IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 0794

BETWEEN	MAMMEE BAY CLUB (1987) LIMITED	CLAIMANT
AND	NEW WAVE WATER SPORTS LIMITED	DEFENDANT

IN CHAMBERS

David Batts and Ms. Teri-Ann Brown instructed by Livingston, Alexander& Levy for the Claimant

Frank Phipps, Q.C. and Ms. Kathryn Phipps for the Defendant

Heard: March, 25 & April 23, 2010

Land - claim for recovery of possession- trespass - application for interim injunction - injunction likely to determine part of claim - whether interim mandatory injunction to be granted - factors to be considered - test to be applied - application of the Judicature (Supreme Court) Act, s. 49(h)

McDONALD-BISHOP, J

1. This is an application for an injunction pending trial. Mammee Bay Club (1987) Limited, the claimant, by claim form filed on 19 February 2010 initiated proceedings against New Wave Water Sports Limited, the defendant, for recovery of possession and trespass in respect of a parcel of land together with all buildings, other structures, equipment, furniture and furnishings thereon referred to as the 'beach' and known as lot 3 in the residential subdivision of Mammee Bay Estate, St. Ann.

2. The claimant is seeking remedies in the form of a perpetual injunction to restrain the defendant from entering or using the beach; an order for recovery of possession of the beach; damages and/or loss of mesne profits for trespass and/or wrongful possession of the beach along with interest and costs.

3. The claimant, by way notice of application for court orders filed on the same date as the claim, now seeks an interim injunction until trial to restrain the defendant its servants and/or agents from entering upon or using the beach. The injunction is being sought on the following grounds:

(a) The defendant is a licensee whose licence has expired and/or was lawfully terminated.

(b) The defendant has been and continues to be unable to pay the agreed license fee and as at the date of the notice of termination of the licence owed the claimant unpaid licence fees.

(c) The claimant will suffer irreparable harm and consequential losses if the defendant is not restrained from entering upon the said beach.

(d) The claimant is unable to grant a licence to any other person or entity so long as the defendant continues to enter upon the said beach.

(e). The claimant has a fair prospect of success in its claim against the defendant and the defendant has no reasonable prospect of success in its defence to the claim.

CLAIMANT'S CASE

4. The claimant's application for the injunction pending trial is supported by the affidavit evidence of Herbert Murdock, chairman of the claimant. Some salient aspects of his evidence will now be extracted in an effort to provide the factual background to the application.

(a) The claimant is the registered proprietor of the beach. There are three buildings on it. The first building is a kiosk with a kitchen, bar area and a public area. The second building consists of

changing rooms and two storage areas while the third building is exclusively used by the directors and members of the claimant.

(b) By an agreement reduced into in writing under the heading 'Licence', the defendant was granted a licence to use the beach for a period of one year commencing 1 January 2008. The agreement also contained a clause for an option to renew for a further term of one year.

(c) The defendant agreed to pay an annual sum of US$21,600.00 in monthly installments of US$1,800.00. The claimant was given the right to terminate the licence upon 30 days notice if at the time, payment of the licence fee was not made on the due date or if the defendant was in breach of any covenant.

(d) At the end of December 2008, the claimant continued the licence although no written request was made for renewal of it. Both parties acted on the basis that such a request had been made. The licence continued on the same terms and conditions to expire at the end of December 2009.

(e) The defendant has had a history of late payment of the prescribed fee that had compelled the claimant to serve notice to terminate the agreement in July 2009. This was later withdrawn upon a plea from Emile Rose, a director of the defendant and upon his promise that the outstanding arrears would be paid. The defendant, however, soon fell into arrears in breach of the agreement.

(f) The claimant and residents of Mammee Bay have become dissatisfied with the defendant's management of the beach. The beach was not kept to a standard where members and their spouses felt comfortable going to the beach. The defendant allows unsavoury characters to visit the beach. At least one resident had made a complaint to the Sunday

Herald causing that newspaper to publish a report accusing the claimant of mismanagement of the beach and accusing the directors of the claimant of turning a blind eye to drug pushing on the beach. The claimant has also received complaints as to the quality of food and service offered by the defendant.

(g) Consequently, a notice dated 12 November 2009 was served on the defendant requiring the defendant to vacate the beach by 31 December 2009. Following the issuance of this notice, the defendant paid up the arrears in fees on 4 December 2009.

(h) Having given notice to the defendant to quit the beach, the claimant later made arrangements with Marksman to provide security guards on the beach as of 1 January 2010 to secure the property and to prevent the defendant and its vendors from entering the beach. This was done on the basis that the defendant's rights to enter the beach had expired by effluxion of time on 31 December 2009, the date set in the agreement as the expiration date.

