development is sufficient notice. This to my mind is a catch all section for instances where the Applicant may not know any of the parties. This provision would deem both an owner and occupier served.

[66] And then of course section 50 bluntly provides that every owner, not occupier, is responsible for development on his land. This makes sense given the simple position at common law, and which is that anything which is built to attach itself to the land, is deemed affixed to the land. Therefore, the Respondent, as owner of the land, ultimately bears responsibility for ensuring that permission is obtained for any development occurring on his land, in this instance, the development site.

[67] Even if I am wrong, it is to my mind clear that CIE deemed themselves served and so sought a meeting with the Applicant and the meeting occurred on December 23rd 2009. Review of the Minutes of the meeting show that service was not an issue discussed. It was not until this suit that the matter of service became an issue.

[68] I deem that on the authority of section 49(e) and section 50 of the Act that there has been effective service.

[69] Moving onto the matters to which I must have regard in deciding whether to grant the interim injunctions, the first being whether there was a serious question to be tried, the affidavits of the Respondent, Mr. Satney for CIE, and those in support were curiously silent on what is to my mind the first question arising. That question being, what was the status of the development that was observed at October 2009? Was it permitted, or not permitted? The enforcement notice and stop notice are merely aids in this cause. The cause for which the Applicant seeks the aid of the court is that development that was occurring was not permitted.

[70] The Physical Planning and Development Act section 16 is clear, there can be no development without prior written permission. Each development requires permission. To my mind even a person hiding in the darkest corner of Saint Lucia, never mind Corinth, must comply with the Act.

[71] The Respondent and CIE say the applicant has taken no action since 1995, and yet neither seek to explain (a) why since the burden to prove approval for each and every new development between 1995 to present, they never produced a single application for all the development which their affidavits have outlined has occurred over the years, (b) address why it became necessary for the Applicant to issue several enforcement notices and stop notices, (c) why they never appealed any of the enforcement notices over the years pursuant to section 38 of the Act.

[72] Is it that the Respondent and CIE held the view according to Mr. Satney's statement that there had been "no significant material change in the use of the land" and so they were making a determination that according to the Bendles Motors Ltd., only the Applicant could make?

[73] Had the Respondent appealed the enforcement notices issued over the course of several years he might have been able to question the considerations of the Applicant. At this juncture I am guided by the authorities, that whether a change of use was a material change of use being one of fact and degree, the court would not interfere with the decision of the Applicant.

[74] I agree with counsel for the Applicant and Residents of Corinth, the stance to CIE of which the Respondent is majority shareholder, and according to his affidavit, he can give direct instructions for implementation, is to be gleamed from the paragraph 2 under the subtitle Decision in the Minutes of the December 23rd 2009 meeting. In short CIE stated relocation of the concrete plant was not an option. This makes it abundantly clear that there was no intention of complying with the enforcement notice and stop notice.

[75] To my mind, what has happened in this instance is there has been follow through by the Applicant on the enforcement notice and stop notice, and this is why we are at this juncture.

[76] The cases of South Bucks and Bendles Motors clearly show that planning legislation must be observed and especially if one has opted not to utilized the provision for appeal against enforcement notices.

[77] It would surely be the end of the Applicant's ability to make and enforce it planning responsibilities if it failed to act when a developer says to it, what you are asking if not an option, and continues to with his development notwithstanding the issuance of an enforcement notice and stop notice.

[78] Looking at all of the facts, I find that there is a serious question to be tried.

[79] As to the issue of delay, the law is clear that acquiescence may be a bar to interim injunctive relief, however, as I understand the Act, every new "development" on the same parcel of land and to even the same building requires permission. Therefore, there is a fresh need to request permission before commencing the development.

[80] I am not called upon to address matters that occurred between 1995 to September 2009. The "new" development complained of is that observed as occurring October 2009. It is between October 2009 and 22nd April 2010 that I must search to see if there has been delay.

[81] What is clear to me is that from October 2009 when the "new" development was occurring on the Respondent's land and it became known to the Applicant, the Applicant issued the first letter at 16th October 2009. This was followed up with the issuance of the enforcement notice and stop notice both dated 10th December 2009. Following that CIE asked for a meeting. They declared their position and which in short was we are not moving and so explicit is that there is no intention of complying with the enforcement notice and stop notice. The deadline set in the enforcement notice was still out, it took effect at 8th January 2010. The Applicant then commissioned a further update report on the environment, and this is dated 24th February 2010.

