[2019] JMSC CIV. 73

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV03872

BETWEEN	**RENFORD NUNES**	**1st CLAIMANT**
AND	**SHERON NUNES**	**2nd CLAIMANT**
AND	**CONTENT SOLAR LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. John Vassell Q.C. and Mrs. Trudy-Ann Dixon Frith instructed by DunnCox for the Claimants

Mr. Kevin Powell and Ms Shanique Scott instructed by Hylton Powell for the Defendant

Civil Procedure and Practice- Application for Summary Judgment-Reasonable prospect of success-Civil Procedure Rule 15.2 – Interim injunction-serious question to be tried- Adequacy of damages-Balance of convenience

Heard: 13th July and 29th October, 2018 and 9th April, 2019

WOLFE-REECE, J (Ag.)

BACKGROUND

[1] There are two Notice of Application for Court Orders before the court for consideration. It can be described that there exists a symbiotic relationship between the two in that the decision in one will automatically affect the other. The

Defendant, Content Solar Limited made an application for summary judgment, and the Claimants, Renford Nunes and Sheron Nunes have applied for an interim injunction.

[2] On May 21, 2018 the Claimant filed a Notice of Application for Court Orders for Interim Injunction seeking the following orders:

a) An interim injunction restraining the Defendant, by himself or his servant or agents or otherwise howsoever from obstructing, interfering or doing any acts similar thereto, the access road on land known as ALL THAT parcel of land part of RHYMESBURY in the parish of Clarendon containing by survey Two Hundred and Ninety-Eight Acres One Rood Sixteen Perches and Five Tenths of a Perch and being land formerly comprised in Certificate of Title Volume 793 Folio 70 and being ALL the land comprised at Volume 1256 Folio 373 of the Register Book of Titles ("the Defendant/applicant 's land") pending the determination of this claim or until further order by this Honourable Court.

b) An interim injunction permitting the claimant, their visitors, servants and or agents to traverse the access road on the Defendant/applicant 's land unimpeded and uninterrupted from ALL THOSE parcels of land being parts of RHYMESBURY in the parish of Clarendon together containing by survey Seventy One Acres One Rood and Fifteen Perches of the shape and dimensions and butting as appears on the plan annexed and being part of land comprised in Certificate of Titles registered at Volume 1189 Folio 292 and being ALL the land comprised in Volume 1257 Folio 344 of the Register Book of Titles ("Claimant/respondents' land) to the public road known as Rhymesbury Main Road in the parish of Clarendon and back again over the said access road on the Defendant/applicant 's land from the Rhymesbury Main Road to the Claimant/respondents' land, for themselves, their servants and or agents, whether on foot, by vehicle and with varied animals,

at all times of the year pending the determination of this claim or until further order by the Honourable Court.

c) For the purposes of Orders numbered 1 and 2 herein, “the access road” is roadway which measures 9.14 meters wide at a certain point and narrows to 6.1 meters respectively at another point on the Defendant/applicant ’s land and is shown on Surveyor’s Plan prepared by R.L. Wilson, Commissioned Land Surveyor, dated April 19, 2017.

d) Costs of this application to be costs in the claim;

e) Such and other further relief as this Honourable Court deems necessary.

[3] The Defendant responded with an Amended Application for Summary Judgment which was filed on June 29, 2018 seeking the following orders:

a) The automatic referral to mediation be dispensed with in accordance with rule 74.4(1) of the Civil Procedure Rules, 2002.

b) The Defendant be granted summary judgment against the Claimant/respondents.

c) The costs of these proceedings be awarded to the Defendant/Applicant.

d) There be such further or other relief as the court deems just.

Counsel on behalf of the parties have all filed written submission and authorities. Given the nature of the applications, whilst I may not refer to every single authority cited, it is not an indication that it was not considered. The Defendant’s/Applicant’s application for summary judgment will be considered first as the Court is of the view that the outcome of that application will determine whether it is necessary to consider the Claimant’s application for an injunction.

