In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 246

BETWEEN:

SAMUEL ANDREW BANKS

Plaintiff

v

SIMON STOREY
and
DEIRDRE STOREY

Defendants

RULING

Dates of Hearing: **6 June, 11 July 2022**
Date of Ruling: **8 September 2022**

Appearances: **Jeffrey Elkinson and Britt Smith, Conyers Dill & Pearman Limited, for Plaintiff**

Keith Robinson and Oliver MacKay, Carey Olsen Bermuda Limited, for Defendants

RULING of Mussenden J

Introduction

1. This matter comes before me on an application by the Defendants for the discharge of an injunction which I granted in favour of the Plaintiff on 1 April 2022 (the "**Injunction**"). In

the Injunction I ordered that the Defendants, their servants or agents were restrained from trespassing and committing a nuisance on the Plaintiff's property.

2. The parties are neighbors. The Plaintiff is the owner, since 2001, of 17 Inglewood Lane in Paget Parish. The Defendants are the owners, since 2012, of the neighboring property 13 Inglewood Lane. Disputes have arisen between them. A Specially Endorsed Writ of Summons was issued 23 August 2021. The Statement of Claim set out that there are boundary issues of trespass, nuisance, and conversion and seeks various orders including injunctions and damages.

3. A Defence and Counterclaim has been filed and a Reply and Amended Defence to the Counterclaim has been filed.

Factual and Procedural Background

4. The parties filed affidavit evidence along with various reports and plans. They each obtained professional land survey reports: (i) Bermuda-Caribbean Engineering Consultants Ltd issued its Survey Report (the "**BCEC Report**") to the Defendants on 23 August 2021; and (ii) Mr. John Noon issued his Survey Report (the "**Noon Report**") to the Plaintiff on 1 September 2021.

5. The Defendants acquired their property in 2012 and before moving received an inspection report from Woodbourne Associates Ltd., which identified some problems including problems with some outside steps. In 2016 the Defendants carried out construction works to remedy damage to the outside steps. Additionally, in 2018 the Defendants made some repairs to their kitchen patio. In June 2021 a visiting Department of Planning ("**DoP**") official advised the Defendants that they should have sought planning permission before carrying out the works on the outside steps and kitchen patio. They were formally apprised of this by the DoP in December 2021. The Defendants then engaged an architect to prepare drawings for a planning application.

6. In June 2021 the Plaintiff first became aware that the Defendants had undertaken extensive works on the Plaintiff's property, including removal of numerous mature trees and other vegetation, excavation of a roadway over the Defendants' own property (the "**Roadway**") of which a portion extended onto the Plaintiff's property (the "**Disputed Roadway**") and construction of an extension to their house, a part of which extended onto the Plaintiff's property. In respect of the Roadway, the BCEC Report shows the Roadway going from the top part of the Defendants' property to the bottom part of their property but the Disputed Roadway does actually cross over onto the Plaintiff's property. The Noon Report confirms the existence of the Disputed Roadway as described.

7. In respect of the matters in issue in this case, the Defendants' former counsel confirmed on 12 July 2021 to the Plaintiff's that the Defendants would provide an undertaking not to use the Disputed Roadway or go on the Plaintiff's property without the Plaintiff's prior permission (the "**Undertaking**") until the dispute was resolved. In the Defence and Counterclaim, the Defendants have pleaded a right of way over the Disputed Roadway and assert that they have refrained from using it pursuant to the Undertaking.

8. The Plaintiff states that in or around August 2021 he became aware of further trespasses on his property by the Defendants including further use of the Disputed Roadway and the placing of large amounts of brush and the felling of two bay grape trees on his land.

9. On 29 March 2022 the Defendants lodged a planning application (the "**Planning Application**") with the DoP. They also uploaded all of the necessary documents, including the drawings, to the DoP website and paid the required fee. They then posted a site notice labelled "Notice of Intention to Develop Land" (the "**Notice**") on their property. The "Description of Proposed Development" appeared exactly as follows:

   "Proposed Replacement of Damaged Landscape
   Stairs with Pillars 2'10" Max Height on Safety
   Grounds and Re-grading of Rear Patios to Prevent
   Flooding. (Retroactive)"

