

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C514 OF 1986

BETWEEN CUTLAS BAY DEVELOPMENT COMPANY LIMITED PLAINTIFF
A N D SANS SOUCI DEVELOPMENT LIMITED DEFENDANT

D. Goffe and H. Samuda instructed by Myers, Fletcher & Gordon
Manton & Hart for Plaintiff.

Dr. Lloyd Barnett and Patrick Brooks instructed by Messrs
Nunes, Scholefield, DeLeon & Company for Defendant.

Heard: May 7, 8,; July 2, 3, 1987
June 14 & 15, 1988

LANGRIN, J.

This is an application on a Summons for an interlocutory injunction whereby the plaintiff is seeking an order, that:

1. The Defendants remove the obstruction which they have placed in the bed of the White River at Ocho Rios in the parish of Saint Ann, and restore the obstructed area to the condition it was in prior to being obstructed by the Defendants.
2. The Defendants be restrained whether by themselves or by their servants or agents or howsoever until the trial of this action from damming up, blocking up, obstructing, altering or in any way interfering with the natural and accustomed channel of the White River situated in the parish of Saint Ann.
3. The Defendants be restrained, whether by themselves or their servants or agents or howsoever, from carrying out any further work or form of development whatsoever in or about or upon the obstructed area, until the trial of this action or until further

Order."

Section 49(1) of the Judicature (Supreme Court) Act states the legal basis of the grant of an injunction as follows:

"A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such order should be made"

The principles by which a court is guided in granting the relief by way of injunction is stated by Lord Diplock in the well established case of the American Cyanamid vs. Ethicon 1975 1 AER p.504. At p.509 it was stated by him as follows:

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

Lord Diplock continued at p.511 as follows:-

"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed consideration"

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."

It is against this background that I have to decide and if necessary go on to consider which way the balance of convenience lies.

The affidavits disclose that the plaintiff operates on its land in St. Ann, Shaw Park Beach Hotel while the defendant operates the Sans Souci Hotel on its land in St. Mary. The White River runs between these two lands.

Prior to June 1986 the natural and accustomed channel of the White River ran past the eastern boundary of the plaintiff's said land and exited in a north-easterly direction across the defendant's said land behind a sand bank and into the sea. As a result of the river taking that course, debris brought down by the river was largely taken beyond reefs which protect the plaintiff's beach, and deposited in the sea. The plaintiff says that its beach is one of the major attraction offered by the hotel.

In June, 1986 an unusually heavy rainfall occurred and as a result, the river took a more direct, northerly course into the sea bringing debris on to the plaintiff's beach and clouding the waters of the beach with silt and limestone.

The plaintiff contends that for very many years prior to June 1986 if heavy rainfall occurred and the river temporarily took the more direct course it always resumed its natural and accustomed channel.

The defendant contends that the direct course which the river took in June 1986 is one of two alternative courses which the river has taken in its approach to the sea and denies any permanence in either course The river's approach to the course across its land was blocked

by sand and vegetation as a result of natural processes. This condition continued for several months in 1986, and created an unhealthy and undesirable state of affairs on the said land with large pools of stagnant water. It was to correct this situation that the defendant deposited marl in the depressions on the channel across its said land.

It is this deposit of marl (infilling) which the plaintiff claims has caused an obstruction and thereby interfered with the natural and accustomed channel of the White River.

Let me turn now to the legal issue in the case. The basic legal contention of the plaintiff is that at the point at which the river turned in a north-easterly direction, and at all material points, the plaintiff was and is a riparian owner.

It follows, therefore, argues Mr. Goffe, Counsel for the plaintiff that the infilling of the defendant's land with marl violated the riparian rights of the plaintiff.

Halsbury Laws of England (Third Edition) Volume 39 at paras 693 in dealing with Riparian Rights and the prevention and removal of obstructions in waters and watercourse states as follows:-

"The bed of a stream must be preserved from all obstructions which could by reasonable possibility interfere with the rights of any of the riparian owners and a riparian owner is entitled to have removed any obstruction which infringes his rights without proof of actual or prospective damage; but in certain circumstances, an injunction for this purpose may not be granted or its issue may be postponed..