(i) The defendant and its vendors, however, with the help of the police gained access from the security guards on 2 January 2010. The defendant refuses to quit occupation of the beach on the grounds that the agreement constitutes a lease and not a license. This was expressed for the first time on 12 December 2009 through a letter from the defendant's attorney- at -law, learned Queen's Counsel, Mr. Phipps.

(j) The security guards were withdrawn by the claimant on 8 January 2010 and the defendant's agents, servants and others connected to it continued to gain entry to the beach and are controlling the beach.

(k) The claimant contends that it is in negotiations with a new licencee but cannot finalize the negotiations because of the activities of the defendant and its servants and/or agents. As a consequence of the defendant's possession of the beach, the claimant is incurring a loss in profit of approximately US$3000.00 per month. The claimant is unable to grant a new licence until and unless the defendant ceases to trespass on the beach.

THE DEFENDANT'S RESPONSE

5. The defendant's evidence in response is contained primarily in the affidavit of Jasper Emile Rose, a director and manager of the defendant. He gained support for his objection to the application from four other affiants, two of whom are craft vendors who ply their trade on the beach. The defendant's case is, essentially, to the following effect.

(a) It is admitted that the property in question is owned by the claimant.

(b) The agreement with the claimant was for one year exclusive possession of the beach from 1 January 2008 to 31 December 2008 with one building on the premises reserved for the exclusive use by the management of the club. At the end of the first year, the defendant continued to occupy the premises on the same terms and conditions.

(c) The defendant operates a restaurant on the premises and other services for the benefit of residents of Mammee Bay, cruise ship visitors, guests from the nearby RIU Hotel and other operators in the hospitality industry.

d) The defendant took the agreement with the clear understanding that it was for a lease of the premises and not a licence as being claimed by the claimant. The defendant could not operate the type of business known and agreed to

by the parties with the responsibilities outlined in the agreement if it was only a licence that was granted with no security of tenure.

(e) No legal advice was received before signing the agreement while it is evident that the claimant did receive such advice.

(f) There had been some 'hiccups' in the payment of rent during 2009 but at the end of 2009, no rent was outstanding but the claimant had refused payment tendered for 2010. Notice was served on the defendant to deliver up possession on 31 December 2009.

(g) An injunction would cause great hardship to the company and its employees. It would be disruptive of its operations and would cause it to breach its obligations to entities for the provision of parasailing services and refreshment for their customers.

(h) It would also cause interruption in the business of the craft vendors and other operators and the hardship that they would suffer would be hard to prevent or correct. The injunction would also be injurious to the hospitality business, generally, especially to the tourism industry at a high point of the season.

(i) If an interim injunction is granted at this stage and at the end of the day the claim for possession should be dismissed, it would be impossible to restore the company to its previous position after its goodwill had disappeared and its business connections had been injured by the injunction.

(j) A refusal of an injunction would cause no hardship to the claimant where damages would be an adequate remedy. The defendant should, therefore, remain until trial of the claim on the substantive issue.

THE LAW

6. The considerations to be applied in determining whether to grant or not to grant an interim injunction are by now well defined and firmly established. The usual starting point in these types of proceedings is to pay regard to the principles authoritatively laid down by Lord Diplock in **American Cyanamid v Ethicon** [1975] 1 All E.R. 504. These principles have consistently been endorsed by the courts within our jurisdiction and have again recently received affirmation by the Privy Council in **National Commercial Bank Jamaica Ltd. v Olint Corp. Limited (NCB v Olint)** [2009] 1 W.L.R. 1405.

7. While I do accept that these principles are not to be taken as inflexible rules of legislative-like character, particularly as one is treading in the sphere of equity, I will nevertheless utilize them as useful guidelines in seeking to determine the question at hand. I will ultimately, however, allow myself to be guided by the statutory authority of the **Judicature (Supreme Court) Act, section 49 (h)** which falls within the provisions of the Act that regulate the administration of law and equity by this Court in special cases.

8. Section **49 (h)** provides in so far as is relevant at this time:

> "[*A*]*n injunction may be granted... 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. (Emphasis Added).*

9. Even in the light of the various principles from the relevant cases, the critical and deciding question, in keeping with the statutory authority that guides the Court's function, must ultimately be whether the making of an interlocutory order for an injunction is just or convenient in all the circumstances of the case. This principle seems to be reflected in the binding

dictum of the Privy Council in **NCB v Olint** wherein Lord Hoffman, in giving the opinion of the Board, stated that at the interlocutory stage, the court must assess whether granting or withholding an injunction is more likely to produce a just result.

10. It is thus against this background of the applicable law that I will now undertake my enquiry into the application before me to determine whether an interim injunction ought to be granted or not. I must state from the outset that my task in enquiring into the facts before me in order to arrive at an informed position has been made much easier by the generous assistance and methodical and thorough preparation of counsel involved on both sides. I am grateful to them.