10. Thereafter, on 29 March 2022, the Plaintiff observed the Notice at the entrance of the Defendants' property. It related to the Planning Application. The Plaintiff then visited the DoP website to obtain copies of all publicly available documents related to the Planning Application. There was a Partial Topographical Plan of Survey (the "**Plan**") dated 18 October 2021 in support of the Planning Application which to the understanding of the Plaintiff showed a proposed encroachment onto his property indicated by a shaded area described as "rock cut". In the circumstances, the Plaintiff considered that the Planning Application contemplated further unauthorised encroachments on to his land as well as the likely use of the Disputed Roadway. I should add here that Mr. Ian Feathers, a project manager of over 32 years' experience in Bermuda, swore an affidavit dated 7 April 2022 on behalf of the Plaintiff. He stated that he reviewed the Plan which appeared to show areas where proposed works were to be carried out, namely an area of "recent storm damage" and "recent exposed foreshore rock" which were partially located on both the Plaintiff's and Defendants' properties (the "**Alleged Proposed Works**"). He inspected the areas on 5 April 2022 but found that the Alleged Proposed Works had not commenced. I should also add here that the Defendants strenuously object to Mr. Feather's – and the Plaintiff's – evidence that the Alleged Proposed Works is accurate as they submit that the Plan was a report and not an application for planning permission. The Plaintiff and Mr. Feathers have not resiled from their position on this point, a matter that will have to be determined at trial.

11. On 31 March 2022 the Plaintiff's counsel sent a letter by email to the Defendants' counsel asserting that the Plaintiff apprehended an immediate risk of trespass to his land by the posting of the Notice and demanded an undertaking by end of day. The Defendants' counsel replied later that day explaining that they had not been able to take instructions and would do so and would respond to the allegation. Carey Olsen requested that they be included in any correspondence with the Supreme Court Registrar if an application was to be made for an injunction and further requested a note of any oral communications with the Registry.

12. On 1 April 2022, prior to the 2:30pm hearing, further correspondence flowed between counsel including:

a. At 11:27am and 11:53am, Conyers sent correspondence to Carey Olsen about an *ex parte* application for an injunction.
b. At 1:21pm the *ex parte* Summons was sent by email to the Registrar, copying Defendants' counsel.
c. At 1:37pm Carey Olsen sent a letter to Conyers warning it off about making an application when it was not urgent insisting that Conyers should wait for a substantive reply. Carey Olsen pointed out that the Planning Application was for works completed in 2016 and that it was difficult to see how a retroactive notice could be used to justify an injunction. Carey Olsen pointed out that the stair repair work took place in 2016 and was 90ft away from the boundary.
d. At 1:49pm Conyers asked Carey Olsen for confirmation "*that no further works of any kind were to take place pursuant to or related to the Notice*";
e. At 2:06pm Conyers emailed the Registrar copying Carey Olsen, attaching the unsworn evidence and indicated that they had received some information from Carey Olsen which might make a hearing unnecessary, however they awaited confirmation from Carey Olsen.
f. At 2:08pm Carey Olsen replied to Conyers' email to the Registrar indicating: (i) they had not seen any evidence; (ii) that there had been no effective notice of the hearing; (iii) that they could not attend and make submissions in accordance with their professional duties; and (iv) they were instructed not to attend the *ex parte* hearing.

13. The *ex parte* hearing took place and I granted the application for the Injunction.

14. Later that evening, the Plaintiff's process server served the Injunction on the Defendants at their property. Carey Olsen were informed of such by the Defendants. Conyers later provided a note of the hearing for the Injunction to Carey Olsen.

Applicable law governing the grant of *ex parte* prohibitory injunctions

15. Section 19(c) of the Supreme Court Act 1905 provides that:

> *"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; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just; and if any injunction is asked for either before, at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim the right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable;"*

<u>Case authorities cited by the Plaintiff</u>

16. As regards interlocutory injunctions in trespass cases, in the English Court of Appeal case of *Patel v WH Smith (Eziot) Ltd* [1987] 2 All E.R. 569, 573 Balcombe J stated that *"... prima facie a landowner whose title is not in issue" is entitled to an injunction to restrain trespass on his land, whether or not the trespass harms him. In support of that proposition there are two comparatively recent cases at first instance. The first is Wollerton & Wilson Ltd v Richard Costain Ltd [1970] 1 All ER 483 where Stamp J stated "It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the Plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction; for if there is no damage done the damage recovered in the action will be nominal and if the injunction is refused the result will be no more or less than a license to continue the tort to trespass in return for a nominal payment.*"

17. In the Hong Kong Court of Appeal case of *Lea Tai Property Development Ltd v Incorporated Owners of Leapoint Industrial Building* [1996] 1 HKC 193, 197 Godfrey J cited *Patel* and held that "*in the ordinary case, an owner of property who complains of a trespass is entitled almost as a matter of course to an injunction to restrain the continuance of the trespass.*"

18. In the Irish Court of Appeal case of *Clare Co Council v McDonagh* [2020] IECA 307, Whelan J cited with approval at [75] the following dictum: "*It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only*."

