IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012 HCV05566

BETWEEN	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**CLAIMANT**
AND	**DR. SANDRA WILLIAMS-PHILLIPS**	**DEFENDANT**

Mr. Christopher Kelman instructed by Myers Fletcher & Gordon for the claimant

Miss Kimone Tennant instructed by Don O. Foote for the defendant

Heard: April 1 and 8, 2014

Injunction - Inquiry as to damages

SIMMONS J

[1] On the 19th December 2013 the defendant filed an application for an order that inquiries be made to ascertain the following:-

i. Whether the defendant has sustained any and, if so, what damages by reason of the injunction granted in this matter on October 11, 2012 and discharged on November 23, 2012;

ii. Whether the claimant ought to pay and if so what interest on any such damages.

[2] The background to this matter is that on the 11th October 2012 an order was made by Pusey, J. restraining the defendant from entering the premises of the University Hospital of the West Indies and from interfering with any medical, administrative and general staff, employees, contractors or agents of the claimant.

[3] The application in respect of which, that order was made, pre-dated the filing of the claim and was without notice. The claimant gave its undertaking to serve the order and to file and serve the claim form and particulars of claim on the defendant on or before the 16th October 2012. It also gave the customary undertaking as to damages. The matter was then set down for an inter partes hearing.

[4] The claimant's application was heard on the 15th and 23rd days of November 2012 by D. McIntosh, J. and was refused.

[5] It is in this context that the defendant, Dr. Sandra Williams - Phillips, has filed this application for an inquiry as to damages. The affidavit in support of the application states that the applicant has suffered loss and damage as a result of the grant of the interim injunction.

[6] Specifically, it has been alleged that the defendant suffered "great mental and emotional distress" which resulted in her being unable to see patients in her private practice for a period of twenty-four (24) days. She has also expressed concern as to whether there will be damage to her career.

Applicant's submissions

[7] Miss Tennant submitted that based on the fact that the injunction has been discharged the applicant is entitled to the order sought. Counsel referred to **paragraph 37.57** of ***Blackstone's Civil Practice 2006*** which states:-

> *"Where it transpires that an interim injunction should not have been granted (for example, if the claimant loses at trial) the defendant may seek to enforce the undertaking in damages by applying for an order for an inquiry as to damages.*
>
> *Where an interim injunction is discharged before trial, the court has a number of options on an application for an inquiry as to damages. These were identified in Cheltenham and Glouster Building Society v Ricketts [1993] 1 WLR 1545, as being:*

(a) *To accede to the application and immediately proceed to determine the question of damages. This should be done only in the most straightforward cases.*

(b) *To allow the application, and to order the inquiry by a master or district judge…..*

(c) *To stand the application over (that is, adjourn it) to a specific time. This is perhaps the usual order where an injunction is discharged during the interim stages of a claim. It is the most appropriate option where matters material to the question whether it is just to order an inquiry are still in issue and will only be determined at trial. The application is most frequently stood over to trial, when all the facts should be known.*

(d) *…….*

(e) *To refuse the application. This is only done in straightforward cases where, for example, it is clear the defendant has suffered no loss as a result of the injunction….."*

[8] Counsel also referred to paragraphs 4 – 9 of the judgment of D McIntosh, J. and submitted that based on those paragraphs it is clear that the interim injunction should not have been granted. The learned judge in those paragraphs stated that even if the defendant committed the acts of trespass as alleged, the last such act took place in October 2012 and as such there was no urgency to have her excluded from the compound. In addition, McIntosh, J was of the view that there were other means by which the claimant could prevent unauthorized entry to specific areas of the hospital. The learned Judge also found that damages would not provide an adequate remedy to the defendant if the injunction was granted.

Respondent's submissions

[9] Mr. Kelman stated that the claim is in its initial stages and as such it is not an appropriate time for holding an inquiry as to damages. He submitted that where it is

alleged that a party has suffered damage as a result of the grant of an injunction and that injunction is discharged, an inquiry as to damages will not usually be ordered until after the substantive suit has been determined. Reference was made to the following cases in support of that submission: ***Ushers Brewery v. King & Co.*** (1972) Ch. D 148**;** ***Apgar v. Howell – Davis & others*** claim no. 2004 HCV 000312**;** ***Watts v. Watts*** [2013] EWHC 4434 (Ch).

