IN THE SUPREME COURT OF JUDICATURE OFJAMAICA

IN EQUITY

SUIT NO. 166 OF 2002

BETWEEN	CHARLTON HYLTON	PLAINTIFF
AND	CENTENNIAL DIGITAL JAMAICA LIMITED	DEFENDANT

Mr. Ian Wilkinson and Miss Shawn Steadman for Plaintiff
Mr. Harold Brady for Defendant

Heard: April 3, 4 and April 11, 2002

Sykes J (Ag)

It is 2002. Cellular telephones are ubiquitous. They are in the hands of princes and paupers. The market appears to be lucrative. The defendant (a registered company in Jamaica), one of three cellular service providers in Jamaica, wishes to erect a tower on property adjoining the plaintiff's dwelling house where he lives with his wife and two children. The defendant says that he is doing this pursuant to a licence granted to him by the Minister of Industry, Commerce and Technology. The defendant obtained permission from the relevant authorities to erect the tower and commenced construction of the tower. Apparently the construction of the tower is noisy and produces dust. The plaintiff seeks to put a stop to the construction activity not only because of the dust and noise but primarily because the plaintiff believes that the tower will emit radiation that may be harmful to him and his family.

To put a stop to this activity the plaintiff filed a Writ of Summons dated March 14, 2002. For good measure he obtained, on March 18, 2002 an Ex Parte Injunction restraining the defendants from continuing their erection of the tower. This injunction had an initial life of four days but was continued until April 3, 2002. The Writ is endorsed as follows

1. An injunction to restrain the Defendant, directly, by its servants or agents or howsoever otherwise, from constructing erecting or doing anything preparatory to constructing or erecting a cellular telephone and /or communications site at property adjoining the Plaintiff's property at 47 Hall Boulevard, Kingston 8, in the parish of Saint. Andrew;
2. An injunction to restrain the Defendant directly, by its servants or agents or howsoever otherwise, from continuing the construction work started at property adjoining the Plaintiff's property at 47 Hall Boulevard, Kingston 8, in the parish of Saint. Andrew;
3. An Order directing the Defendant, directly or through its agents, assigns and/or servants to remove the construction material and debris placed beside the Plaintiff's premises on Hall Boulevard, Kingston 8, in the parish of Saint Andrew;
4. Damages for nuisance regarding the construction of a cellular telephone and/or communications site beside the Plaintiff's property at 47 Hall Boulevard, Kingston 8, in the parish of Saint Andrew;
5. Liberty to apply;
6. Costs and,
7. Such further other relief as this Honourable Court deems fit.

It is common ground that tower is still not complete. It is not in service. No radiation of any kind is being emitted from it. The plaintiff is not taking any chances. He now wants all activity at the site to cease until the action is tried. By Summons dated March 19, 2002 the plaintiff is seeking an injunction to restrain the defendant from doing any further work on the property until the action is tried. It is this Summons that has

come before me for hearing. The plaintiff supports his application by swearing to affidavits dated March 15, 2002, March 20, 2002, March 26, 2002 and April 2, 2002. He also relies on the affidavit of Margaret Gaynair dated March 26, 2002 and Norma Moosang dated March 26, 2002.

The plaintiff says that the tower will emit radiation that may be harmful to him and his family. He accepts that to date there are no studies that show that towers used in the provision of cellular telephone services emit radiation that is harmful. Undaunted by this the plaintiff presses his case by saying that there are studies that show that "*analogue cellular telephones us FM RF/MW signals and digital cellular telephones use pulsed microwaves that are very similar to radar signals*" (see third paragraph of exhibit 3 attached to affidavit dated March 20, 2002). He says further that FM radio and radar exposure have caused significant increase in brain cancer and other cancers (see third paragraph of exhibit 3 attached to affidavit dated March 20, 2002). The plaintiff adds that this shows that "*it is highly probable the cell sites and cell phones are causing many adverse health effects*" (see third paragraph of exhibit CH 3 attached to the affidavit dated March 20, 2002). The plaintiff has put before the court a number of documents which he says show that it is quite likely that the tower in question will emit radiation harmful to himself and his family.

As I understand the submission of counsel for the plaintiff, he is saying that the similarity between cellular telephone signals and FM RF/MW signals are sufficient to justify the plaintiff's concern. He says further that since it known that FM RF/MW signals have been associated with increases in cancer then there is good reason to believe that the signals from cellular telephone towers may cause an increase in cancer. Thus the plaintiff's case rests upon inductive reasoning and not deductive reasoning. The consequence of this distinction being that the conclusion arrived at by the plaintiff, assuming the reasoning is valid, may or may not be true. Therefore, the plaintiff submits, because his conclusion may be true this means that there is a serious triable issue. The plaintiff submits further that such studies as there are show a correlation between radiation patterns from broadcast towers and cancer among persons who lived in the vicinity of radio frequency transmitting towers. The studies suggest that exposure to even low levels of radio frequency radiation causes sleep disturbance, melatonin reduction and

cancer in may parts of the human body (see sixth paragraph of exhibit CH 3 attached to the affidavit dated March 20, 2002).

The defendant resists the application and in so doing relies on the affidavits of James Beneda (Chief Operations officer of the defendant company) dated March 21, 2002 and March 25, 2002. He also relies on the affidavit of Rene Carazo (Land Acquisition Agent for the defendant) dated March 25, 2002.

The defendant says that the plaintiff's arguments are misconceived. The defendant says that there is no conclusive evidence that radiation from cellular towers is harmful to humans and therefore it cannot be said that the plaintiff is likely to be adversely affected by the radiation from the tower.

Here lies the crux of the matter: it is agreed by both sides that if the tower is completed and becomes operational radiation will be emitted but no one knows for sure what the effect may be. The plaintiff says that such studies as they are show that radiation is harmful. The radiation that will be emitted from the tower may well be harmful and it is for this reason why he has brought his action and it is for this reason why the defendant should be restrained from completing the tower until the action is tried. The defendant, on the other hand, submits that this is not sufficient to grant the injunction. The defendant says that the plaintiff must go further. He must show that the radiation from it tower is harmful.

This court has examined all the affidavits and exhibits submitted.

I am mindful of the principles stated by Lord Diplock in the well known cases of ***American Cyanamid v Ethicon Limited*** [1975] 1 All ER 504 and ***N.W.L. Ltd v Nelson and Laughton*** [1980] 1 Lloyds Rep. 1. The principles to be derived from these cases appear to be:

a) the court should always bear in mind that at the time the application is made for an interlocutory injunction the evidence available at that time is given on affidavit and untested by cross-examination (per Lord Diplock in ***American Cyanamid*** (supra) at page 509 e);
b) the court should be mindful that where the facts are contested "the existence of the right or the violation of it, or both, is uncertain and will

remain uncertain until the final judgment is given in the action" (per Lord Diplock in ***American Cyanamid*** (supra) at page 509 a-b);

c) the court is not to "try to resolve conflicts of evidence on affidavit as to facts on which the merits of the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration" (per Lord Diplock in ***American Cyanamid*** (supra) at page 510e);

d) the court is not to "weigh" the case of the plaintiff and assess the chances of success. The court is simply to determine whether the issue raised is a serious one (per Lord Diplock in ***American Cyanamid*** (supra) at page 509g-c);

e) if there is a serious issue to be tried then the court goes on to consider whether the balance of convenience lies in favour of granting or refusing the injunction (per Lord Diplock in ***American Cyanamid*** (supra) at page 510f);

f) however if the effect of granting or the refusal of the injunction would have the effect of concluding the matter then the court should take into account the degree of likelihood of the plaintiff succeeding at trial (per Lord Diplock in ***N.W.L. Ltd.*** (supra at page 10);

g) one of the factors in determining where the balance of convenience lies is whether damages would be an adequate compensation for the plaintiff if he succeeds at the trial or for the defendant if he succeeds at the trial (per Lord Diplock in ***American Cyanamid*** (supra) at page 510g-j);

h) if matters are evenly balanced and the defendant is being restrained from doing something that he has not yet done, then the effect of the injunction is merely to postpone what he was about to do. If on the other hand the defendant is already in course of some established operation then an injunction may have a very deleterious effect on him (per Lord Diplock in ***American Cyanamid*** (supra) at page 511b.

The defendant submits that the endorsement on the Writ of Summons does not disclose any cause of action and consequently interlocutory relief should be refused since such relief is not a cause of action but ancillary to a cause of action. I do not agree. While it true that the endorsement is some what terse it seems to me that the plaintiff is alleging that his cause of action sounds in nuisance.

The defendant next submits that assuming that the cause of action sounds in nuisance the precise legal right that may be infringed has not been identified. He relies on the House of Lords decision in ***Hunter and others v Canary Wharf Ltd*** [1997] 2 All ER 426. The defendant places heavy reliance on the judgment of Lord Hoffman. In his judgment the learned Law Lord reminded us that the tort of nuisance is a tort against land. He said that the tort can be conveniently divided into two groups: (a) causing "material injury to the property" and (b) causing "sensible personal discomfort" (see page 451c). His Lordship said that there was a tendency to regard the second group as an action for discomfort or personal injury but this was not so. While it is true that in the second group there was no injury to the land its utility had been diminished by the existence of the nuisance. Thus the basis of the injunction when dealing with the second group is the "unlawful threat to the utility of [the] land" (see page 451f). The diminution of the utility entitles the plaintiff to compensation.

In the instant case it would seem to me that on the totality of the affidavit evidence relied on by the plaintiff he is saying that if the tower were to be erected and the radiation is emitted then there is the probability of diminution of the utility of his land. It necessarily follows that I do not agree that the precise legal right has not been identified. It seems to me that the plaintiff could quite easily fit within the second group identified by Lord Hoffman.

Mr. Brady, on behalf of the defendants, submitted that the injunction being sought is a quia timet injunction and the plaintiff must satisfy the requirements of ***Redland Bricks Ltd v Morris and Another*** [1969] 2 All ER 576 and ***Hooper v Rogers*** [1974] 3 All ER 417. I do not believe that those cases are of assistance. In those cases the matter was fully ventilated and then the remedy was granted. That is not the case here. Mr. Brady urged that those cases showed that the plaintiff must show that the danger was imminent and not merely possible. Ultimately this is really a question of fact that can

only be resolved by a trial and not by an analysis of the affidavit evidence. To accede to Mr. Brady's submission would be to do precisely what Lord Diplock in ***American Cyanamid*** (supra) said I am not to do.

During the course of argument Mr. Brady introduced the Telecommunications Act and submitted that Parliament had provided an alternative avenue for the plaintiff to seek and obtain redress. Mr. Brady sought support in the judgment of Lord Hoffman in the ***Hunter*** case (supra). At pages 454-455 the learned Law Lord suggested that the common law freedom of an owner to do as he pleased on his own land was now curtailed by the need to obtain planning permission to build on his land. This planning permission regime provided a mechanism for the various views to be debated. These observations led Mr. Brady to submit that the Telecommunication Act created a regime that was specific to the provision of telecommunication services and within that regime the concern of the plaintiff could be addressed.

Whilst this is true, Lord Hoffman was careful to make the point that this did not mean that the grant of planning permission is a defence to an actionable nuisance under the existing law. This clearly must be so. The Telecommunication Act sets out the responsibilities of various persons when an application for a license to provide telecommunication services is being considered. The question of whether the successful applicant may create a nuisance when he is seeking to provide the actual service is not addressed by the Act. But even if I am wrong on this there is nothing in the Act that remotely suggests that it was intended to abolish this well established tort.

Mr. Brady submitted that if the court were to grant this injunction it would have a deleterious effect on the business of the defendant. Regrettably there is no evidence that would enable me to assent this submission. Here we are concerned with the location of a single tower. There is nothing to suggest that this tower is at the heart of the defendant's business. There is nothing to suggest that without this tower the defendant will be unable to provide the service or can only provide the service at great expense. What Mr. Beneda says in his affidavit dated March 21, 2002 at paragraph 14 is that if the tower were to be relocated then it would be at great expense.

The plaintiff is not asking, at this stage, that the tower should be relocated. What he is asking for is a delay in the construction of the tower until the trial.

Having reviewed all the affidavit evidence and having taken into account all the submissions made to me by both counsel I find as follows:

1. there is a serious issue to be tried. It is agreed that the tower if erected and brought into operation will emit radiation. It is accepted that the precise effects are not known but what is clear is that radiation of a kind similar that emitted by cellular towers causes some types of cancer. It is of significance that in the affidavit of Rene Carazo dated March 25, 2002 there is a document (exhibit REPC 2) entitled "HOW WIRELESS WORK". In that document there are two subheading that are as follows: *"Have any studies been done specifically on RF from wireless base stations?" and "If RF energy from wireless antennas is safe, why is there a need for setting exposure limits?".* What follows in answer to these questions is telling. The answers show that there are experts who disagree with the methdology of some of the studies done in this area, but despite the alleged defects in the studies it is still thought that it is desirable to set exposure limits. Why set exposure limits if there was not some probability that harm would result from some exposure to RF energy? Having regard to the suggested similarity between RF energy and radiation from cellular towers it is not unreasonable to conclude that the plaintiff in this case has raised a serious triable issue.
2. damages would not be an adequate remedy for the plaintiff if he is successful at trial. Here we are dealing with potentially long lasting and even permanent negative effects on the plaintiff's health and well being that may arise from a reduction in his quite enjoyment of his property because the defendant has erected a cellular tower that will emit radiation that may be harmful. The plaintiff has given an undertaking to compensate the defendant, if the injunction is granted, if the defendant succeeds at the trial. There is nothing to suggest that this would not be an appropriate remedy for the defendant;
3. the granting of the injunction would not have the effect of determining the issue between the parties. What is at stake here is not the closing down of

> a business but rather the erection of a single tower. It has not been established that the failure to erect this tower will or may prevent the defendant from fulfilling the terms and conditions of his licence.

I therefore conclude that that an interlocutory injunction ought to be granted in favour of the plaintiff.

1. Order granted in terms of Summons dated March 19, 2002
2. Speedy trial ordered.
3. The plaintiff to file and serve the statement of claim within thirty days of this order.
4. The defendant to file the defence within thirty days of being served with the plaintiff's statement of claim.
5. Costs to be cost in the cause.

Leave to appeal granted to the defendant.