In general, a riparian owner although he is the owner of half the the alveus of the stream, may not build upon such alveus, even though no damage is occasioned or likely to be occasioned thereby, but he may dam up the stream for the purpose

of a mill provided he does not interrupt the regular flow of the stream, and thereby interfere with the use of the water by other proprietors and inflict on them a sensible injury."

Mr. Goffe cited several authorities before me but the one on which he seems to place considerable reliance is Bicket v. Morris 1861-73 AER p.778. The applicant, Bicket was the owner in fee of certain tenements abutting on the water of Kilmarnock in the town of Kilmarnock. At that place the river was about fifty-eight feet wide and very shallow. Bicket resolved to rebuild his premises, and he was desirous of building the wall on the river side farther into the river. He applied to his neighbour, the respondent Morris, the owner of premises directly opposite, on the other bank of the river for permission to build the new wall according to a red line drawn on the ordinance map, and it was finally agreed that in consideration of receiving £10 from Bicket, Morris would make no objection to the wall being built farther into the river. The parties signed a copy of the map as relative to their agreement and the money was paid. After the building had proceeded, Morris discovered that Bicket instead of adhering to the red line agreed on, advanced his wall still farther by a distance of three feet at one place. Morris commenced action alleging that such operations were injurious, and had the effect inter alia of diverting the course of the stream. He also prayed an injunction ordering him to take down his building so far as it transgressed the red line agreed on between the parties. The Court held that the general rule of law was that a proprietor on the banks of a stream of this kind was not entitled to make any erection whatever in alveo even for the purpose of defence of his property; and that even though he had suffered no damage the respondent was entitled to have the erection removed. This judgment was approved in the House of Lords.

Whether the infilling was done on the alveus thereby infringing the plaintiff's Riparian right is an essential feature of the facts. There are several conflicts on the affidavit evidence before me and I shall only mention a few of them:

1. When certain weather conditions occur and end, the White River instantly or spontaneously resumes a defined unalterable course.
2. That the area filled in is subject to the rights of an adjacent riparian owner on basis that facts show that the alveus is part of the common ownership of plaintiff and defendant.
3. That the infilling has blocked the flow of water.

The case of Bicket vs. Morris can only be helpful in this case if the disputed facts are resolved. There is, however, no doubt as to whether there is a serious question to be tried.

What is being sought by the plaintiff is an interlocutory application for mandatory injunction. Such an injunction requires the taking of positive steps and may as in the present case require the dismantling or destruction of something already erected or constructed at a cost of over \$110,000.00. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the infilling. As Kindersley V.C. said in Gale v. Abbot (1862) 10 W.R. 748, 750 quoted in Shepherd Homes Ltd. v. Sandham (CLD) 1970 3 WLR p.348 at 356 "An interlocutory application for a mandatory injunction was one of the rarest cases that occurred "for the court would not compel a man to do so serious a thing as to undo what he

had done except at the hearing." Even if today the degree of rarity of such application is not quite so profound, the seriousness of such an order remains as an important factor".

Megarry J. in the Shepherds case at p.359 when he was dealing with the principles on which a Mandatory injunction would be granted said inter alia.

"On Motion, as contrasted with the trial the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction.

(the underlining is mine)

In the light of the disputed questions of fact and the considerable doubt which I entertain that the riparian rights of the plaintiff is violated, the instant case falls considerably short of any standard on which, in my judgment, it would be safe to grant the injunction at this interlocutory stage.

The plaintiff may indeed be able with a considerable degree of skill and effort at the trial to make out a formidable case in support of its contentions just as the defendant may be able to make out a formidable case in reply. With the full procedure of the trial coupled with the advantage of seeing and hearing the witnesses and the testing process of cross-examination the Court will be able to reach a firm conclusion one way or the other. Because I lack these advantages in dealing with the disputed questions of fact it is my judgment that the plaintiff has not made out a case for the injunction that it seeks. Indeed I am inclined to the view that there is no real prospect of the plaintiff succeeding in their action for a permanent injunction.

In addition to the balance of convenience which I have to some extent considered, I am not satisfied that

irreparable injury may ensue to the plaintiff's property. As there appears to be no intention of repeating the act which has been done in the past and for reasons that I have given I do not think that any injunction should be granted.

Accordingly, the application fails and I dismiss it.