[10] It was submitted that the principle which is to be applied is that set out in ***Ushers Brewery v. King & Co*** (supra) at page 154, where Plowman, J. said:

> *"It is in my judgment well established that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance".*

[11] He stated that this principle was applied in this jurisdiction by Sykes, J. in ***Apgar v. Howell – Davis & others*** (supra) and as recently as 2013 in ***Watts v. Watts*** (supra). Mr. Kelman argued that a determination as to whether the injunction ought not to have been granted is some distance away as the proceedings have just reached the stage of referral to mediation. He also stated that a determination of the facts in the substantive action may affect the outcome of any inquiry as to damages.

The law

[12] The usual practice where the court is granting an interlocutory injunction is to require the claimant to give an undertaking as to damages. It is to be noted that this undertaking is given to the court and is intended to provide a method of compensating the other party if at some later date it appears that the injunction was wrongly granted. It has therefore been described as *"the price which the person asking for an interlocutory injunction has to pay for its grant".*[1] The effect of the undertaking is that the party who obtains the injunction undertakes to pay any damages sustained by the other party as assessed by the court.

[1] Cheltenham & Gloucester Building Society v. Ricketts and others [1993] 4 All E.R. 276 at 281

[13] The purpose of the undertaking, according to Jessell, M.R. in ***Smith v. Day*** (1882) 21 Ch.D. 421, is to protect the Court and the defendant from improper applications for injunctions. By way of explanation the learned Judge said:-

> *"If the evidence in support of the application suppressed or misrepresented facts, the Court was enabled not only to punish the Plaintiff but to compensate the Defendant. By degrees the practice was extended to all cases of interlocutory injunction. The reason for this extension was, that though when the application was disposed of upon notice, there was not the same opportunity for concealment or misrepresentation, still, owing to the shortness of the time allowed, it was often difficult for the Defendant to get up his case properly, and as the evidence was taken by affidavit, and generally without cross-examination, it was impossible to be certain on which side the truth lay. The Court therefore required the undertaking in order that it might be able to do justice if it had been induced to grant the injunction by false statement or suppression. I am of opinion that the undertaking was not intended to apply where the injunction was wrongly granted, owing to the mistake of the Court, as for instance, if the Judge was wrong in his law. I think this is shown by the fact that such an undertaking is never inserted in a final order for an injunction".*

[14] In ***Cheltenham & Gloucester Building Society v. Ricketts and others*** [1993] 4 All E.R. 276 at 281, Neill, L.J. listed the following points as being applicable in respect of undertakings as to damages:-

> *"(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*

(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.

(3) The undertaking is not given to the party enjoined but to the court.

(4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.

(5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued…".

(6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd LJ pointed out in Financiera Avenida v Shiblaq [1990] CA Transcript 973 the court may occasionally wish to postpone the question of enforcement to a later date".

[15] Where a claimant who has obtained an interim injunction fails to obtain a final order at the trial, the defendant may therefore seek to enforce that undertaking. If the order is granted, he will usually be entitled to damages for any loss that he has suffered as a result of its imposition.

[16] In order to enforce the undertaking there must be an assessment by way of an inquiry as to damages. There are two issues which arise on an application for such an inquiry to be conducted. The first is whether the undertaking ought to be enforced. If the answer is in the affirmative it must then be considered whether the defendant has suffered any damage at all.

[17] The resolution of the first issue according to Lloyd, L.J. in ***Financiera Avenida S A v. Shiblaq,*** The Times January 14, 1991, is dependent on *"…the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at trial, the subsequent conduct of the defendant and all other circumstances of the case*". The learned Judge also said that the decision as to whether the order ought to be made is a question of discretion. He also expressed the view that the person most equipped to make that decision is the trial Judge as he would know more about the facts of the case.

[18] In ***Cheltenham & Gloucester Building Society v. Ricketts and others*** (supra) it was held that the appropriate course was to adjourn the application for determination at the trial when all the facts would be known. The court based its decision on the fact that the trial judge being seized of all the facts would be in the best position to decide, having considered all the circumstances, whether the society's undertaking as to damages should be enforced.

[19] The claimant in this matter has objected to application on the basis that it is premature. The issue of the timing of these applications was dealt with in ***Smith v. Day*** (supra) where it was stated that the time when the application is made is a material issue. It is to be noted however that the courts have not sought to lay down an absolute rule as to when such applications are to be made. This is an acknowledgment of the fact that the determination of the appropriate time for such applications is dependent on the circumstances of each case. Jessell, M.R. at page 425 of the above mentioned case described the approach taken by the courts in the following words:-

> *"Having regard to the decisions, we are not entitled to say that the application for an inquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper*

time. The application may be made when the injunction is dissolved, but if made then it probably will be ordered to stand over till the trial. If made by motion subsequently to the trial, the party moving is subject to some disadvantage, for the application is one which should be made speedily, and not after the Court has forgotten".

[20] In ***Ushers Brewery v. King & Co*.** (supra) where the defendants' application to dissolve an interlocutory injunction was successful, the court held that an inquiry was not to be ordered unless the plaintiff had failed on the merits at the trial or it was established before the trial that the injunction ought not to have been granted. The court stated that the proper course was to adjourn the hearing of the application to the date of the trial. Plowman, J. cited the case of ***Southworth v. Taylor*** (1860) 28 Beav. 616 as an authority on this point. In that case Romilly, M.R. said: *"I am inclined to think that the defendant is entitled to a reference: but that this is not the proper time for making the order".*

[21] This principle was also applied in ***Apgar v. Howell – Davis*** (supra) by Sykes, J. It was later applied in ***Watts v. Watts*** (supra) where the learned judge stated:-

"The defendant then submitted that I should order a damages enquiry. I decline to do so, and I believe that the proper course applying the authority applying the authority of Ushers Brewery v King & Co (Finance) Limited [1972] Ch 148 is to reserve the question of whether there should be a damages enquiry to the judge hearing the trial of this action. My reasons are that there are extremely serious allegations made by the Claimant against the Defendant in this action. I am not in a position to judge whether or not they are justified. If they are justified, it may well be that the judge at trial will consider it an injustice for the Claimant to have to pay damages to a Defendant who has essentially defrauded him. Therefore, I reserve that question to the trial judge".

[22] The approach of the courts when considering applications as in the instant case, suggests that in most cases the appropriate time for making a decision is at the trial. In this matter, the next step in the litigation is mediation. If the parties fail to arrive at a settlement it should proceed to a case management conference and ultimately trial.

[23] The claim in this matter is for trespass. At this stage the facts have not been fully ventilated and it is for the trial Judge to determine whether the claimant has proved its case. The decision of D. McIntosh, J. to discharge the interim injunction was not based on a finding that there was no trespass. The learned Judge was very clear as to the reasons for his decision. He felt that there were other means available to the claimant to prevent any trespass by the defendant and that damages, would not provide an adequate remedy for the defendant. It is also important to note that he was also of the view that there was a serious issue to be tried.

[24] In these circumstances where it has been alleged that the defendant had on various days entered the Cardiology Clinic at the hospital without authorization, molested members of staff and searched patients' records, the matter cannot be described as being one of *"the most straightforward cases"* . The without notice application was filed on the 10th October 2012 and the interim injunction granted on the following day. The acts complained of were said to have occurred on various dates up to the 12th October 2012.

[25] At this stage there is no material before the court which suggests that the injunction ought not to have been granted. The trial Judge when dealing with the issue of whether the defendant committed the various acts of trespass will have the opportunity of hearing and observing the witnesses and assessing their evidence.

[26] It is my view that this is not a situation where it can be said that it is patently obvious that the injunction ought not to have been granted. Mr. Kelman has urged the court to refuse the application. In the ***Cheltenham*** case (supra), this course was described as being appropriate in straightforward cases where it is obvious that the defendant has not suffered any loss as a result of the grant of the injunction. That cannot be said of the instant case.

[27] I am also of the view that there are matters in issue which may be material to the determination of whether the defendant ought to be compensated in damages. In such circumstances according to the ***Cheltenham*** case (supra), the appropriate course is to adjourn the application for hearing before the trial Judge.

[28] It is therefore ordered as follows-:

i. the hearing of this application is adjourned for determination at the trial;
ii. costs are awarded to the claimant to be taxed if not agreed.