[1980–87 Gib LR 286]

LOMBARD v. GIBRALTAR GARRISON LIBRARY COMMITTEE and VASQUEZ

SUPREME COURT (Alcantara, A.J.): March 29th, 1985

Injunctions—interlocutory injunction—balance of convenience—interlocutory injunction refused if balance of convenience favours preserving status quo and strong probability that plaintiff would suffer grave damage which could not be adequately compensated for in damages

The plaintiff sought an interlocutory injunction requiring the defendants to remove boarding they had placed over his window and a restraining order to prevent them from repeating or continuing the act.

The first defendant sold two properties on 99-year leases, one to the plaintiff and one to the second defendant. The plaintiff's property had a window which had been bricked up for over 20 years and which the plaintiff wanted to open up. A covenant in the lease, however, prohibited him from doing so without the written consent of the lessor. Before the execution of the lease, the plaintiff wrote to the first defendant's solicitors requesting permission to open up the window. Although permission was not forthcoming, the plaintiff proceeded to sign the lease, but shortly after the lessor replied, declining permission. Despite this, the plaintiff went ahead and opened up the window only to find, the next morning, that it had been boarded over again by the defendants.

The plaintiff submitted that (a) the second defendant had told him that he had no objection to his opening up the window; (b) he had been orally informed by the solicitor of the first defendant that permission to open up the window would be forthcoming; (c) he was entitled to open up the window as of right and, in boarding up the window, the first defendants had breached his right to quiet enjoyment of the lease; and (d) the first and second defendants had conspired against him to board up the window in breach of his legal rights.

The first defendant submitted that its solicitor had not informed the plaintiff that permission to open up the window would be forthcoming.

Held, dismissing the application:

Neither an interlocutory injunction nor a restraining order would be granted. Although it had been unreasonable for the defendants to board up the plaintiff's window, the fact remained that the window had not been in existence when the plaintiff entered into the lease and had only come into existence because he had knocked out the bricks covering the window

space without obtaining permission. While the plaintiff's claim could not be said to be frivolous, vexatious or without prospect of success, he could not show, as it was necessary for him to do so in order to obtain the injunction, that he would suffer grave damage or that he could not be adequately compensated in damages if the boarding were not taken down prior to the trial. The *status quo* between the parties would also be preserved if the boarding remained in place (paras. 9–10).

Cases cited:
(1) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504; [1975] F.S.R. 101, considered.
(2) *Redland Bricks Ltd.* v. *Morris*, [1970] A.C. 652; [1969] 2 W.L.R. 1437; [1969] 2 All E.R. 576, considered.

H.K. Budhrani for the plaintiff;
F. Vasquez for the first and second defendants.

1 **ALCANTARA, A.J.:** The plaintiff is seeking an interlocutory injunction ordering the first and second defendants to "remove the boarding erected by them or on their behalf against or near the window on the southern wall of the plaintiff's dwelling-house at No. 8, Library Ramp" and a further order restraining the defendants from repeating or continuing the act.

2 This is a short history of the matter. The Gibraltar Garrison Library Committee has sold two properties on 99-year leases—one to the plaintiff, at 8, Library Ramp and the other to the second defendant, Mr. Robert Vasquez, at No. 24a, Prince Edward's Road. The plaintiff's property had a window on the south side which overlooked an open passageway or patio leading to the front entrance of No. 24a, Prince Edward's Road. This opening has been bricked up for the past 20 years. I have called it an opening because it can be argued that a bricked-up window is no longer a window in the same manner that a table with sawn-off legs might no longer be a table. Anyhow, a window had existed there and was bricked up long before the plaintiff bought the property. The plaintiff went to inspect the property. The window was bricked up. On September 10th, 1984, the plaintiff entered into a written agreement with the first defendant to acquire the property. The window was still bricked up. On November 20th, 1984 the purchase of the property was completed and the plaintiff executed the 99-year-lease. The window was still bricked up.

3 The lease contained the following covenant at cl. (e) of the Third Schedule:

> "Not to make any structural alteration whatsoever to the exterior of the demised premises and not to erect on the demised premises any additional building structure or other erection whatsoever, whether

temporary or permanent, without prior approval in writing of the lessor. Such approval is not to be unreasonably withheld."

4 Just prior to executing the lease, in fact six days before, the plaintiff wrote to the first defendant's solicitors seeking permission to unbrick the window. Notwithstanding that permission in writing was not forthcoming, the plaintiff executed the lease. In fact, permission was refused on January 11th, 1985. In between, the plaintiff had been in contact and in correspondence with the second defendant, the first defendant's solicitor and the President of the Gibraltar Garrison Library Committee. In his affidavit, the plaintiff states that Mr. Vasquez had no objection to his "opening" the window and that he was orally informed both by the solicitor of the first defendant and the President of the Garrison Library Committee that permission would be forthcoming. This is denied by the first defendant.

5 On March 6th, 1985, the plaintiff caused the window to be unbricked and the following morning it was boarded up by the first defendants. The plaintiff now comes to court for an interlocutory injunction, having first issued and served a writ claiming a permanent injunction. The statement of claim endorsed on the writ no longer relies on permission having been granted or the defendants being estopped from denying permission or permission being unreasonably withheld. The case as pleaded is that the plaintiff is entitled to open the window as of right and that the defendant's boarding up of the window is a breach of the covenant of quiet enjoyment in the lease which enures for the benefit of the plaintiff. There is also an allegation of conspiracy between the first and second defendants. The application for an interim injunction has been argued by the plaintiff on those lines. The argument is that the defendant or defendants, in boarding up the window, have infringed the legal rights of the plaintiff and are in breach of covenant. Counsel has referred me to *Redland Bricks Ltd.* v. *Morris* (2) for the principles which rule the granting of mandatory injunction. Lord Upjohn deals with the matter thus ([1970] A.C. at 665):

"The grant of a mandatory injunction is, of course, entirely discretionary and unlike a negative injunction can never be 'as of course.' Every case must depend essentially on its own particular circumstances. Any general principles for its application can only be laid down in most general terms:

1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future . . . It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

2. Damages will not be a sufficient or adequate remedy if such damage does happen . . . Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act the question of the cost to the defendant to do the works to prevent or

> lessen the likelihood of a future apprehended wrong must be an element to be taken into account . . ."

6 In this case I am satisfied that the cost to the defendants in taking down the boarding is minimal, but I am not satisfied that the plaintiff will suffer grave damage or that he cannot be compensated in damages adequately. I am satisfied that the placing of boarding over an opening belonging to another person is an unreasonable use of land, but the fact remains that the opening was not in existence when the plaintiff went into possession. The opening came into existence because the plaintiff unbricked a window without written permission. Rather than come to court for a declaration of his rights under the lease, he decided to act. Similarly, the defendants, instead of coming to court for an injunction preventing the defendant from opening the window and continuing the window to remain open, just boarded it up.

7 Counsel for the plaintiff has referred me to the Town Planning Ordinance 1973, alleging that the defendants are guilty of an illegality and to the Conspiracy and Protection of Property Act 1875 on the question of conspiracy between the two defendants. Those two matters might be of relevance at the trial stage, but I do not intend to deal with them at this stage because I am of the opinion that they have no applicability to the issue before me.

8 The issue now before me is whether I should grant or refuse an interim injunction. Counsel for the defendants brought to my attention the well-known leading case on the subject, *American Cyanamid Co.* v. *Ethicon Ltd.* (1). As the principles set out in that case are not in dispute, I may be forgiven for adopting the passage in the 1 *The Supreme Court Practice 1985*, para. 29/1/2, at 454, where the above case is quoted:

> "The basic purpose of the grant of an interlocutory injunction is to preserve the *status quo* until the rights of the parties have been determined in the action.
>
> The grant of an interlocutory injunction is a remedy that is both temporary and discretionary, and in exercising its discretion whether or not to grant such an injunction, the Court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. It is sufficient to show that there is a serious question to be tried. Unless the material available to the Court shows that the plaintiff has no real prospect of succeeding in his claim at the trial, or the Court is satisfied that the claim is frivolous or vexatious, the Court must go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. The governing principle is that if the recoverable damages would be an adequate remedy, no interlocutory injunction should normally be

granted however strong the plaintiff's claim appears to be at the interlocutory stage. Equally if the recoverable damages under the plaintiff's undertaking as to damages would be adequate remedy for the defendant, and the plaintiff is in a financial position to pay them, then there is no reason to refuse the plaintiff an interlocutory injunction. Where other factors appear to be evenly balanced, the prudent course for the Court is to preserve the status quo."

9 Applying the above principles to the case before me, I cannot say that the plaintiff has no prospect of success or that his claim is frivolous or vexatious. I am of the opinion, however, that damages would be an adequate remedy if he were to succeed. In any case, the balance of convenience lies in preserving the *status quo*, that is the window remaining boarded up until trial. I therefore refuse the granting of the injunction. Costs for both defendants.

Application refused.