[82] Looking at this time-table, I think it would be unduely unjust of me to interpret the points in time between October 2009 to April 22nd 2010 when the application was filed as a period of delay. The evidence is clear, the Applicant was not "sleeping" on its rights this time around.

[83] On the issue of where does the balance of convenience lie, I am guided by the several authorities. While is it is appreciated although no proof has been supplied that CIE is a prominent corporation at Saint Lucia with a large employee work force, and considerable investment in the company, the

law is also clear, that this is not to be my only consideration when considering the justice of granting the interim injunction.

[84] It appears on reading the affidavits of both the Respondent and Mr. Satney that while attempting to strike down the evidence put forward by the Applicant and Residents of Corinth, neither the Respondent of CIE tendered a single document to support their statements. It is to be recalled that there is no cross-examination, and this application is proceeding strictly on the evidence in the affidavits before the court. Aside from the matters set out above in my deliberations about whether there was a serious question to the tried, another glaring example is that Mr. Satney goes to great lengths to attack the methodology of the report prepared for Ministry of Health. He then states that conditions at the development site improved but himself tenders no expert report with methodology or otherwise.

[85] It is also extremely curious that on each of the 2 occasions when the Ministry of Health expert visited the development site to gather data, Mr. Satney is able to tender a reason as to why the findings reported were as they were on those 2 particular days.

[86] I have taken on board the history of protest of the Residents of Corinth, those who signed the petition, and who wrote letters and an newspaper article over the years to present. I have also taken on board the several current medical reports laid before the court.

[87] The matter of the noises generated by the constant dumping of materials, the going and coming of heavy trucks with materials and cement trucks belonging to either the Respondent and or CIE (ownership never declared) was never addressed by either the Respondent or Mr. Satney.

[88] As previously stated the Respondent inferred and CIE stated that the cement plant was allowed to be establish since 1995 (without permission) and the Applicant has allowed CIE to harbor the impression that it could continue to do so. I do believe that the issuances of the prior enforcement notices and stop notices over the years serious erode the truth of this proposition.

[89] Added to this, I come once again to the stance of CIE as set out in the Decisions taken at the meeting of 23rd December 2009. To repeat myself, CIE has a declared position, and that is not relocating the cement plant and implicit in that is no intention of complying with the enforcement notice and the stop notice issued 10th December 2009.

[90] Surely no court can sit idly by and allow a party to say to its face, he or they have no intention of complying with the law, by firstly, applying for permission to carry out development, and secondly, complying with any enforcement notice and stop notice when those are served on them. The authorities of South Bucks District Council and Bendles Motors Ltd. support this position. I therefore find that the balance of convenience favours granting the interim injunction.

[91] As I have come to understand the law, where it sets requirements, particularly mandatory requirements such as that one must obtain permission to carry out development save and except permitted development, then failure to comply with its requirements usually bear consequences. Neither the Respondent as owner with responsibility pursuant to section 50 or CIE has been able to demonstrate that such approval or permission was obtained from the Applicant or even applied for.

[92] No issue was raised about the applicant's ability to pay damages. The Applicant having given an undertaking in the affidavit of Mr. Hinkson Smith filed 22nd April 2010, to abide by any order this Court may make as to damages in case this Court shall hereafter be of opinion that the Respondent shall have sustained any by reason of this Order which the Applicant ought to pay it is hereby ordered that:

> (3) The Applicant is to file and serve its CPR Part 8.1 form within 7 days of this Order. (1) The Respondent by himself, his agents or servants or otherwise be restrained and an injunction is hereby granted restraining him with immediate effect from using the 4 bin aggregate feeders, the gathering conveyor belt, the tower for concrete storage, the *concrete* mixer and the concrete weighing hopper erected/constructed on the parcel of land registered as Block and Parcel 1252 B568 situate at Corinth, Gros Islet until trial of this action.
>
> (2) The Respondent by himself, his agents or servants or otherwise be restrained and an injunction is hereby granted restraining him with immediate effect from carrying out any industrial activities which involves the mixing, storing, and distribution of cement and cement related products and from mixing, storing and distributing construction material

(including sand, gravel and concrete ready-mix) on the parcel of land registered as Block and Parcel 1252 B568 situate at Corinth, Gros Islet until trial of this action.

Rosalyn E. Wilkinson

High Court Judge