Case authorities cited by the Defendants

19. In *Bermuda Cablevision Ltd v Greene and others* [2004] Bda LR 18 Kawaley J (as he then was) noted that the rules outlined in the *American Cyanamid* case apply to the grant of interlocutory injunctions Bermuda:

> *"The applicant for an interlocutory injunction must accordingly be able to demonstrate that the injunction is required to prevent the invasion of some legal or equitable right possessed by the applicant. The American Cyanamid case prescribes the following rules applicable to the typical case where an injunction is sought in support of commercial or other ordinary property rights:(a) damages must be an inadequate remedy; (b) there must be a serious issue to be tried; (c) the balance of convenience must be weighed and favour the applicant."*

20. Kawaley J also confirmed in *Bermuda Cablevision Ltd* that a *quia timet* injunction is no different to any other interlocutory injunction. A *quia timet* ("because he fears") injunction is an injunction granted where no wrong has yet been committed, although it is threatened. The jurisdiction involves proof that unless the Court intervenes by injunction there is a real risk that an actionable wrong will be committed.

21. It is requirement of *quia timet* injunctions that there must be a substantial likelihood of damage occurring which is real and imminent. In *Fletcher v Bealey* (1884) 28 Ch D 688 Pearson J stated "*I do not think, therefore, that I shall be very far from wrong if I lay down that there are at least two necessary ingredients for a quia timet action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. ...*" In *Lloyd v Symonds*, *Unreported*, Chadwick LJ stated that the harm must be irreparable, "*that is to say, harm*

which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages."

22. In the text *Injunctions by Bean*, 13th Edition, the following principles were espoused: (i) an order should not be made against a party without first giving him the opportunity to be heard; (ii) a party can be unreasonably precipitate - for instance inappropriately bringing proceedings without any prior complaint to the defendant or attempt to explore an amicable resolution; (iii) if an expeditious hearing is granted for an application for an injunction without notice, a speedy hearing should be granted for an application to discharge it; (iv) it is fundamental for the applicant to show good faith in making a without notice application; (v) there is a duty of disclosure on the applicant and the advocate. The applicant must disclose all the facts which could or would be taken into account by the judge in deciding the application. The advocate must tell the judge exactly what he would say if he were representing the defendant, to ensure that the court is assisted fairly in the absence of the defendant; (vi) the duty of the advocate includes ensuring the draft order is correct; and (vii) the duty of full and frank disclosure continues to apply even in circumstances where informal notice is given to the defendant.

Applicable law governing planning applications

23. Planning applications such as the Planning Application are governed by statute. Section 16 and 17 of the Development and Planning Act 1974 govern the form and content, and determination of planning applications respectively. These sections in turn refer to 'rules' which include the Development and Planning (Application Procedure) Rules 1997, which in turn provides for guidelines to be issued. Guideline GN214/2020, which outlines the requirements for site notices such as the Notice, provides *"...any objections or representations should be submitted to the Department of Planning within 14 calendar days of the publication date.*"

The Defendants' Submissions

24. The Defendants submitted that the injunction was wrongfully granted and should be discharged because:
    a. The Plaintiff did not satisfy the urgency requirements to make its application *ex parte* and did not seek a further *inter partes* hearing in any event;
    b. The Plaintiff did not disclose to the Court all that was required to in breach of his duties of full and frank disclosure;
    c. The Plaintiff provided incorrect information to the Court on matters fundamental to the Court's reasoning in granting the injunction; and
    d. The Plaintiff cannot make out a *prima facie* case for an injunction on the true facts and circumstances of the matter.

The Plaintiff's Submissions

25. Mr. Elkinson submitted that the Plaintiff had a right to obtain the injunction and that the injunction was properly obtained. He directed the Court to the evidence of the Plaintiff as well as to the evidence of the Application including the Plan and photographs.

Analysis

26. I am not satisfied that I should grant the Defendants' application to discharge the Injunction for several reasons. As background, I granted the Injunction on the basis that the Plaintiff had an apprehension that work could start soon after the date of the Notices being posted; that although the Application was for retroactive work, some work may still be required to be performed so that the Defendants were in compliance with Planning requirements; and there was a likelihood of immediate trespass onto the Disputed Roadway to perform further work.