ANALYSIS OF FACTS WITH LAW

Is there a serious issue to be tried?

11. I will elect as my starting point a consideration as to whether there is a serious question to be tried on the merits of the substantive claim. This means, in effect, that the claim must not be frivolous or vexatious. As said in the relevant authorities, this is not the same as the requirement to establish a *prima facie* case. What must be disclosed is that the claimant has a real prospect of succeeding in his claim for a permanent injunction at trial. If there is no serious question to be tried, then the injunction will have to be refused: **(American Cyanamid v Ethicon)**.

12. I accept that it is, therefore, legitimate for me at this stage to ask whether the claimant, as the applicant for the injunction, is likely to obtain an injunction if the case was to proceed to trial. I also accept that in considering this question it is open to me to resolve it by reference to the facts and matters in evidence before me (**Commissioner of Police v Bermuda Broadcasting Co. Ltd. and others** Privy Council Appeal 487 delivered January, 2008.)

Submissions

The claimant's

13. Mr. Batts, on behalf of the claimant, submitted that the claim is not vexatious or frivolous. In forcefully pushing the claimant's case that the agreement created a licence, learned counsel pointed out various clauses of the agreement that he submitted are indicative of the nature of the occupancy being a licence. After doing so and placing reliance on the legal principles as distilled from several authorities, he concluded that no exclusive possession was granted, or any interest created in land nor was there any possession sufficient to create the presumption of a tenancy. Mr. Batts argued that in the alternative, if exclusive possession is found, the terms and circumstances of the agreement however, negative the presumption that a tenancy was created. Reliance is placed on **Street v Mountford** [1985] 2 All ER 289; **Cobb v. Lane** [1952] 1 All ER 1199; **Shell-Max and P Ltd. v. Manchester Garages** [1971] 1 All ER 841; **Isaacs v Hotel de Paris** [1960] 1 All ER 348; **Westminster CC v. Clarke** [1992] 2 AC 288,

14. According to Mr. Batts, as far as the evidence shows and as far as the claimant is concerned, the agreement created a licence. The relationship was clearly that of licensor and licencee and that was the manifest intention of the parties. The defendant's assertion that it is a lease is untenable and unsupported by the authorities.

15. Mr. Batts further submitted that a licence having been created, it was validly terminated by a notice that complied with the terms of the agreement. According to him, even if this Court should hold that the 12 November 2009 notice was invalid, the presence of the defendant on the beach after 31 December 2009, however, would still be unlawful since the agreement, having been renewed for a further term of one year only, automatically came to an end by effluxion of time on December 31 2009. This, he said, is in keeping with the

agreement that had provided for the further term to expire on that date which it, in fact, did.

16. Learned Counsel went a bit further to say that even if the agreement was to be found to have created a lease, that lease would also have validly determined on 31 December 2009 by effluxion of time. In support of the claimant's contention that the termination of the defendant's occupation of the beach was valid, he prayed in aid **Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co.** [1997] 3 All ER 352 and **Woodfall on Landlord and Tenant** Vol. 1 para 1-0652.

17. Mr. Batts maintained that whether the relationship is held to be a licence or a lease, either way, the continued occupation of the beach by the defendant constitutes a continuing trespass entitling the claimant to a perpetual injunction. The claimant, he said, has therefore demonstrated that the claim for recovery of possession of the beach and for a permanent injunction at trial is thus virtually unanswerable.

18. He declared, in no uncertain terms, that the defence has no real prospect of success given the terms of the agreement, the subject matter of the agreement and the conduct of the parties. Relying on **Patel v WH Smith** [1987] 2 AER 569, he submitted that it has been held that a landowner is *prima facie* entitled to an injunction to prevent trespass unless the defendant can show an arguable case to support a right to enter. In the instant case, the defendant can show no such case and so the absence of such a defence to the claim means that the injunction should be granted pending trial.

Defendant

19. In responding to the claimant's submission and in seeking to advance the defendant's case, Mr. Phipps, Q.C. submitted that there are three live issues to be determined at the hearing that would make the grant of an interlocutory

injunction inappropriate. These are, he said, (1) whether the defendant was granted a lease or licence under the written agreement;(2) whether the defendant's continued operation of business on the premises after 31 December 2008 was legal and, if is so, in what capacity and (3) whether the one month's notice requiring the defendant to deliver up possession by 31 December 2009 is valid.