DEFENDANTS'SUBMISSIONS

[4] Counsel Mr. Kevin Powell commenced his submissions, on behalf of the Defendant and relied on Rule 15.2(a) of the Civil Procedure Rules (CPR) which provides that the court may give summary judgment on a claim if it considers that the Respondent has no real prospect of succeeding on the claim.

[5] Counsel referred the Court to what was described as the "principles guiding an application of summary judgment" as set out by Brooks J.A. in the case of ***ASE Metals NV v Exclusive Holiday of Elegance Limited*** *[2013] JMCA Civ 3.* Mr. Powell submitted that on a proper application of the principles summary judgment should be granted against the Claimants. Counsel made specific reference to and quoted Brooks, J.A. who said at paragraph 14-15:

> *"The overall burden of proving that it is entitled to summary judgment lies on the applicant for that grant. The applicant must assert that he believes the respondent's case had no real prospect of success…Once and applicant/claimant asserts that belief on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable"… The defendant must show he has a realistic as opposed to fanciful prospect of success."*

[6] Learned Counsel submitted that there are four issues that they propose the court should deal with on the application for summary judgment:

I. Whether the Claimants are entitled to the alleged right of way over Content Solar's Property by way of prescription under the **Prescription Act** 1882.

II. Whether the Claimants are entitled to the alleged right of way over Content Solar's Property by way of an easement of necessity.

III. Whether the Claimant/respondents are entitled to the alleged right of way over Content Solar's Property by way of an expressed or implied reservation. and

IV. Whether the Claimant/respondents are entitled to damages for obstruction to and permanent injunction to restrain interference with the alleged right of way.

[7] He submitted that all these issues should be resolved in favour of the Defendant/Applicant Content Solar and consequently summary judgment should be granted against the Claimant.

[8] Brooks J.A. further averred that in considering a summary judgment application the court must not conduct a 'mini trial' so far as the factual issues are concerned.

[9] In addressing the issue of easement by prescription, Mr. Powell submitted that the Claimant/Respondents have not satisfied the requirement set out in Sections 2 and 5 of the **Prescription Act 1882** which stipulates that the easement must have been enjoyed for an uninterrupted period of 20 years before bringing the claim.

[10] He argued that the mere assertion in the evidence put forward by the Claimant/Respondent that many members of the community had used the access road since the 1950s until around 2005 when a gate was erected by the previous owner of the Applicant's land. at paragraph 15 of the Affidavit of Henry Fenton does not assist the Claimant/Respondents. Mr. Powell posited that even if this assertion was true, it does not create an easement in the Claimant/Respondent's favour and that the authorities establish that it is only an owner of land who can claim an easement over the land of another. (See: pages 172-174 of **Commonwealth Caribbean Property Law)**

[11] Mr. Powell referred to the **Commonwealth Caribbean Property Law** and ***Bradley Milton Millingen and another v Lisa Stoddard Millingen*** 2015 JMSC Civ 261 and submitted that the authorities state that a claim for an easement by prescription cannot be maintained where the same person owns the dominant and servient tenements. Counsel argued that it has been less than twenty years since both the Applicant's property and the Respondent's property were owned by separate individuals and when these proceedings were initiated by the

Claimants/Respondents. He further submitted that it was not open to the Claimants/Respondents to argue that an easement was established prior to the mutual ownership of both properties and that it continued thereafter.

[12] Counsel therefore concluded that any easement that may have existed prior to January 1993 was extinguished when Content Farms limited became owner of both properties, and that any evidence as to what may have occurred prior to that date is therefore irrelevant. Mr. Powell relied on ***Malcolm Rowe v Roslyn Bennett and others*** (unreported) Claim No. 2004HCV00193 in which Campbell J said

> *"easements are extinguished by unity of seining. If the dominant and servient tenement became vested in the same owner, all easements come to an end…once the easement is destroyed by the unity…even a subsequent severance would not operate to revive it."*

[13] In light of the foregoing Counsel submitted that the earliest date from which a claim for an easement by prescription under the **Prescription Act** could be made in this case is April 2003, when Content Farms Limited ceased being the owner of both properties. Consequently, Counsel opined that the Respondents cannot legally obtain an easement by prescription under the Prescription Act and summary judgment should be granted against them on this issue.

