IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013CD00059

BETWEEN	**THE PROPRIETORS, STRATA PLAN NO. 305**	**CLAIMANT**
A N D	**GREATER WORKS INTERNATIONAL FELLOWSHIP**	**1ST DEFENDANT**
A N D	**ANTHONY RENALDO YOUNG AND LORENS JOY YOUNG**	**2ND DEFENDANT**

Ms. Carol Davis for the Claimant.

Mrs. M. Georgia Gibson-Henlin and Kamau Ruddock instructed by Henlin Gibson Henlin for the 1st Defendant.

The 2nd Defendant appeared in person and made no submissions.

Breach of By-Laws-Injunction restraining church from operating in Commercial centre

HEARD: 14th & 18th June 2013

SINCLAIR-HAYNES, J

[1] Situated at Lot No. 105 Red Hills Road in the parish of St Andrew is a commercial complex known as the Red Hills Mall. The Proprietors, Strata Plan No 305 (claimant), Greater Works International Fellowship (1st defendant) and Anthony Young and Loren Young (2nd defendants) are registered proprietors of strata lots in the said mall.

[2] The 1st defendant is the occupier of seven shops. Two of the seven are rented from the 2nd defendants, who are the proprietors of those two. The 1st defendant utilizes five of the lots as a church. The other two are operated as an office and a bookshop respectively. The claimant instituted these proceeding to prevent the 1st defendant from operating as a church. It has invoked the courts equitable jurisdiction in seeking to restrain the defendants from operating as a church. It takes no issue with its other operations. The application is however trenchantly resisted by the 1st defendant.

The Claimant's Claim

[3] It is the claimant's claim that the defendants are in contravention of the by-laws of Strata Corporation 305, which prohibit:

(a) the use of the mall as a church;

(b) the use of the strata lots in a manner or purpose which causes a nuisance to the persons who occupy the other lots;

(c) the making of noise and playing of music in a manner which disturbs the other proprietors or their guests; and

(d) the use of the common property in a manner which interferes with the use and enjoyment of the proprietors or their guests

[4] The claimant also complains that the use of lots number 24, 27, 28, 29 and 30 as a church is hampering the commercial activities of the other members of the strata corporation who operate businesses. The operation of the Strata Lots as a church has caused great inconvenience and loss to the claimant, and unreasonably interferes with the use and enjoyment of the property by other proprietors. The claimant seeks damages for breach of covenant and an injunction restraining the defendant, their servants or agents from operating the strata lots as a church.

The 1st defendants' averments in opposition to the application for injunction

[5] It is the evidence of Ms. Annmarie Taylor, a member of the executive of the 1st defendant that the claimant was always aware that the 1st defendant intended to operate as a church. According to her, it was disclosed to Mr. Eaton Gabbidon, the then strata manager at the time of purchase in December 2005, that the lots were being acquired for use as a church. The lots have been so utilized since January or February 2006 without objection. Two other lots were purchased by the 1st defendant in 2008. These, together with the other lots rented, have since been used as a place of worship. It is also her evidence that the use of the other shops as an office and a bookshop is merely incidental to the 1st defendant's primary use of the premises for religious worship.

[6] She further avers that the 1st defendant is not the only church that has operated at the location with the knowledge and approval of the Claimant. Lots 29 and 30 were previously rented to the Universal Church of Christ and were used as a church. According to her the 1st defendant has sound-proofed the lots which are used as the church to reduce the noise and interference with the other proprietors.

[7] Ms Taylor's evidence is that the main issue is with parking and not the fact that it uses the premises for religious worship. She insists that there have been no oral complaints concerning its operations as a church. There have been discussions regarding parking issues with the proprietors of the pharmacy and the supermarket and the 1st defendant has on several occasions sought to resolve the parking issue with the claimant.

[9] It is also her evidence that the claimant has further acquiesced in the use of the premises as church because since 2005/2006 the claimant collected and accepted maintenance fees from the 1st defendant in accordance with the Strata Titles Act. The claimant's executive also sought further contributions from the first defendant for the repair of the mall with which request the first defendant readily complied.