27. Also, as background, I note that the Plaintiff had at the forefront on his mind, just prior to the grant of the Injunction, the previous conduct of the Defendants trespassing on the

Plaintiff's property including the excavation and use of the Disputed Roadway, and the allegations of construction on part of the Plaintiff's property, the dumping of mulch on the property, the removal of vegetation, the replanting and maintenance of other vegetation. He also had on his mind the Undertaking although he had asserted that there had been further trespasses since the Undertaking was given.

Whether the Injunction was properly obtained

28. I am of the view that the Injunction was properly obtained for several reasons.

Urgency

29. First, the Notice dated 29 March 2022 indicated that the Planning Application was for a "Proposed Development" on a retroactive basis. The information on the DoP website and counsel's correspondence also indicated that the Application was in respect of retroactive permission. Further, according to the Plaintiff, the documents also showed a "rock cut" encroachment on his property, a proposal to develop/construct/reinforce a structure that was already built on his property and a breach of a 10-foot boundary setback. Mr. Robinson pointed out that the area marked "rock cut" was not an area where work had been done or was going to be done, it was simply a label on the Plan. Thus, the Plaintiff's position was that upon seeing the Notices, based on the Defendants' previous conduct and his perception that further work might be carried out with encroachments on his property as well as use of the Disputed Roadway, then the matter was urgent as the Defendants might have started work immediately.

30. I note that the Defendants argue that a careful review of the planning laws, rules and guidelines (the "**Planning Process**"), which were accessible on the same website to the Plaintiff, were not put before the Court by the Plaintiff. The Planning Process apparently would have shown to the Court that the posting of the Notice was the start of the process to obtain the desired planning permission and there were a number of further steps to be determined in the procedure. However, the Plaintiff has given evidence over several affidavits which asserts that the Defendants have a history of carrying out works on their

property without planning permission, the very reason why the Defendants were seeking retroactive permission. Further, there is the history of the Defendants' trespass on the Plaintiff's property and the fact of the Undertaking not to trespass and not to use the Disputed Roadway. In my view, the Planning Process did not affect the urgency of the matter one way or the other as its mere existence would not likely hinder the Defendants in carrying out works if they chose to do such works.

31. Additionally, the Plaintiff had requested a confirmation "*that there are no further works of any kind to occur pursuant to or related to this Notice*", but despite repeated requests, no such confirmation materialised before the hearing. Instead, counsel for the Defendants repeated their statements that the work was for retroactive permission and that an injunction was not necessary. Pointedly, there was no confirmation forthcoming. Mr. Robinson stressed that the fact that the Defendants did not confirm that no further works were going to take place is not a factor to support urgency. I agree with Mr. Robinson on that point. He also argued that the Plaintiff should have waited for a proper reply before seeking the Injunction. The Plaintiff has stated in his evidence that a Mr. Fox, a DoP official, informed him that "*Retroactive Approval does not mean that all the works are completed.*" The Plaintiff also stated in his evidence that there is a continuing risk of trespass for any work to be done by the Defendants as they use the Disputed Roadway to transport equipment (including a large backhoe), materials and labour to access the rear of their property. In my view, these factors contributed to the Plaintiff's conclusion that the matter was urgent and required the attention of the Court.

32. In my own view, upon all the evidence, putting aside the lack of confirmation from Carey Olsen, the circumstances initiated by the posting of the Notices, the further information in the online Application, the history of the matter, the existence of the Undertaking and the likelihood that there would be further works (that is, the Alleged Proposed Works) and thus further use of the Disputed Roadway did amount to there being an urgent need for an injunction.

Whether there was full and frank disclosure

33. Second, in my view, the Plaintiff gave full and frank disclosure to the Court in his affidavits and on oath at the hearing for the Injunction. There was a comprehensive, fair and detailed account of the background to the matter and the prevailing circumstances for the application for the Injunction. Further, the Plaintiff took the steps of accessing the DoP website to collect all the available information about the Application and reviewed it when he saw that although it was a retroactive application, the Plan also contained information suggesting that there were further works (that is, the Alleged Proposed Works) to be carried out.