[14] In addressing the issue of easement by necessity Mr. Powell submitted that a central requirement for the implication of an easement of necessity is evidence that there is no other means of access to the Respondents property. He relied on the learned authors of **Halsbury's Laws of England** volume 87 (2017) at paragraph 885 which reads:

> *"A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is landlocked…a way of necessity can only exist where the implied grantee of the easement has no other means of reaching his land. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not itself give rise to a way necessity. Accordingly, a way of necessity will not be implied where access can be gained on foot, though not by car, or by water…"*

[15] He further submitted that the court should not be swayed by any invitation from the Claimants/Respondents to refuse summary judgment on the basis that their affidavits in support of their application for interim injunction should be considered evidence which contradicts the Defendants'/Applicants' evidence that the Claimants/Respondents have an alternative means of access to their property.

[16] Counsel argued that the evidence as set out in the affidavit of Renford Nunes is inherently contradictory. Counsel made specific reference to Mr. Nunes' statement that the access road is the sole way and the shortest, most direct and convenient way of accessing their property from the main road. He added that in that case, the highest the court should put it is that the alleged right of way provides them with the most convenient route to their property, but that even if this was established the Respondents would have no real prospect of successfully defending that issue.

[17] Mr. Powell averred that the Certificate of Title for the Defendant/Applicant was not endorsed with a right of way in favour of the Claimants'/Respondents" property, and submitted that the endorsement of a right of way on the title for the Claimants'/Respondents' property cannot be an indication that they have a right of way over the property of Content Solar Limited.

[18] Counsel then directed the Court to the copy Duplicate Certificate of Title for the Lambert Property identified in the affidavit of Mr. Roderick Heaven which he submitted, is an alternative route which goes across property which adjoins the Respondent's property.

[19] Mr. Powell also submitted that there is no real prospect of the Claimant's/Respondent's succeeding on a claim for an easement by express grant or reservation. He made reference to **Section 93 of the Registration of Titles Act** which states:

> *"a memorandum of any transfer or lease creating any easement over or upon or affecting under land under the operation of this Act shall be entered on the folium of the Register Book, constituted by the existing certificate of*

> *title of such land in addition to any other entry concerning such instrument required by this Act".*

He then indicated that the Certificate of Title for Content Solar Limited property does not have endorsed on it any entry which refers to a right of way or easement in favour of the Respondents' property.

[20] Mr. Powell made reference to the decision of Chong, JA in **Leslie Emanuel (Personal Representative of Leopold Allan Emanuel) and Lennard Emanuel v Ace Engineering Limited and Anthony LeBlanc DOMHCVAP2013/0014** and was guided by Halsbury's Laws of England volume 87 (2017) 4 paragraph 796 which stated:

> *"an easement may also be implied in favour of the grantor who disposes of the quasi servient tenement where this is required to carry out the common intention of the parties. Thus, if one of the two houses supported by each other is conveyed by the common owner mutual easements of support may be implied. Such intended easements require the claimant/respondent to establish a common intention as to some definite and particular use. He must also show that the easements he claims are necessary to give effect to it. A heavy burden of proof lies on the grantor."*

Counsel submitted that the Respondents have no real prospect of successfully discharging at trial the heavy burden they have to establish an implied easement based on the common intention of the parties. It was further submitted that both the Respondents' and the Applicants' properties were owned by Content Farms Limited and Content Farms Limited did not reserve a right of way over the servient tenement.