The Law

[10] The Judicial Privy Council in the matter of **National Commercial Bank v Olint Corp Limited** which was delivered on the 28 April 2009 advised that at the interlocutory stage, the court must assess "*whether granting or withholding an injunction is likely to produce a just result."* Lord Hoffman in delivering the decision of the Board recognized that in granting an injunction the actions of the defendant and other persons are restricted. He stated the purpose of an injunction as improving the court's ability to do justice after the merits of the case have been determined at the trial. At page 5 paragraph 16, he said:

> *"As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by*

the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in ***the American Cyanamid case*** *[1975] AC 396, 408:*

> *"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."*

Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

[11] The principles enunciated by the English Court of Appeal in **Vefa Ibrahim Araci v Kieren Fallon** [2011] EWCA Civ 668 are pertinent in light of the facts of this case. At paragraph 33 of that case, Lord Justice Jackson outlined four propositions which the judge at first instance had distilled from **Treitel on the Law of Contract** (12th edition, 2007) as the considerations necessary in the exercise of its discretion whether or not to grant an injunction. The Court of Appeal found no fault with them. Jackson LJ stated them as follows*:*

> *"1. First, where there is a negative stipulation, breach may be restrained by injunction, as a matter of course, to restrain future breaches. It applies only to prohibitory injunctions and that is this case.*

2. Secondly, the balance of convenience test applies to applications for interim injunctions, except where there is a clear or uncontested breach of a covenant not to do a particular thing. In my judgment, that also applies here.

3. Third, where the granting of the injunction amounts in substance to a final determination at the interim stage, the court will take into account the strengths and weaknesses of the respective cases, and the likelihood of the claimant's eventual success at the trial. I interpolate that in effect something I have already done, in examining Mr. Fallon's evidence.

4. Fourth, this is all subject to discretion, an injunction being an equitable remedy. Although, I emphasize the basic rule that an injunction in the circumstances described will be normally granted as a matter of course. But injunctive relief may be refused if it is oppressive to the defendant to cause him particular hardship, although it would not be oppressive merely because burdensome or little prejudice to the claimant."

[12] The judge at first instance in **Araci**, had refused to exercise his discretion to grant the injunction on the fourth principle. Jackson LJ accepted the above stated four principles with the qualification that where a defendant acted in breach of a negative covenant, that is, did that which he agreed not to do; there must be the existence of special circumstances for the court to refuse to exercise its discretion in favour of the claimant.

[13] Jackson LJ relied on the following two authorities (which he noted, were not cited to the judge) for the proposition that in circumstances of clear breach, in the absence of special circumstances, the judge ought not to withhold the relief:

At paragraph 36 he said :

"In Doherty v Allman [1878] 3 App Cas 709 Lord Cairns LC enunciated the following statement of principle:

"If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say, by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the

contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or any of any injury. It is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves."

"In Hampstead and Suburban Properties Limited v Diomedous [1969] 1 Ch248 Megarry J granted an interlocutory injunction to restrain the playing of musical instruments in breach of covenant. Citing the statement of principle in Doherty, Megarry J said this:

"Thirdly, there is Doherty v Allman. I accept, of course, that Lord Cairns' words were uttered in a case where what was in issue was a perpetual injunction and not an interlocutory injunction. Indeed, the words seem to be obiter, for no negative covenant was present in that case. But these considerations do not preclude the words from having any weight or cogency in relation to an interlocutory injunction. Where there is a plain and uncontested breach of a clear covenant not to do a particular thing, and the covenantor promptly begins to do what he has promised not to do, then in the absence of special circumstances it seems to me that the sooner he is compelled to keep his promise the better. In such a case I do not think that the enforceability of the defendant's obligation falls into two stages, so that between the issue of the writ and the trial the defendant will be enjoined only if that is dictated by the balance of convenience and so on, and not until the trial will Lord Cairns' statement come into its own. Indeed, Lord Cairns' express reference to "the balance of convenience or inconvenience" suggests that he had not forgotten interlocutory injunctions. I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial. It may be that there is no direct authority on this point; certainly none has been cited. If so, it is high time that there was such authority; and now there is."

[14] In the instant case, the use of the shopping centre is regulated by by-laws.

Section 9 (1) (5) of the **Registration (Strata Titles)** Act states:

(1) Subject to the provisions of this Act the control, management, administration use and enjoyment of the Strata lots and the common property contained in every registered strata plan shall be regulated by by-laws.

(2) The by-laws shall include-

(a) The by-laws set forth in the First Schedule, which shall not be amended or varied except by a resolution passed by at least seventy-five percent of the proprietors;

(b) The by-laws set forth in the Second Schedule, which may be amended or varied by the corporation.

The By-Laws for the time being in force shall bind the corporation and proprietors to the same extent as if such by-laws had respectively been signed and sealed by the corporation and each proprietor and contained covenants on the part of the corporation with each proprietor with every other proprietor and with the corporation to observe and perform all the provisions of the by-laws."

[15] Pursuant to Section 9 of the **Registration (Strata Titles) Act**, the Proprietors Strata Plan No. 305 unanimously passed the following Resolution:-

"That the By-Laws contained in pages annexed to this Resolution be adopted by the Proprietors Strata Plan No. 305 in substitution for the By-Laws contained in the First and Second Schedules to the Registration (Strata Titles) Act which came into force upon the registration of Strata Plan No. 305 in the Office of Titles on the day of 19 and that the said By-Laws annexed hereto be lodged in the Office of Titles for registration."

[16] The third schedule of the By-Laws of the Proprietors, Strata Plan 305 No states:

1. *A Proprietor shall :*

(d) Use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or their families or visitors;

(c) Not use his strata lot or permit it to be used in such a manner or for such purpose as shall cause a nuisance or hazard to the occupier of any other strata lot (whether a proprietor or not) or the family of such occupier;

[17] Paragraph 2 of the third schedule reads:

2. *A Proprietor shall not:*

(a) Utilize his Strata Lot for any purpose other than as offices or shops.

(e) *Make such noises or use musical instruments, radios, televisions, and amplifiers in such a manner so as to disturb other proprietors, residents or guests in the building*.

[18] The **Registration (Strata Title) Act** states:

(5) No amendment or variation of any by-law shall have effect until the corporation has lodged with the Registrar of Titles a notification thereof in such form as may be prescribed and until the Registrar of Titles notifies the corporation that he has made reference thereto on the relevant registered strata plan.

(6) The corporation shall on the application of a proprietor or any person authorized in writing by him make available for inspection the by-laws for the time being in force.

The by-laws were unanimously passed and duly registered in accordance with section 5 of the **Registration (Strata Title) Act** and contain negative stipulations against the utilizing of the shops as a church, making such noise as to disturb, and causing a nuisance to the other occupiers of the strata.

Whether injunction sought is prohibitory or mandatory

[19] In reliance on the statement of Jackson LJ in **Vefa Ibrahim Araci v Kieren Fallon**, Mrs. Gibson Henlin submits that this application is an application for a mandatory injunction which is not allowed.

The Law

A prohibitory injunction restrains a party from doing an act. The purpose is to maintain the status quo whereas a mandatory injunction requires the party to "*take some new positive step or undo what he has done in the past…a mandatory order usually gives a party the whole of the relief which he claims in the writ and makes it unlikely that there will be a trial."* (per Hoffman J **Film Rover Ltd v Cannon Films Sales Ltd** 1 WLR 670,681).

Ruling

[20] It is the view of this court that this application is for a prohibitory injunction. The application is to restrain the defendants from using the shops as a church. It is an application to prevent the defendants from further breaching the by- laws thus preserving the status quo as a shopping centre.

[21] In any event, as Hoffmann LJ in **Olint,** approving the view he held in **Films Rover** pointed out that "*arguments over whether the injunction should be classified as prohibitive or mandatory are barren*." In **Films Rover Ltd. v Cannon Film Sales Ltd. (Ch. D) [1986 F. No. 1283] pp. 680 Hoffmann J** as he then was said at page 680:

> *"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant the injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice or it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*
>
> *The passage quoted from **Megarry J**. in Shepherd Homes Ltd. v Sandham [1971] Ch. 340, 351, qualified as it was by the words "in a normal case," was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as "mandatory" will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a "high degree of assurance" that the plaintiff would be able to establish his right at trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren.*

[22] In **Olin**t,Hoffman LJ

> *Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, 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, ext parte Factortame Ltd Ltd (No 2)*** *[1991] AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action:* ***see Films Rover International Ltd v Cannon Film Sales Ltd [1987]*** *1 WLR 670, 680. But this is no more than a generalization. What is required in each case is to examine what on the particular facts of the case the consequence of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in* ***Shepherd Homes Ltd v Sandham*** *[1971] CH 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted.*

Delay

[23] Mrs. Gibson Henlin submits that the application for an injunction ought to be refused because the claimant has led the 1st defendant to believe that it had no objection to its occupation and use of the premises as a place of religious worship. She further submits that the 1st defendant has operated as a church for eight years. The claimant has only filed its application on the 24th April 2013 and is now seeking to '*uproot its congregation and stop it from operating as a church"*.

