NMCA

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS: 17 & 21/2001

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE LANGRIN, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (AG.)

BETWEEN	**UNIVERSITY OF THE WEST INDIES**	**DEFENDANT/ APPELLANT**
AND	**THE MONA REHABILITATION FOUNDATION**	**PLAINTIFF/ RESPONDENT**

Dennis Goffe, Q.C. with Haydee Gordon instructed by Myers, Fletcher & Gordon for the Appellant

Emil George, Q.C. with Conrad George instructed by Hart, Muirhead & Fatta for the Respondent

John Francis, Crown Counsel for Attorney-General

June 18, 19, 20 & July 31, 2001

FORTE, P.

This is an appeal from the following Order made by Donald McIntosh J, sitting in the Supreme Court:

> "It is hereby ordered that:
>
> 1. The Defendant be restrained until further Order by itself, its servants, agents, lessees, licensees, or otherwise howsoever:
>
> (a) from dealing with, entering, remaining upon, or crossing the land demised to the Plaintiff by the Defendant under an oral lease for 99 years at a

peppercorn and edged red on the plan annexed hereto;

(b) from permitting or allowing the land or any part thereof adjacent to or within 600 meters of the Plaintiff's medical wards and other facilities at the Mona Rehab Centre (edged blue on the plan annexed hereto) to be used for residential premises, in particular, from permitting its user for the purpose of housing relocated squatters moved from Mona Commons.

2. The costs of this application be costs in the cause.

Order made for speedy trial."

Before we commenced this appeal, Mr. John Francis of the Attorney-General's office applied for the consolidation of Appeal SCCA 17/2001 with the appeal before us (SCCA 21/2001). The application was granted with no objection from the other parties. It should be noted that the appeal of the Attorney-General (SCCA17/01) though filed separately related to the same case and subject matter as that in appeal SCCA 21/01.

The plainitff/respondent is an institution set up during a polio epidemic which befell Jamaica in 1954. It was situated on its present locale (12 acres) as a result of a 99 year lease granted by the appellant at peppercorn to the respondent per the Ministry of Health for the purpose of treating and rehabilitating polio victims. It has developed since 1954, into a fully-fledged hospital of over 100 beds caring for those suffering from physical disability, regardless of the cause. Mark Golding, the Chairman of the respondent attests in his affidavit that the Mona Rehabilitation Foundation was established in 1996 to assume the undertaking and operations at the Rehab Centre, and was vested with, and has assumed the benefit of the said lease. The majority of its patients are now motor accident and gunshot wound victims. It is now regarded in the region as a centre of excellence in its field, and serves patients from all around Jamaica and the wider Caribbean.

The appellant, the University of the West Indies, is itself a beneficiary of the Government of Jamaica of a long lease of the lands on which it is situate, granted for the purpose of setting up that institution for the academic benefit of Caribbean people. The respondent alleges that the appellant has entered into an agreement to lease a part of this land to the Government of Jamaica for the purpose of facilitating the Government's plan to relocate thereon squatters from Mona Common.

During the arguments before us, it was agreed:

(i) That the land on which the housing development to house the squatters will be built is that piece of land to the north of the University Laundry (the "laundry land") and which sits directly across the roadway from the Rehab Centre now renamed the Sir John Golding Rehab Centre, named after Sir John Golding the virtual developer of the Centre.

(ii) There is no plan to erect houses for squatters on the land edged in red on the plan tendered in evidence as Exhibit

(iii) The respondent has no proprietary interest in the land described in (i) above.

As a result of these agreements Mr. John Francis stating that the Attorney General had no further interest, withdrew from the appeal.

On that background, it may now be appropriate to examine the indorsement on the writ filed in the suit by the respondent, no Statement of Claim having yet been filed. The indorsement reads as follows:

"AND THE PLAINTIFF CLAIMS:

1. Damages for nuisance

2. Damages for breach of the Defendant's duty to permit the Plaintiff quiet enjoyment of premises leased to it.

3. Damages for trespass

4. An Injunction restraining the Defendant by itself, its servants, agents, lessees, licensees, or otherwise howsoever, from dealing with entering, remaining upon, or crossing the land demised to the Plaintiff by the Defendant under an oral lease for 99 years at a peppercorn.

5. An Injunction restraining the Defendant from permitting or allowing the land adjacent to or within 400 meters of the Plaintiff's medical wards and other facilities at the Mona Rehab Centre to be used for residential premises, in particular, restraining its user for the purpose of housing relocated squatters moved from Mona Common. "

Having regard to the concessions made in paragraphs (i) to (iii) supra, the issue was narrowed to the question whether the interlocutory injunction in so far as it relates to the laundry land was in fact correctly granted by the learned trial judge. The interlocutory injunction in so far as the land edged in red on the plan, fell into insignificance after we were informed that the intention of the Government is to erect the residential buildings on the "laundry land" and not on the lands edged in red on the plan. In relation to the latter therefore, the interlocutory injunction as it relates to those lands would a fortiori be discharged, as there is no contest at present concerning any construction of buildings on those lands.