[21] Counsel argued that since Content Solar's property was sold to its predecessor in title, Alexander Archer under powers of sale by the mortgage of the property, this is a credible basis on which to conclude that there was no common intention between the parties for the land to be used in a particular manner, and the alleged easement was necessary to give effect to this intention. Learned Counsel submitted that in the circumstances and based on the authorities, the Respondents have no real prospect of successfully establishing that an easement over the Content Solar Property should be implied in their favour.

[22] As it relates to damages Counsel submitted that in the circumstances where the Respondents have no real prospect of establishing that they have an easement over Content Solar's property, this final issue should also be resolved against them. They then submitted that the Respondents would not be entitled to any compensation for Content Solar's refusal to grant them unlimited and unrestricted (or any) access to Content Solar's property and they would not be entitled to a permanent injunction.

CLAIMANTS'/RESPONDENTS' SUBMISSION

[23] On the other hand, learned Queens Counsel for the Respondents, Mr. John Vassell Q.C. maintained that in applying rule 15.2 of the CPR the Applicant is unable to and has failed to discharge its burden of proving that the Respondents have no real prospect of succeeding on the claim. He further submitted that the Respondents have demonstrated on the evidence that it has a good claim as shown in their submissions filed on July 8, 2018 in support of their Application for an Interim Injunction, and upon which the Respondents rely in answer to this application.

[24] Queens Counsel submitted that the settled legal test is found in ***Swain v Hillman*** *[2001] All ER 91* in which Lord Woolf MR said:

> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or…they direct the court to the need to see whether there is a realistic as opposed to a 'fanciful' prospect of success."*

[25] It was further submitted that based on the decisions in ***Swain v Hillman*** **and** ***Three Rivers District Council & others v Bank of England*** *(No. 3) [2001] 2 All ER 513* it could not be contended that the Respondent's case bears no reality, or is inconceivable or unwinnable or that the claim was bound to fail. He added that the Respondents purchased property from the Defendant/Applicant 's predecessors in title and there must be some way to access their land from the main road, and this issue cannot be determined without the benefit of disclosure of documents,

exchange of witness statements and the evidence being tested in cross-examination.

[26] Queens Counsel submitted that the surveyors map exhibited as “RN5” to Affidavit of Urgency of Renford Nunes was approved by the Clarendon Parish Council and that on that map the right of way being claimed is endorsed. It was further submitted that without more this recognized that a right of way existed which was affirmed by the Clarendon Parish Council. It therefore runs contrary to the Claimant’s/Applicant’s assertions.

[27] Further to that based on the Surveyor’s Map prepared by Commissioned Land Surveyor, Robert Wilson, a copy of which is exhibited to the affidavit of Renford Nunes, there is no alternate route whatsoever to the Claimants/Respondents land and that the sole access that the Claimants/Respondents have to their land is by way of the claimed right of way over the Defendants/Applicants property. This further supports the Respondents submissions that the right of way in question is an easement of necessity, without which the Claimant’s/Respondents’ land cannot be accessed or otherwise used.

[28] Mr. Vassell Q.C. stated that it would not be furthering the overriding objective if summary judgment is granted in the instant case, and that it would not be in the interest of justice for the Respondents to be in a position where they are shut out from the Court to determine how they access their land in circumstances where the land is landlocked and they have no access to it.

[29] Counsel also relied on ***Swain v Hillman*** *[2001] All ER 91* and ***Island Car Rentals limited (Montego Bay) v Headley Linda*** *[2015] JMVA App 2* when he submitted that this is not a proper case for summary judgment as there are disputes of fact and as to the applicable law and legal principles. He further submitted that summary judgment is not appropriate where there are disputes as to facts, but also where the issues raised are serious and require investigation.

[30] Queens Counsel submitted that the Court ask itself, **"Can the issues here be resolved on application for summary judgment?"** He proffered that the answer must be no and that even where there is no conflict as to facts, the Court may still decline to grant summary judgment where the facts warrant further investigations or where there are serious issues which warrant a full investigation. The Claimants/ Respondents contend that the evidence reveals that there are serious issues, which require full investigation at trial.

[31] Another issue raised is the question of the alternate path and whether it is an enforceable alternative. Queens Counsel indicated that the evidence reveals that the alternate path puts the Claimants in the same position as it goes over another person's property. He submitted that the questions require a determination that can only achieved by a trial.

LAW AND ANALYSIS

[32] In making a determination on this application for summary judgment the court is guided by the overriding objective contained in part 1 of the Civil Procedure Rules (CPR) and rule 15.2 which purports that the court has a discretion to give summary judgment on a claim or issue if it considers that the Claimants'/Respondents' or Defendant/Applicant has no real prospect of succeeding in the claim or issue.

[33] The burden of proof is on the Defendant/Applicant to satisfy the court that the Claimant/Respondent has no realistic prospect of success (see: ***ASE Metals NV v Exclusive Holiday of Elegance Limited)***. Further, as noted by Brooks J.A. the court must be mindful not to conduct a mini trial on the factual issues. Therefore, at this juncture the Claimant is not required to provide compelling evidence in support of its case, but they are merely required to prove that their case has a real, and not a fanciful prospect of success (see: **Melody Cammock-Gayle v Heather Urquhart and another** [2015] JMSC Civ. 213).

[34] I have considered the submissions on behalf of the parties as well as the affidavit evidence of Mr. Robert Blinker filed on February 22, 2018, the affidavit of Mr.

Roderick Heaven filed on June 14, 2018, the Affidavit of Henry Fenton in support of the Application for Interim Injunction filed on June 11, 2018, and the Affidavit of Urgency of Mr. Renford Nunes filed on May 21, 2018, and in so doing, I have ensured not to conduct a mini trial as warned against by Brooks JA in ***ASE Metals NV v Exclusive Holiday of Elegance Limited.***

[35] In **Three Rivers District Council v. Bank of England (No. 3)** [2003] 2 AC 1 it was held that a claim may be fanciful, where it is entirely without substance, or where it is clear beyond question that the Claimants'/Respondents' statement of case is contradicted by all of the documents or other material on which it is based. Lord Hope in giving examples of situations that may be appropriate for summary judgment stated;

> *" ..It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money and it is proper that the action should be taken out of court as soon as possible. In other cases, it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all documents or other material on which it is based."*

[36] I cannot agree with the Defendant/Applicant that the case at bar can be categorized as one which is appropriate for summary judgment. In the instant case I find that the Defendant has failed to satisfy the burden required to prove that the Claimants case is so weak and without substance that they have no real prospect of succeeding in their claim.

[37] Further, evidence from a Commissioned Land Surveyor, Mr. Robert Wilson was presented in an affidavit filed on June 29, 2018. He asserted that the Claimants'/Respondents' property is landlocked and the access road is the only right of way to the main road. Mr. Wilson gave evidence that he visited the area himself as recently as June 23, 2017 and examined the neighbouring property (the lambert property) which the Defendant/Applicant asserted may serve as an alternate route. Mr. Walker concludes that he found there to be no defined and

driveable road or even a walkable track. He said the area was thick with mature trees and bushes and joins a wide canal. He also provided a Surveyor's diagram to support his findings.

[38] The Defendant/Applicant has failed to prove weakness in the Claimants/Respondent's case to the extent that the Claimants have no real prospect of succeeding in the claim on this issue. The Claimants/Respondents on the other hand has successfully proven that they have a case which is better than merely arguable, that they have a realistic as opposed to a fanciful prospect of success. Having assessed the Claim form and the Particulars of Claim, I am of the view that it has raised issues that need to be determined by trial.

INTERIM INJUNCTION

[39] I will now address the issue regarding interim injunction. The Privy Council in **ENG Mee YONG and Others v Letuchasan**, 1979 UKPC 13 (4th April 79), in a judgment delivered by Lord Diplock, stated what he considered to be the principles which should guide the Court in determining whether or not to grant an interlocutory junction in this way:

> *"the guiding principle in granting an interlocutory injunction is the balance of convenience, there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability,' a 'prima facie case' or 'a strong prima facie case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, American Cynamid v Ethicon Ltd. (1975) AC396."*

[40] In **American Cynamid v Ethicon** (1975) AC 396the principle was that for an interim injunction to be granted the following must be satisfied:

i. The case must not be frivolous or vexatious. There must be a serious case to be tried;

ii. If damages would be an adequate remedy and the defendant/applicant would be in a position to pay the claimant/respondent, an injunction must be refused;

iii. Whether the undertaking as to damages is adequate protection for the respondent;

iv. The balance of convenience (this question is only considered when there is doubt as to the adequacy of the respective remedies in damages).

[41] **National Commercial Bank v Olint** (2009) 1 WLR 405 applied and somewhat modified the rule in **American Cynamid v Ethicon** when it was opined that "the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

[42] The Claimants'/Applicants' have been in possession of their property since June 3, 2008. It is the Claimant/Applicant case that prior to the Defendant/Respondent acquiring the Content Solar property, themselves as well as other members of the community were able to traverse the access road freely. The Claimants'/Applicants' argued that they acquired the land for agricultural purposes and provided evidence in the form of a contract between them and Caribbean Broilers Jamaica Limited to supply chicken. However, since the Defendant/Respondent imposed the restriction on the Claimants'/Applicants' access to the road, they have lost the contract because large vehicles such as trucks have been barred from traversing the road. It is clear that the act of the Defendant/Respondent restricting their access to the road has caused and will continue to cause them great financial loss, and has resulted in them being unable to fully enjoy the use of their property.

[43] On the other hand, the Defendant/Respondent has argued that the access road is not the sole route for the Claimants'/Applicants' to access their property, but that there is an alternate route through another property. However, the Claimants'/Applicants' have provided a Surveyor's Identification report as well as

the affidavit evidence of the Commissioned Land Surveyor, Mr. Wilson to support their opposing position. The Defendant/Respondent has disputed the accuracy of the Claimants'/Applicants' Surveyor's plan and in their defence stated that they intend to refer to and rely on a surveyor's report of the adjoining property prepared by another Commissioned Land Surveyor. This assertion therefore begs the question whether the surveyor's plan prepared by Mr. Wilson is an accurate representation of the property and its accessibility. Their assertion further begs the question whether there is in fact an alternate route for the Claimants'/Applicants to access the main road to and from their property other than through the access road? Will the Claimants'/Applicants' property be landlocked without access from the "access road"?

[44] The Claimants'/Applicants' has also argued that the access road is a public right of way, and that for several years members of the community have traversed the access road to an adjoining canal unimpeded. Therefore, one is led to ask whether the use of the road by members of the community to access a canal for seemingly recreational and fishing purposes created a public right of way. What are the implications of a public right of way being formed on the defendant/respondents property? Will the Defendant/Respondent be required to allow unimpeded access to the road to the public generally and to vehicles of all sizes, whether belonging to or associated with the Claimants/Applicants? If it is found that a public right of way was created, can the said right of way be challenged by the Defendant/Respondent?

[45] To my mind these are all serious questions that need to be considered under the conditions of a trial and with the benefit of cross examination and greater analysis of the facts against the applicable law. I conclude that the case is neither frivolous nor vexatious and there is a real and serious issues to be tried.

[46] The question that follows is whether damages would be an adequate remedy? I am not of the view that the issues in the instant case is one that may be remedied

by an award of damages. How would damages help to assist a litigant who is unable to access his own property.

[47] Damages would not be an adequate remedy to compensate the Claimant/Applicant inability to access and use their property. Further, even if damages were an adequate remedy, the Defendant/Respondent has sought to give a cross undertaking. The Claimants/Applicants have submitted that Content Solar Limited has not established proof that they would be in a position to pay the Claimants/Applicants if they were unsuccessful in the claim. This submission is based on the evidence that even though Content Solar's plant and other assets are worth in excess of US$60 million, the property is being used for collateral for their mortgage debt, which the evidence shows is US$59 million, therefore the US$60 million is just enough to cover the mortgage. Without detailed accounts the Claimant/Applicant submits that the Court has not been put in a position to determine whether the Defendant/Respondent is in a position to give this cross-undertaking for damages which may arise from this claim.