[24] It is her submission that the Claimant's lack of urgency in filing the claim suggests that it should not be dealt with at an interim stage. Delay, she submits, is an important consideration in determining whether an equitable relief should be granted. She relies on Megarry's J statement in **Shepherd Homes Ltd. v Sandham**. She further submits that the existence of parallel regulatory proceedings does not provide the justification for a delay in instituting proceeding. For this proposition she relies on **AAH Pharmaceuticals Ltd and others v Pfizer Ltd and another** [2007] EWHC 565; **Osmond Hemans and Thelma Hemans v St. Andrew Developers Ltd.** [1993] 30 JLR 290; and **Gee on Commercial Injunctions.**

The evidence

[25] Ms. Taylor's, evidence is that the claimant did not complain about the shops being used as a church until 2013, which complaint was by way of letter. There were however verbal complaints made concerning the parking issue. On behalf of the claimant, Dr. Lasisi and Mrs. Lee Hendrickson aver that the 1st defendant began its operations on a small scale and there was little cause for complaint. In 2008 two more shops were purchased by the 1st defendant. They later rented three other shops. Over the years the church has grown dramatically. Several oral complaints regarding its operation as a church were made but they were ignored by the defendants.

[26] It is their evidence that from the year 2009 to the present, there have been numerous discussions between the claimant and the first defendant concerning the defendants' breaches of the By-Laws. Some of these discussions included meetings which were held at the office of the Strata Corporation of Jamaica. They further aver that Mrs. Lee-Hendrickson had written to the 1st defendant in 2010 about the claimant's complaints. There were at least three very stormy meetings with the 1st defendant regarding the parking issue which arose consequent upon the 1st defendant's use of the shops as a church in breach of the by-laws. In or about March 2013, the claimant again wrote to the 1st defendant with respect to its operations. In response the 1st defendant requested a meeting but the issues were not resolved at the said meeting.

[27] There has been no cross-examination of the witnesses to determine their veracity as to whether oral complaints were or were not made, that notwithstanding, Ms. Taylor admits that there have been meetings regarding the parking issue. The parking issue is directly related to use of the shops as a church in contravention of the by-laws. There is therefore much force in the claimant's position that the use of the shops as a church was discussed.

The issue of acquiescence

[28] Regarding Ms. Taylor's evidence that it was disclosed to Mr. Eaton Gabbidon, a former elected member of the Strata executive that the 1st defendant intended to utilize

the shops as a place of worship, she does not state who made the disclosure to Mr. Gabbidon or how she came by this knowledge. That person is not an affiant in this matter. The court is therefore unable to place any weight on that averment. In any event, assuming Mr. Gabbidon was in fact informed that the shops were to be used as a place of worship, his then position as manager did not permit him to consent to any breach of the by-laws. In the absence of an order of the court or the necessary permission from KSAC altering the land use, the covenant is still governs the use of the lots.

[29] She also relies on an electronic mail of 13 May 2013, addressed to the 1st defendant, in which Mr. Gabbidon wrote:

> *"This serves to confirm that Greater Works International Fellowship moved into Red Hills Mall in February 2006. I was the strata manager at the time and I was informed by Mr. Samuda, the former owner, that a church had bought the shops. I subsequently met the new owners on their arrival at the mall.*

This letter does not support her evidence that Mr. Gabbidon was informed that the 1st defendant intended to use the lots purchased as a church.

[30] Mrs. Gibson-Henlin also submits that the fact that the claimant sold the shops to the 1st defendant with the knowledge that it was a church is evidence that the claimant has acquiesced in its use as a church. Ms Davis however contends that churches are not prevented from purchasing properties. She points out that the church now utilizes two shops as a book store and an office which are acceptable uses. I agree with the submissions of Ms. Davis. The proscription is against using the shops for any purpose other than a shop or office. A church is at liberty to buy property. Like any other entity, it must use such property it buys in accordance with the rules governing the premises.

[31] It is Ms. Taylor's further evidence that since shops 29 and 30 were formerly used by the Universal Church of God and in light of the prolonged use by the 1st Defendant of the shops as a church, 'the appropriate application is for retention of use if any.' There is no such application before this court. Such an application would have had to be made by the 1st Defendant if it desired such an order.