20. In relation to the first issue he identified, Mr. Phipps, Q.C. stated categorically that based upon the terms of the agreement as pointed out particularly by him, it is evident that the defendant was granted a lease of the beach and so the label or description of the document as a 'licence' is not the final determinant of what the agreement constitutes. According to him, although the label speaks for a licence with no intention to create a lease or tenancy, the terms in the body of the document gave the defendant an interest in the property and not a mere right *in personam.*

21. Having placed reliance on dicta from authorities such as, **Facchini v Bryson** (CA) (1952) 1 Times L R. 1386, **Addiscombe Garden v Crabbe** (CA) 1957) 3 AER 563, **Street v. Mountford** (HL (1985) 2 A.E.R. 289 and **Antoniades v Villiers** (1988) 2 A.E.R. 309), Mr. Phipps Q.C. maintained that the defendant has a better chance of success at the hearing for a finding that a lease was granted as distinct from a licence. He submitted, with an analogy influenced by a biblical occurrence that "the label speaks, like the *voice of Jacob*, for a licence; but the terms of the agreement, like t*he hands of Esau*, are recognized otherwise as a lease."

22. On the second point, learned Queen's Counsel submitted that after the period in the agreement expired, the defendant continued in possession legally with the acquiescence of the claimant. He maintained that because the procedure laid down for renewal of the agreement was not complied with (in that it was given in writing), the revocation in December 2009 was under no

agreement because the original agreement had expired. He said that in 2009, the defendant was not on the beach under the original terms and conditions of the agreement. However, it cannot be successfully argued that it was a trespasser.

23. Mr. Phipps, Q.C. argued that the question as to the status of the defendant in 2009 is an important point of law to be decided. His submission on this point is that in 2009, when the agreement expired, the defendant became a statutory tenant on the payment of rent on a yearly basis. The defendant, being a tenant of a commercial building under the Rent Restriction Act, now enjoys the position as a statutory tenant. This, he maintained, will give rise to the third issue as to the validity of the notice.

24. In relation to the notice, learned Queen's Counsel argued that the termination notice has alleged no breach of covenant by the defendant and was issued because of the effluxion of time in the agreement. However, whether under the original agreement or where the defendant held over after the expiry date in the agreement, the Rent Restriction Act protects it from eviction without a court order. Therefore, the one month's notice given for the defendant to vacate the premises by 31 December 2009 is insufficient for a commercial building and the notice without a court order is illegal, void and of no effect.

25. I take the foregoing submissions made on behalf of the defendant to mean, in effect, that there are triable issues which are likely to be resolved in favour of the defendant at trial that would warrant the preservation of the status quo until trial. This would mean then that the injunction should be refused.

Findings

26. In light of the contending views confronting me, I start my deliberations guided by the wise counsel of Lord Diplock in **American Cyanamid** that it is not part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit as to facts as presented by the parties or to decide questions

of law which call for detailed argument and mature deliberations. Indeed, throughout the course of these proceedings, Mr. Phipps Q.C. never failed to remind me of this caveat that it is not for me at the interlocutory stage to decide the issue as to whether the agreement constitutes a lease or licence and the issues emanating from that question. I certainly will heed that counsel.

27. It is accepted, however, that in assessing whether the claimant's claim is of substance and reality and so not frivolous and vexatious, the court is required to investigate the merits of the claim even if it can only be to a limited extent. For there is no other way to determine the prospect of success of the claimant obtaining an injunction at trial or whether it has a serious issue to be tried. This will, of course, have to be assessed in the light of the defence the claimant has to reckon with.

28. Having said that, I will now state that I do not believe anything more is required of me at this stage than to say that having examined all the evidence adduced by the parties against the background of the claim and the defence being advanced, I have found that there is a serious question to be tried on the merits of the substantive claim. The claimant's claim is not frivolous or vexatious and therefore has reality and substance. Indeed, the claimant has a real, as distinct from a whimsical, prospect of success in obtaining an injunction at trial. On this basis, which falls within the ambit of the **American Cyanamid** guidelines, the injunction cannot be refused without consideration of the other factors relevant to the question as to whether an injunction should be granted.

29. Mr. Batts has, however, argued on the authority of **Patel v Smith** that given that the claimant has presented a claim with a real and serious issue that would entitle it to an injunction at trial, the injunction ought to be granted because the defence being mounted in response to the claim does not have a real prospect of success. On this analysis, it would mean that I need not consider

anything further within the **American Cyanamid** guidelines as to whether the injunction should be granted.

30. I will now consider this argument in light of the principles in **Patel v Smith** since that case applies to the specific issue of an interlocutory injunction in a case of trespass to land as is the claim in the instant case. That case affirms the principle that a landowner whose title is not in issue is, *prima facie,* entitled to an injunction to restrain a trespass whether or not the trespass harmed him. This applies equally to the grant of an interlocutory injunction unless there are exceptional circumstances in which the court could properly decline to grant such an injunction.