[48] The question that follows therefore is whether the undertaking as to damages is adequate protection for the Defendant/Respondent in the event the Claimants'/Applicants' application for an injunction is granted. The simple answer is yes; damages would be an adequate protection for the Defendant/Respondent. The Defendant/Respondent greatest concern appears to be the potential financial loss that may result from delay in the commencement of their project. However, I find that the potential loss may be satisfied by an award of damages.

[49] Given that damages will not be an adequate remedy for the Claimant/Applicant; the balance of convenience must be considered. An interlocutory injunction allows the observation of the overriding objective by improving the likelihood of justice being done upon the determination of the merits at trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result (see: **Chisholm and Company Developments Limited v James Chisholm** [2012] JMCC Comm 3).

[50] Mr. Roderick Heaven in his affidavit on behalf of the Defendant/Respondent state that they own and operate a utility-scale solar energy power plant on its property, and that they have a 20-year power purchase agreement with the Jamaica Public Service Company Limited, which commenced in 2016. However, according to Mr. Heaven the second phase of the solar energy project is scheduled to begin within months. He contended that given the confidential and proprietary nature of the project, the Defendant/Respondent will have to exercise strict control and access to its property. He further stated that given the value of the project and the equipment and other material that will be involved there will be a security concern.

[51] He expresses concern that if the injunction is granted the commencement of the project will be compromised, and that unrestricted, uninterrupted and unimpeded access over the Content Solar property as sought by the Claimant/Applicant will result in significant financial loss and substantial prejudice to the Defendant/Applicant.

[52] I am not convinced that the mere granting of access to the road will compromise the commencement of the Defendant/Respondent project. The Defendant/Respondent has acknowledged that small vehicles and persons on foot are currently allowed access to the road. Therefore, whichever security measure was used in 2016 when the initial operation began to ensure that confidentiality was maintained, and whatever security concerns were mitigated then can be used now with both smaller and larger vehicles. If that is still not satisfactory, the implementation of stricter security measures instead of restricting or potentially prohibiting the Claimant/Applicant access to the road will better serve the interest of justice for both parties.

[53] This is a case where the Claimants'/Applicants' property may potentially be landlocked without the use of the access road, and the Defendant/Applicant who has absolute control of said road is at liberty to, and does in fact restrict whomever they please from utilizing the road. On the other hand, the Defendant/Respondent is concerned about the security surrounding a major project that will commence in

months, and the potential loss that will result from any delay. However, it is noteworthy that the Defendant has not presented documentary evidence to support their assertion that they have an impending project; further, they have failed to produce the alleged contract they have with Jamaica Public Service, and they have also failed to give an exact date for which the project is expected to commence.

[54] The Claimants'/Applicants' on the other hand have produced documentary evidence to support their assertion that they have already suffered a severe financial loss from their loss of contract with Caribbean Broilers Jamaica Limited. Further, the Claimants/Applicants also suffer the obvious restriction to movement in and out of their property. Although the Defendant/Respondent is currently allowing small vehicles and persons by foot to access the road, the Defendant/Respondent would be at liberty to change this access and completely restrict access to all individuals and vehicles that are not associated with them. In light of the foregoing, I find that the balance of convenience lies in favour of the application for interim injunction being granted.

DISPOSITION

[55] It is hereby ordered:

a) The Defendants application for summary judgment is refused.

b) The costs of the application for summary judgment is awarded to the Claimant to be taxed if not agreed.

c) Interim injunction granted against the Defendant Content Solar Limited in the terms set out in paragraphs 1,2 & 3 of the Notice of Application for Orders for Interim Injunction filed on May 21, 2018.