Payment of maintenance

[32] It is also the evidence of Ms. Taylor that the claimant collects maintenance fees from the 1st defendant. Ms. Gibson-Henlin submits that this demonstrates that the Claimant acquiesced to the defendant utilizing the shops as a church. Reference was made to a dispute as to the method to be employed in assessing the maintenance fees. This court must again agree with the submission of Ms. Davis. The Defendants are owners of the shops. They are required by the By-Laws to pay maintenance. The fact that they are operating in breach of the by-laws does not exempt them.

[33] She complained about several irregularities, such as, delinquent members being elected to the executive committee. Those matters are however outside of the remit of this application. It is her evidence that the petition does not accurately reflect the sentiments of the strata members towards the 1st defendant as some of the signatures do not match the names of the proprietors and that no company seal is affixed.

[34] Ms Taylor further depones that there are other proprietors that are in breach of By-Laws and the claimant has not pursued those proprietors. She lists the Island Grill's use of the common area as a "drive thru" for a fee and the supermarket's use of the common area for parking of its trolleys in exchange for free back up lighting of the common area. This court is of the view that those facts are not germane to these proceedings. Those persons are not in breach of by- laws which prohibit the use of the shops as a church and the loud playing of music. She also included in that list, the use of the premises by the 1st Defendant as a church until the year 2013.

Would damages be an adequate remedy?

[35] In the matter of **Araci,** Jackson LJ, in dealing with the issue of damages being an adequate remedy in circumstances where a party acted in breach of a covenant, relied on **Chitty on Contracts** (30th edition, 2008) the 27th chapter. He said: "*that phrase is not entirely appropriate. The real question is whether it is just in all the circumstances."*

[36] In **Araci** the judge had held that damages would have been an adequate remedy. Jackson LJ in disagreeing said:

> *"First, the judge erred in law in holding that damages would be an adequate remedy. Secondly, although weight must be a matter for the trial judge not this court, in my view, the various factors identified by the judge are not capable of justifying refusal of relief in a clear case such as this.*
>
> *The defendant voluntarily entered into a contract for substantial reward containing both positive and negative obligations. There is nothing special about the world of racing which entitles the major players to act in flagrant breach of contract. The defendant has promised in the context of a commercial agreement that he will not compete against Native Khan in the Derby this afternoon. In my view, the promise should be enforced."*

[37] At paragraph 70, Elias LJ opined:

> *"So the question becomes whether the injunction should be granted following the trial. There were two reasons relied upon by the judge why it should not. First, he considered that damages would be an adequate remedy. However, that is not generally a relevant consideration when the injunction restrains the breach of a negative covenant. The court is, by granting the injunction simply enforcing what the parties have agreed: [see the discussion in* ***Chitty on Contracts, 30th Edition, para 27-060****]. Exceptionally, an injunction may be refused if it would be oppressive to the defendant to grant it, but it can hardly be said to be oppressive to prevent Mr. Fallon from acting in cynical disregard of the obligations he has voluntarily undertaken."*

[38] In the instant case, the 1st defendant purchased lots which use is governed by by-laws. The said strata lots being registered, the 1st defendant is therefore fixed with notice of the by-laws and is deemed to know that its operation is contrary to the By-Laws. By purchasing the said shops, it therefore agreed to use the said lots in accordance with the By-Laws. The church, similiarly cannot therefore act in '*cynical disregard*" of the rules.

Are there special circumstances which should cause the court to withhold the relief?

[39] An important consideration is whether there are special circumstances which would cause the court to withhold the relief sought by the claimants. It is Ms. Taylor's evidence that:

> "*The 1st defendant has settled in the mall. Its congregation is accustomed to that location. Forcing it to move would jeopardize its operations and cause it to lose some of its congregation*."

The claimants however complain of hardship they are experiencing as a consequence of the 1st defendant's operation as a church.

The parking issue

[40] Dr. Lasisi's and Mrs. Lee Hendrickson's evidence is that the church's operation has grown exponentially and has become a nuisance to them and to the other proprietors. Church meetings are held on Mondays, Wednesday, some Fridays and every Sunday. Sunday service begins at 10:00 am and ends at 2:00 pm. The other meetings begin at 6:00pm and continue until very late in the night. Their evidence is that few of the businesses in the mall close at 5: p.m. Most businesses close at 8 p.m. Mondays to Thursday and at 9:pm on Fridays and Saturdays. Island Grill remains open much later. The supermarket, the pharmacy and a few other shops are open at the same time the church operates on Sundays. .

[41] A serious problem with parking has resulted. There are approximately 150 parking spaces which are part of the common property. On the days the church operates, a large number of the congregation parks on the common property for several hours. This results in the area becoming congested for hours which discourages customers who are unable to find parking. Business is stifled as a result.

[42] Since 2008, with the increased activities of the church, there has been a remarkable drop in their earnings, as sales decrease at the times the church operates particularly on Sundays and during the Christmas. Prior to 2008, during the month of December, before the church's popularity grew, their earnings were significantly higher. As a result of the church's increased activities, some businesses that operated on Sundays have decided to close on those days because of the operations of the church. Prior to 2008, during the month of December most businesses were opened on Sundays, however during that period the 1st defendant increased its operations; many proprietors have had to close on Sundays because of the parking problem created by the church.

[43] The proprietors have consequently suffered significant losses and are suffering hardship as a result of poor business created by the operation of the church. They also complain that the ushers and security personnel employed by the church to regulate and police the traffic create additional problems as they insist on using the spaces reserved after they have utilized all the other parking spaces.

[44] Ms. Taylor's evidence is that the claimant's assertion that the church's growth has affected the claimant cannot be substantiated. According to her, the 1st defendant's activities on Mondays, Wednesdays and Fridays commence after the shops close at 5 pm so there is no conflict. Further, on those days, the number of attendees is reduced. Businesses have remained steady and obtain support from the church members. Many of their members frequent the supermarket and the pharmacy. Any change in the level of economic activity is attributable to the difficult economic climate and not to the presence of the church.

[45] Dr. Lasisi's and Mrs. Lee- Hendrickson's evidence however, is that they are aware of the existence of several premises which are suitable for housing church activities. According to them, large warehouses and houses are often advertised in the Gleaner newspaper. It is their opinion that those buildings can be modified for the operations of a church.

[46] They also complain that the church is on the second floor of the building and the stomping of the congregants' feet is disturbing the proprietors who operate below. The meetings and services are very noisy because of the loud singing, preaching, foot stomping, and amplification of musical instruments and singing and screaming in other languages. Those complaints have not been countered by the defendants except for Ms. Taylor's averment that the 1st defendant has sound proofed the church. Dr. Lasisi and Mrs. Lee Hendrickson have however deponed that if they (the 1st defendant) have indeed soundproofed the said lots, such soundproofing is ineffective.

Ruling

[47] The court, in determining how to exercise its discretion, must also consider the hardship being suffered by the occupants of the lots immediately below the church as a

result of the alleged behavior. In **Olint**, Lord Hoffman opined that the underlying principle in determining whether to grant or to withhold the relief is, "*that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or other."* The paramount consideration in determining how to exercise my discretion is which party is likely to suffer injustice by granting or withholding the relief. In this court's judgment, the consequences of the claimants' assertion that the parking situation has affected their ability to earn and the hardship being suffered by them as a result of the noise created by the church are far more serious than the church losing some of its members. The church's population increased rapidly at its present location. It is quite likely that with the church's popularity it will encounter little difficulty increasing its numbers at a location more conducive to its operations.

[48] Of importance is the fact that the mall is a commercial complex in which the proprietors have invested and are now at risk of losing the benefit of their investment. Should the court withhold the granting of the injunction and they succeed at trial it is likely to result in further hardship to the claimant. Upon weighing the various matters that have been submitted for the court's consideration, it is the view of the court that the likelihood of injustice occurring as a consequence of the remedy being withheld is greater than its refusal.

The likelihood of the injunction being wrongly granted

[49]Hoffman LJ in **Olint** said:

> "*What is required in each case is to examine what on the particular facts of the case the consequence of the granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it /unless satisfied that the chances that it will turn out to have been wrongly granted are low*."

The defendants are in breach of several by-laws. The averments of Ms. Taylor regarding the claimant's delay and acquiescence are in this court's view tenuous.

In the circumstances:

The Defendants, their servants/and or agents are restrained from operating the strata lots numbered 24, 27, 28, 29, and 30 being the strata lots registered at

volume 1187 folio 865,868,869,870 and 871 of the Register Book of Titles as a church for a period of 21 days from the date hereof.

The Claimant gives the usual undertaking for damages.

Cost to be costs in the claim.

Stay of execution granted for six weeks.