I therefore now direct my attention to the interlocutory injunction in respect to the construction of residential buildings on the laundry land. The allegation from the respondent is that the appellant, through its granting of a lease to the Government to facilitate the project, will be permitting the placement of squatters from Mona Common, on the laundry land thereby causing a nuisance to the Rehab Centre and its patients. In other words, the respondent sought a *quia timet* injunction, as it apprehends that a nuisance will be caused if the Government is allowed to relocate the squatters from Mona Common unto the "laundry land" which is in close proximity to the Rehab Centre.

In the case of ***Attorney-General v. Corporation of Manchester*** (1893) 2 Ch. 87 at 92, Chitty J after examining the cases, concluded that, -

> "the principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise".

In my opinion that statement accurately defines the test which should be applied today, as it was in 1893.

In the instant case, applying the principles applicable to the granting of an interlocutory injunction the court must be satisfied firstly that there is a serious question to be tried: (***American Cyanamid Co v. Ethicon Ltd*** [1975] 2 W.L.R. 316). In determining whether that is so, in a *quia timet* case such as this, the serious question must relate to whether or not the evidence which the plaintiff proposes to establish could show a strong case of probability that the apprehended mischief will in fact arise.

In its effort to discharge that burden the respondent relied on the affidavits of Mark Jefferson Golding and Major General Robert Neish, the Chairman and Chief Executive officer respectively of the plaintiff company.

The relevant aspects of the affidavit of Mark Golding are set out hereunder:

> "2. I have heard that the Defendant is about to lease, or transfer or otherwise make available land adjacent to and/or in close proximity to Irvine Hall, the Rehab Centre, and Preston Hall ('the Land') to a third party for the purpose of building multi-storey blocks of 144 apartments to house relocated squatters, who currently live on land at Mona Common, opposite the main gate of the University Hospital."

As stated heretofore it was agreed in argument that the proposed buildings would be erected on the "laundry land" which would be in close proximity to the Rehab Centre. In addressing the question of nuisance Mr. Golding avers:

Paragraph 16 -

"(a) the land was demised for the purpose of establishing a rehabilitation hospital, which now has over 100 beds for patients (including a children's ward and a hostel for disabled children), and a quiet and peaceful environment is of paramount importance – a fortiori, as many of our patients have been paralysed by gunshots injuries and are psychologically traumatised, which requires a safe, serene environment, for the lengthy healing process, as they go through physical rehabilitation and occupational therapy at the Rehab Centre;

(b) the proposed development will attempt to construct in only 3.5 acres 140 apartments for people who currently squat in socially deprived conditions, and that the concentration of humanity will be considerable, with the attendant likelihood of high noise levels from sound systems and the like;

(c) that the disabled people in the care of the Plaintiff are inherently vulnerable and are extremely anxious and frightened by the prospect of the re-location of the Mona Common dwellers onto the Land beside the Rehab Centre;

(d) the small businesses so far operated by the Plaintiff for the employment of disabled people (and currently employing over 60 people) will be vulnerable to preying by criminal elements;

(e) That I am told by Major General Neish, who is now the Chief Executive of the Plaintiff, that the community currently squatting at Mona Common has particularly poor relations with the Police and surrounding residents for the reason that it harbours a significant criminal element, and I am gravely concerned that the safety of the disabled people within the care of the Rehab Centre will be seriously threatened should they be moved to the land; ...

I am concerned that if the Defendant is not stopped immediately, it will –

(a-b) ...

(c) breach its obligation to permit the Plaintiffs quiet enjoyment of the original and all subsequent demises."

Major General Neish addresses the probability of nuisance in the following paragraphs of his affidavit:

> "3. From my own personal knowledge, I can say that:
>
> I. on 19th April 1999, squatters from Mona Common attempted to storm the grounds of the University Hospital. They were unsuccessful, but the attempt included a barrage of stones being thrown by them over the Hospital fence, followed by bursts of gunfire into the Hospital Grounds in the afternoon and in the night;
>
> II. the noise levels in the vicinity of Mona Common are horrendous as a result of constant (24 hour) playing of sound systems at high volume. This is evident to anyone who walks or drives in the vicinity of Golding Avenue, or spends anytime at or near the University Hospital;
>
> III. the squatters from Mona Common recently attacked members of the University Hospital Staff because they say they were annoyed at being removed from the sidewalk outside the main gate of the hospital, to make way for patients to gain access to the hospital.
>
> 4. I have been told by others, all of whom hold positions of responsibility within the University or the Police Force, that:
>
> I. the nurses on night duty are unable to sleep during the day because of the extreme noise levels caused by the sound systems operated by the Mona Common squatters;
>
> II. there is a very high incidence of domestic choppings, stabbings and shootings in the community of the Mona Common squatters, and they are amongst the highest users of the Accident and Emergency Unit of the University Hospital;
>
> III. the police receive frequent reports of serious violent domestic disputes from members of the Mona Common squatter community, but when the matter comes to Court, the witnesses invariably say that no such incident took place, and the complaints are withdrawn;

IV. it was necessary for the public telephones at the Accident and Emergency Unit of the University Hospital to be moved from outside to inside the Unit, to stop members of the squatter community from attacking members of the public who had the temerity to use the phones, thereby interfering with their uninterrupted use by the squatters;

V. one member of the squatter community, a former resident of Jones Town by the name of 'General', claims to be the 'Area Don';

VI. 'General' sent a message to the University Hospital last week saying that he must have constant access to the said telephones, otherwise he is going to shoot up the Hospital;

VII. 'General' has been arrested on a number of occasions, but has never been convicted of any crime, as no evidence of wrong-doing has ever been presented in Court.

5. I verily believe that if the squatters from Mona Common were to be relocated to land anywhere near the Rehab Centre, the patients and staff at the Rehab Centre, and the infrastructure of the Centre itself, would be greatly at risk. I do not believe that the Rehab Centre would be able to continue its operations as it currently does.

6. I must emphasize the nature of the Rehab Centre. It is for the treatment and rehabilitation of people who have suffered terrible physical and sometimes mental injury and trauma. They are very fragile and are amongst the most vulnerable members of our society. The squatters from Mona Common have an undeniable history of preying in the crudest and most violent manner on those around them, and I can see no reason to suppose that a change in location would bring about a change in their ways. If they were to be moved to land adjacent to the Rehab Centre, I believe that it would be an unmitigated human disaster, which would cause untold suffering to people that the Plaintiff has been doing its best to protect and serve for the last 50 years."

In my judgment the stated allegations in these two affidavits disclose that there is a serious question to be tried as to the strong possibility that the apprehended nuisance

will in fact occur. There have been contentions made in the process of argument, that the behavioural patterns of the squatters who are now housed at Mona Common even if they are as the respondent avers, do not necessarily indicate that squatters who will be relocated into an organized community, will necessarily continue to behave in the same manner. As attractive as that argument is, in my view that is a determination that ought to be reserved for the trial of the issues when all the evidence is heard and analysed. For the purpose of determining the question before us, it is unwise at this stage to embark on a determination of the evidence. It is sufficient to say that the evidence contained in the affidavits establishes that there is a serious question to be tried.

Balance of Convenience

Having decided that there is a serious question to be tried I turn now to consider where does the balance of convenience lie. In other words would damages be an adequate remedy?

In the event that the respondent's fears are realized after the buildings are constructed, it is very clear and obvious that damages could not be an adequate compensation for the nuisance that would have trespassed on the solitude required in a hospital environment. Consequently that question cannot arise. On the other hand if the respondent fails to establish its case of nuisance and breach of quiet enjoyment, then the appellants could be adequately compensated for its losses in damages. The question therefore is whether the respondent could meet the undertaking in damages if it fails to prove its case. In his affidavit Mr. Golding states at paragraph 18:

> "I confirm that the Plaintff is financially capable of giving an undertaking to pay damages."

In a later affidavit sworn to on the 29th January 2001 Mr. Golding also avers that the respondent is funded by earnings from Monex Ltd and the respondent's other

commercial enterprises and donation by the public and corporations in Jamaica and the United Kingdom. The Company's net assets are worth at least $20million. Having regard to that evidence it is not difficult to conclude that the respondent is in a position to adequately compensate the appellant under its undertaking as to damages. I would conclude therefore that the order of the Court below granting the interlocutory injunction should stand. Accordingly I would dismiss the appeal but would vary the order for the interlocutory injunction to apply only to that parcel of land described as the "laundry land" and described in more detail earlier in this judgment. I would also affirm the order of the learned judge for a speedy trial. The respondent should have its costs to be taxed if not agreed.

LANGRIN, J.A.

I agree.

SMITH, J.A. (Ag.)

I have read in draft the judgment of Forte, P and agree with his reasons and conclusion.

ORDER

FORTE, P:

We make the following order:

1. The Defendant be restrained until further Order by itself, its servants, agents, lessees, licensees, or otherwise however from permitting or allowing the land or any part thereof adjacent to or within 600 meters of the plaintiff's medical wards and other facilities at the Mona Rehab Centre (edged blue on the plan annexed thereto) to be used for residential premises, in

particular, from permitting its uses for the purpose of housing relocated squatters moved from Mona Common.

2. Costs of the appeal to the respondent to be taxed if not agreed.

3. Order made for a speedy trial.