34. I have considered the complaint that the Plaintiff did not inform the Court about the Planning Process which would have shown the Court that the posting of the Notice was the start of a process and that the objections closing date and the approval decision was still some weeks away. In my view, I do not consider this to be a failure of full and frank disclosure because the Planning Process would have no impact one way or the other on the Defendants conduct to breach the Undertaking if that is what they chose to do. To this point, the evidence does show that the Undertaking was a result of the creation and use of the Disputed Roadway and other trespasses onto the Plaintiff's property.

Whether there was proper notice

35. I have given consideration to the complaint by the Defendants that there was no proper notice given to them. However, on 31 March 2022, Conyers had put the Defendants on notice about the Plaintiff's apprehension that there would be further trespass to his property, thus seeking a further undertaking from the Defendant. Thereafter, correspondence started to flow between counsel, some copied to the Registry. Upon review of the correspondence it appears to me that Conyers were seeking confirmation that no further work was going to be carried out whilst Carey Olsen were stressing that there was no need for an injunction as the application was in respect of retroactive work and they

needed more time to take instructions on the matter. They declined to attend the *ex parte* hearing which they could have attended, listened to the *ex parte* application and then sought an immediate *inter partes* hearing. In my view, Carey Olsen were properly on notice that the Plaintiffs intended to seek an urgent hearing for an *ex parte* injunction. Thus, I find no fault with the correspondence from Conyers to the Court as well as to the Defendants who Conyers kept informed about the progress of setting the matter down for the *ex parte* on notice hearing.

<u>Whether the Injunction was properly granted</u>

36. In my view, the Injunction was properly granted for several reasons.

37. First, as stated above, I granted the Injunction based on the *quia timet* basis, namely that the Plaintiff held the apprehension that there was going to be trespass and damage to his property. In my view, the present circumstances are not in the context of a *Patel* basis for an application for an injunction where there is an actual trespass that needs to be prevented. In those circumstances, an injunction could be granted and maintained as the Plaintiff is *prima facie* a landowner whose title is not in issue and whether or not the trespass harms him would not be a consideration in determining the Application. The cases of *Lea Tai Property Development Ltd* and *Clare Co Council* support this position. If those circumstances obtained presently I would have no hesitation in granting an injunction based on the principles of *Patel*.

38. In mid-2021 when proceedings commenced, followed by the Undertaking by the Defendants to not use the Disputed Roadway and to not further trespass, no injunction was applied for or obtained on the *Patel* basis. However, where there is an apprehension of a trespass as in the present circumstances, the Court must be satisfied that the requirements for a *quia timet* injunction have been satisfied, namely that the Plaintiff has shown that there must be a substantial likelihood of damage occurring which is real and imminent.

Imminent risk of damage occurring

39. Second, I am satisfied that there was an imminent risk of damage occurring. I rely on my reasons set out above in respect of my findings that there was urgency. Also, I am of the view that the Planning Process does not negate imminent risk and the history of the matter shows that the Defendants might not follow the planning procedure. Further, the Notice and online Application were in relation to retroactive permission for work already done but also indicated that further work (that is, the Alleged Proposed Works) remained to be carried out.

40. In my view, the conduct of the Defendants leading to the Undertaking along with the assertions of additional breaches as well as the posting of the Notice provided a basis for concluding that the Defendants would likely act immediately on their Notices. Thus, I am satisfied that once the Notice was posted by the Defendants, there was an imminent risk that further work would take place.

41. The important link that I make between the Notice and the likelihood of imminent work is that it is clear that the Defendants have continuously acted over a period of years to conduct construction or landscaping work on their property and the Plaintiff's property. The activity is a long list, some of which was clearly without planning permission which is not disputed, starting with the stair repairs, then the patio repairs, the removal of numerous mature trees and other vegetation, the replanting of vegetation, the excavation of the Roadway which includes the Disputed Roadway, the placement of the shipping container, the works connected to the shipping container including the boring of an extraction well, the presence of a backhoe and other construction equipment on their property and some other works referred to in the evidence. The Defendants strike me as property owners who are active, determined and wish to move on with such projects. Thus, the posting of the Notice persuades me that the Defendants had a focus on and were continuing in their construction activity and as such, further work and damage as described below was imminent.

42. Third, I have reviewed the letter of Ciaran Keaveny dated 1 April 2022 to the DoP. It is in respect of the application to locate a shipping container on the Defendants' property for temporary storage in support of works on the property. The letter states that it is a retroactive planning application and sets out how the shipping container was used from 2019 in connection with the repair work to the stairs and patio. The letter also stated that the shipping container was "*… also utlilized during the recent boring of an abstraction well in the parking area in front of the property to increase drainage*." I note that the Defendants submitted that such application was denied.