31. It was, however, held in **Patel v Smith** that notwithstanding the right of the claimant, as owner, to its property, a defendant is entitled to put in evidence facts establishing that he has a right to do that which would otherwise be a trespass, and if he adduces sufficient evidence to establish that there was a serious issue to be tried, considerations such as the balance of convenience and whether the status quo should be maintained become material. In that case, the court found that the defendant did not have an arguable case and so the interlocutory injunction was granted.

32. Using the *'Patel Principle'* as a guide, it would mean that the claimant, being the registered proprietor of the beach with an undisputed title, it has, *prima facie,* a right to possession of it and to prevent trespass on it. It would go without saying that if the defendant is a licencee whose licence has expired, as being contended by the claimant, then the defendant would have no right to be on the beach. This would mean that the claimant would be entitled to prevent further trespass even at this interlocutory stage unless exceptional circumstances exist for the court to rule otherwise.

33. The claimant is drawing support on the principle to say that there is no arguable defence much more one with a real prospect of success in answer to its claim. As such, there are no exceptional circumstances that exist to justify a refusal of the injunction. But the question that now arises is whether that is the true situation in this case?

34. Indeed, employing the reasoning in **Patel v Smith,** it does seem that the most the defendant would need to show in response to the claimant's claim of its right to restrain entry to the beach is that it (the defendant) has an arguable case for entry. In this regard, the defendant is contending that it is a tenant of commercial premises whose tenancy has not been properly terminated and so it is entitled to enter and use the beach.

35. Given that the question as to whether an agreement constitutes a licence or a lease will usually require some construction, analysis and mature considerations of the agreement along with an examination of the conduct of the parties in relation to the agreement, I believe that the defence has raised some issues that are, at least, triable.

36. In considering whether there is a serious issue to be tried, I will, therefore, refrain from embarking on an exercise to examine into the prospect of success of the defence at this stage. I am comfortable to lean towards a finding, even if it should eventually prove too generous to the defence, that there is raised, at least, an arguable case. This is sufficient within the **Patel v Smith** guidelines to not grant the injunction without first going on to consider the other factors that must be satisfied for the grant of an interlocutory injunction.

37. The legal position at this juncture is, therefore, the same whether the **American Cyanamid** *'serious-issue-to-be-tried-test'* is applied or the **Patel v Smith** *'arguable-defence-test'* is applied. There is thus harmony between the two authorities that further consideration of this application is required before the

injunction can be granted or refused. This now takes me to the next stage of the enquiry.

38. In **American Cyanamid,** Lord Diplock, in speaking about the next stage of the enquiry where a serious issue to be tried is found, said:

> *"The court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction being sought.*
> *As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendants continuing to do what was sought to be enjoined between the time of the application and the time of the trial."*

Adequacy of damages

39. This test as to adequacy of damages can be seen as part and parcel of the test as to the balance of convenience and so in this regard the governing principle is simply this: If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the claimant's claim appeared to be at that stage **(American Cyanamid).** For, if damages will be an adequate remedy for the claimant, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction **(NCB v Olint)**.

40. Mr. Phipps, Q.C. has submitted that damages would be an adequate remedy. Mr. Batts does not agree. Mr. Batts contends that damages is not adequate as based on the evidence of Mr. Murdock in paragraph 24 of his affidavit, the claimant will continue to suffer incalculable loss. Mr. Murdock, in his affidavit, has exhibited a newspaper clipping from the Sunday Herald for the period 19-25 July 2009 headed *"Mammee Bay residents blame beach club board".*

41. This report stated, *inter alia,* that the claimant has turned a blind eye to drug pushing on the beach and that residents were calling for the resignation of the claimant's board. The article also stated that craft vendors were the main perpetrators and that when the chairman of the claimant was asked about it, he denied that drugs were being sold on the beach. The Sunday Herald, in response to the denial of the claimant's chairman, stated that it had witnessed, first-hand, the harassment of visitors on the beach to buy the illicit substances to include ganja and cocaine. The article also cited police report as to the arrest of two drug pushers operating on the beach and that the police had confirmed that the problem lies with the "Mammee Bay Beach Club" (the claimant) as it is responsible for the management of the beach.

42. It is the claimant's contention that this has affected its name and reputation and, therefore, if the defendant should continue to occupy the beach, it will continue to be affected thereby causing irreparable harm. Furthermore, the occurrences on the beach and the overall unsatisfactory service being provided by the defendant have affected and will continue to affect the comfort and enjoyment of the members of the club.

43. The report is, from all indication, a damning report and a sad commentary, if accepted as true, on the management and operation of the beach. If the contents of the report are true and provable, they are, indeed, such as are capable of affecting the name and reputation of the claimant and its members to the extent that it asserted that the claimant is condoning criminal activities on its property.

44. I have duly noted that the claimant's evidence concerning this newspaper article has not been the subject of any response by the defendant. Nothing is said about the allegations and averments of the claimant that the defendant has breached clause 5.1 of the agreement for failing to properly manage and supervise the beach causing such unacceptable activities as alleged in the report.

This is, indeed, significant. The claimant's contention that it is affected in its reputation by the omission of the defendant to properly manage the beach stands unrefuted up to now.

45. Mr. Phipps, Q.C. has, however, argued that the matters being relied on by the claimant, as contained in the newspaper report, and on what it is alleging its members told it constitute "classic hearsay". This would mean that they are inadmissible or, at best, no weight should be attached to them. While I do accept that that the newspaper article and the alleged complaints of the residents of Mammee Bay do constitute hearsay, that does not make them inadmissible in these proceedings and, as such, of no value. The **Civil Procedure Rules, 2002 (CPR)** r. 30.3 provide for the admissibility of hearsay statement in proceedings such as this provided certain conditions are fulfilled. In all the circumstances of this application, I find that the conditions are satisfied for the admissibility of the report and complaints in these proceedings.

46. I am, therefore, prepared to consider the report within this context albeit to a limited extent, that is, not to rely on it to say the contents are true but rather to view it just as evidence of the fact that some complaint has been made concerning the management of the beach and which has the potential to affect the name and standing of the claimant. These matters, in so far as they stand unchallenged, are, indeed, relevant to my deliberation as to the question of adequacy of damages if the claimant was to succeed at trial in establishing its averment that the defendant failed to properly manage the beach in breach of its contract thus forming a basis for recovery of possession. The question to my mind now is: If it turned out at trial that this allegation of the claimant is true, would it be such as to cause incalculable and irreparable damage if the injunction was not granted?

47. In considering this question, I conclude that given the nature of the allegations leveled against the claimant and the occurrences and concerns

detailed in the report, this, to me, appears to be something that could well cause incalculable and irreparable harm to the claimant that compensation in money could not adequately repair.

48. So, while there may be aspects of the claimant's claim that could be remedied in money such as loss of income/mesne profit or damages for trespass, there are aspects that could not be adequately compensated by money. In the end, given that all the losses that could possibly flow from the claimant's deprivation of possession might not be adequately compensatable in monetary terms, I conclude that the claimant would not be adequately compensated in damages.

49. I must say, however, that if I were to argue the contrary position that the claimant could be adequately compensated in damages, the test would still not end here for the refusal of the injunction. The second limb to be satisfied where it is found that damages would be adequate is whether the defendant is or would be in a position to satisfy any award of damages for the claimant's losses if it was to turn out at trial that the injunction should have been granted. The ability of the defendant to give and honour an undertaking as to damages is a crucial consideration.

50. It is interesting to note that while Mr. Phipps, Q.C. has vigorously argued that damages would be an adequate remedy, he has not said that the defendant can honour an undertaking as to damages. In fact, there is no evidence of an undertaking from the defendant or evidence of its ability or willingness to give one. This assumes particular significance in the context of the circumstances as obtained in this case where the defendant had shown repeated and constant defaults in paying the stipulated sum for its occupation of the beach. The undisputed payment history chronicled by the claimant shows that for every month as of May 2008 to December 2009, the defendant was in arrears. It was not until notice was served that the arrears were settled almost one month later.

51. Mr. Batts has used the defendant's 'fee' payment history against it to argue that its poor record of fulfilling its financial obligations to the claimant for occupation of the beach for almost the two years suggest that it will not be in a position to pay damages. I cannot ignore this submission. Before I can refuse the injunction on the basis that damages would be adequate, I must be satisfied that the defendant can honour any undertaking as to damages

52. While I do see that no balance on account is now outstanding, I have noted the payment history of the defendant and it has not been the best. The fact is that even after notice was served on the defendant to give up possession, the arrears were not settled promptly. The established conduct of the defendant in fulfilling its financial obligations to the claimant is thus a major cause for concern and it does put me on enquiry as to whether it is or would really be in a position to honour any award as to damages that could be made if the claimant was to succeed at trial.

53. In the absence of an undertaking as to damages and in the absence of any material that could be used as directly or indirectly going to fortifying an undertaking if one were given, I am in real doubt as to whether the defendant would be in a position to pay for the claimant's losses pending trial if the injunction was refused and it turned out at trial that the claimant was entitled to it. So even if I were to find that damages would be adequate, I am not satisfied that the defendant would be in a position to pay them.

54. Now, acting on my finding that the claimant could not be adequately compensated in damages and that even if it could be argued that it could be so compensated, that the defendant seems not to be in a position to be able to pay them, I still cannot stop there and grant the injunction. The authorities have said that if damages would not be adequate, then I must, on the contrary hypothesis, investigate whether if an interim injunction was granted, the claimant is able to

give an undertaking to adequately compensate the defendant for any loss if, at the eventual trial, the court should find that the claimant was not entitled to the injunction.

55. If the claimant is able to give an undertaking effectively, there is a strong case to grant the injunction because it is unlikely that injustice would be caused by granting it **(NCB v Olint)**. In other words: *"If damages in the measure recoverable under such an undertaking would be an adequate remedy and the claimant would be in a financial position to pay them, there would be no reason to refuse an interlocutory application." **(American Cyanamid)***

56. In conducting this aspect of the enquiry, it is noted that the evidence shows that the claimant is the owner of the beach and the roads in Mammee Bay. It states that it is a company in good standing with assets of over $70 million. This has not been challenged. On top of this, the claimant is poised to enter into new arrangements for operation of the beach which would mean, on the face of it, that it would be able to obtain additional income (approximately$US3000.00 per month) pending trial if the defendant is restrained. This is evidence to be taken into account in determining whether, if the defendant was restrained and it turned out that the injunction ought not to have been granted, the claimant would be in a position to pay for the losses to the defendant pending trial.

57. If the claimant failed at trial, any prejudice to the defendant, given that it is not claiming title to the land, would be that its occupation of the beach would have been prematurely terminated. The worst case scenario is that it would have lost income from its operation for the duration of time as its business would have been adversely affected as a result. Its losses, if any, as far as I can see them, would be substantially financial however. Such losses could be readily assessed and calculated in terms of money.

58. This is not a dispute as to title or a tenancy with several years left remaining (on the argument that it is a tenancy). If the court was to find it is a tenancy, the fundamental question would, at best be, what is the period of notice that would be required to terminate the tenancy? The loss to the defendant that would flow from the invalid termination would then have to be assessed. I can hardly, if at all, see reinstatement of the defendant as a remedy in the circumstances of this case. Damages would be adequate.

59. In my view, therefore, damages in the measure recoverable in the circumstances of this case would be an adequate remedy for the defendant if it should turn out at trial that the injunction was wrongly granted. I am satisfied on the evidence of the claimant that it is in a position to pay such damages. The authorities are all agreed that on this basis, there would be no reason to refuse the interlocutory injunction as no injustice would be brought to the defendant if the claimant was not to succeed at trial. (See **NCB v Olint** and **American Cyanamid.**)

Balance of convenience/ preservation of the status quo

60. The law states that only if there is doubt as to the adequacy of the respective positions with regards to damages will the case depends generally on the balance of convenience. Since I am not in doubt that the claimant could satisfy an award of damages in favour of the defendant if the injunction was to be wrongly granted, I have a basis to grant the injunction without a need to go further.

61. Mr. Phipps, Q.C., however, with his usual tenacity has made stimulating arguments against the grant of an injunction even when this basis exists for the grant of it. I will therefore examine his arguments to see if there is anything in the circumstances that would make the grant of the injunction unjust or inconvenient even though the adequacy of damages test has been resolved in favour of the claimant.

62. The defendant has relied on the affidavit of third parties to show hardship in dislocation at this time. Mr. Phipps, Q.C. further submitted the following: (a) no evidence is provided from residents at Mammee Bay Estate or any other person to show the need for an interlocutory injunction; (b)an injunction at this stage will cause real hardship for the defendant and others; (c) it will cause serious injury to the hospitality industry generally and tourism in particular at the high point of the season; (d)it will be disruptive for the services the defendant is contracted to provide for visitors from cruise ships; the RIU Hotel, and the residents at Mammee Bay Estate; and (e) it will result in immediate suffering for the craft vendors who, at present, operate at the premises under the defendant's authority.

63. In the light of this submission, I have looked at the defendant's position and have recognized that some disruption would be caused which would probably cause some measure of hardship. It is instructive, however, that despite the hardships as disclosed, even with the notice served in November, the defendant did nothing about serving a counter-notice on the claimant to indicate its difficulty in giving up possession at the stated time on the basis of hardship. Neither did it seek the court's protection on the grounds of hardship which it would have a legal right to do under the Rent restriction Act given its argument that it is a statutory tenant. The defendant is arguing that it is a statutory tenant but it would have sat on its rights despite claiming hardship to itself and others. The claim of hardship, now being used as a basis to block the grant of an injunction, lacks potency in light of the defendant's conduct in not seeking protection from the law when it had the opportunity before now to do so.

64. Having considered the evidence proffered by the defendant as to hardship vis-à-vis the claimant's position as already discussed, I conclude that my finding made above that the claimant is likely to suffer uncompensatable disadvantage if the injunction was refused and it succeeded at trial is not displaced. As Lord

Diplock said in **American Cyanamid**, the extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. I find that the claimant is more likely to suffer irreparable prejudice than the defendant. This would mean that the balance of convenience is still heavily in favour of the grant of the injunction.

Should interim mandatory injunction be granted?

65. I must however consider one other important point raised by Mr. Phipps, Q.C. before determining whether the injunction should be granted. He has argued that in a claim for recovery of possession, an interlocutory injunction is inappropriate as it will operate to determine the substantive issue in the claim in advance of a hearing as distinct from preserving the status quo.

66. It is, indeed, recognized that if the injunction is granted it would, in effect, disturb the status quo and would, therefore, be in effect a mandatory injunction albeit expressed in prohibitory terms. However, while it is usually the case that an injunction is most times applied for and granted to retain the status quo until trial, there is nothing to preclude an injunction being granted that may disturb the status quo. As the Privy Council said in **NCB v Olint** *"it is impossible to stop the world pending trial."*

67. It is important to note that in the light of **the Judicature (Supreme Court) Act, section 49(h),** by which I am particularly guided as stated before, the fact that the status quo may be disturbed is evidently not determinative against the grant of the injunction. The section states in part:

> *[A]n injunction may be granted 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 if an injunction is asked either* ***before*** *or at or after the hearing of any cause or matter, to prevent any threatened or*

*apprehended ... 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...** (Emphasis added).*

68. It means then that even if a person is in possession of land in a trespass case, an injunction may be granted before the trial of the claim against such person to prevent any threatened or apprehended trespass if the court thinks fit. There is thus no hard-and-fast rule barring the grant of an injunction in a claim for recovery of possession. The result must depend on what the justice of the case demands.

69. In **Films Rover International Limited v Cannon Film Sales Limited** [1986] 3 All ER 773, it was held that the test to be applied in determining whether an interlocutory injunction is granted is the same whether the injunction is mandatory or prohibitory. The question, therefore, is not whether the injunction is mandatory or prohibitory or will disturb the status quo but rather, primarily, whether the injustice that would be caused to the defendant if the claimant was granted an injunction and failed at trial outweighed the injustice that would be caused to the claimant if the injunction was refused and it subsequently succeeds at trial. Thus, in that case, it was established that an interlocutory mandatory injunction would be granted where there was a greater risk of injustice being caused to the claimant than to the defendant if it were not granted.

70. This principle enunciated in **Films Rover** was strongly reiterated in **NCB v Olint** wherein the Privy Council stated that the **American Cyanamid** principles could not be taken as intending to be confined to prohibitory rather than mandatory injunctions. According to their Lordships, *"whether the injunction is mandatory or prohibitory, the underlying principle is the same, namely that the court should take whichever course seems likely to cause the least irremediable*

prejudice to one party or the other: (see Lord Jauncey in ***R. v. Secretary of State for Transport, ex parte Factortame Ltd.*** *(No. 2) [1991] 1 A.C. 603, 682-683.)"*

71. So, I conclude that the ultimate question for me is not whether if the injunction is granted it will have the effect of determining the claim or whether it is mandatory or prohibitory or will disturb the status quo. What matters, as Lord Hoffman instructed and as Mr. Phipps, Q.C. urged, is what the practical consequences of the actual injunction are likely to be. I will adopt that course that will produce the most just results.

72. I have taken all the guidance afforded by the relevant authorities and have paid due regard to the intellectually stimulating and helpful submissions of counsel on both sides. When all that is applied to the evidence and matters before me, I am satisfied that it is just and convenient to grant the injunction pending trial. The injustice that is likely to be caused to the claimant if the injunction was refused and it succeeds at trial outweighs the injustice that would be caused to the defendant if the injunction was granted and it succeeds at trial. I do *'feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted'* (applying the dictum of Megarry J in **Shepherd Homes Ltd. v Sadham** [1971] Ch. 340 at 351 as applied in **NCB v Olint**). The claimant's application for an interim injunction, therefore, succeeds.

73. I will make such order on such terms as I see fit having borne in mind that I am granting a mandatory interim injunction which I believe necessitates some safeguard to ensure that the most just result is achieved.

ORDER

74. Accordingly, I make the order set out as follows:

1. Within seven (7) days of the claimant giving an undertaking as to damages and paying the sum of three hundred and fifty thousand

($350,000.00) into court towards this undertaking, the defendant is restrained by itself, its servants and/or agents or otherwise howsoever from entering upon or using ALL THAT parcel of land known as Lot THREE part of Mammee Bay in the parish of St. Ann (situate within the residential subdivision known as "Mammee Bay Estate") being the land comprised and described in Certificate of title registered at Volume 932 Folio 361 of the Register Book of Titles together with all buildings and other structures thereon and any equipment, furniture and furnishings thereon (the beach) until the trial of this matter.

2. *Costs of this application to be costs in the claim.*