43. Additionally, the letter also stated "*It is hoped that the container can be retained in place until after future works (pending planning permission) including but not limited to; the construction of a revetment on the southern shoreline; electric access gate with associated wing walls, pillars, utility closet, security surveillance, landscape planters and retaining wall along the deeded access; new driveway surfacing with associated drainage and lighting; relocation and replacement of utility feeds with associated new transformer pads, transformer, generator, gas cylinder, outdoor water and electric meter closet; and renovation of kitchen garden to include the removal of an existing shed and decommissioned BELCO utility building, and instill an irrigation tank and control closet.*"

44. Thus, in my view, the letter clearly sets out that there is extensive further work to be done on the Defendants' property. A list of works was provided but the letter stated that the future works was not limited to the list provided, meaning there was even more future work contemplated. As stated above, I reject the submissions of the Defendants that as the list of future works is potential, hypothetical and without any planning permission there is no risk of harm to the Plaintiff. In my view, the facts of the Defendants' retroactive planning applications show that they are not opposed to carry out works first and then seek planning permission later.

<u>Was there a substantial likelihood of damage</u>

45. Fourth, in my view, there is a substantial likelihood of damage. The Plaintiff's case is that in order for the Defendants to carry out their future works (that is, the Alleged Proposed

Works) as set out in the Planning Application they would have to use the Disputed Roadway. This would also apply in relation to the extensive future works contemplated by the Defendants in the Keaveny letter dated 1 April 2022. On the other hand, the Defendants state that the Planning Application is for retroactive permission only, but in any event, they have no need or intention to use the Disputed Roadway for any further works or for access to the shipping container. Further, they can access around their property by using other pathways. Additionally, the Defendants stress that the only work in consideration was work already done which was nowhere near the Plaintiff's property.

46. However, the Plaintiff's evidence asserts that the Defendant Mr. Storey took huge objection to the Plaintiff instructing a construction firm, since the Injunction, to place building materials on the Disputed Roadway and insisting that they cease such work. The effect of placing the building materials on the Disputed Roadway was to block the use of it by the Defendants. I am also reminded of the Plaintiff's assertions that the Defendants, in particular their agents, have breached the Undertaking to not use the Disputed Roadway. In response, Mr. Storey has sworn an affidavit in which he denied that he interfered in the delivery and that he was aggressive. His concerns were that the Plaintiff had stacked building materials without a permit which could fall onto his property, no Notice was displayed, it is an eyesore, it is on the Disputed Roadway over which he has claimed a right of way and it was totally unreasonable. Also, he has stressed that he has not used the Disputed Roadway since the Undertaking although the Plaintiff stress that the Defendants have used it. These are matters that will no doubt be more fully ventilated and determined at trial.

47. In my view, I am satisfied at this stage on the evidence, that the Defendants, most likely by their agents, were likely to use the Disputed Roadway to access their property for one reason or the other, ostensibly in furtherance of any of the works required to be done on their property. To that point, as already stated, I reject the submissions of the Defendants that as the list of future works is potential, hypothetical and without any planning permission there is no risk of harm to the Plaintiff. In my view, the Defendants are continuously active in their construction and landscaping works and the facts of the

Defendants' retroactive planning applications show that they are not opposed to carry out works first and then seek planning permission later. Thus, in my view, there was a substantial likelihood of damage to the Plaintiff's property, namely the continued and extensive use of the Disputed Roadway that, according to the Plaintiff, did not exist previously on the Plaintiff's property and which has turned an area of vegetation into a roadway capable of handling heavy construction machinery.

The Present Position

48. I have found that that the Injunction was properly granted in the *quia timet* context. On that basis, in my view, there is no present need to discharge it. The Injunction serves to prevent trespass by the Defendants on the Plaintiff's property whilst still allowing the Defendants to lawfully perform any works on their property as necessary. In *Gee on Commercial Injunctions 7th Edition* at 2-046 it stated "*Whether a case is an appropriate one for the grant of quia timet relief has to be considered in the light of all the circumstances known at the time of the hearing of an application for an interim injunction, or at the time of trial. .... The test is what is fair, and just in all the circumstances."* In, my view, in light of all the circumstances, it is fair and just to keep the Injunction in place.

Conclusion

49. For the reasons above, I refuse the Defendants' application to discharge the Injunction.

50. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendants on a standard basis, to be taxed by the Registrar if not agreed.

Dated 8 September 2022

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT