[1991–92 Gib LR 51]

MARRACHE v. DEWMONT PROPERTIES LIMITED and MIVAN LIMITED

SUPREME COURT (Alcantara, A.J.): May 3rd, 1991

Injunctions—interlocutory injunction—balance of convenience—where plaintiff alleges trespass during rendering and painting of defendant's adjacent wall, and ownership of wall disputed, balance of convenience lies in prohibiting works pending trial—if ownership decided in plaintiff's favour, entitled to stop work being done—later damages in respect of work already done inadequate remedy and difficult to assess

Injunctions—interlocutory injunction—probability of damage—no interlocutory mandatory injunction against unauthorized building work unless strong probability of grave damage—where ownership of property in dispute, plaintiff successful at trial may be able to obtain injunction to restore property and damages for incidental loss may then be assessed

The plaintiff applied for prohibitory and mandatory injunctions against the defendants.

The properties of the plaintiff and the first defendant adjoined each other, the boundary wall between them apparently belonging to the first defendant. The first defendant sought the plaintiff's permission to carry out works which would encroach on the airspace of the plaintiff's property, namely the rendering and painting of the wall, and the replacing and re-routing of certain drain pipes on the wall. The parties were unable to reach agreement on the granting of permission and acrimonious negotiations concluded with threats of legal action on both sides.

The existence of an oral agreement to permit the work and the ownership of the wall itself were matters to be decided at trial. The first defendant had already replaced and re-routed the drain pipes using a cradle (which had now been removed) overhanging the plaintiff's garden. A further piece of pipe was still to be removed for aesthetic reasons, and no rendering or painting had yet taken place.

The plaintiff submitted that (a) the first defendant's invasion of its airspace constituted a trespass for which the proper remedy (to prevent any recurrence by rendering and painting the wall pending trial) was an interim prohibitory injunction; and (b) the defendant should be ordered to restore the wall to its former state, since it deprived him of the rain-water used to irrigate his garden, and had attempted to anticipate the court's response to the application by carrying out the works already.

The defendants submitted in reply that (a) the plaintiff was not entitled to an interim prohibitory injunction, since his own property had not been deprived of light by the works carried out, and the cradle had now been removed; and (b) a mandatory injunction should only be granted if the plaintiff would otherwise suffer grave damage in future; the re-routing of the drain pipes had not been an attempt to anticipate the court's decision and the new drain pipes would benefit the plaintiff as much as the first defendant.

Held, granting an interim prohibitory injunction and refusing a mandatory injunction:

(1) The balance of convenience lay in prohibiting the rendering and painting of the wall, since the issue of the ownership of the wall had yet to be decided, and if the plaintiff were held to own it, he would be entitled to prevent the work being done. Moreover, if it were to be held that he had agreed to the works, the question would arise whether in equity, the defendant could compel him to comply with the agreement. Damages awarded at a later stage for rendering and paint-work done earlier would not be a sufficient remedy and would be difficult to assess (para. 15).

(2) However, in the absence of a strong probability that grave damage would in future result from the replacing and re-routing of the drain pipes, no mandatory injunction would be granted. If the plaintiff succeeded at trial, he would probably succeed in obtaining an injunction for the removal of the pipes then, and damages for the deprivation of rain-water could be assessed at that time (para. 16).

Cases cited:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 1 All E.R. 504, applied.
(2) *Anchor Brewhouse Dev. Ltd.* v. *Berkeley House (Docklands) Dev. Ltd.*, *The Times*, April 3rd, 1987, unreported, referred to.
(3) *Charrington* v. *Simons & Co. Ltd.*, [1971] 1 W.L.R. 598; [1971] 2 All E.R. 588, referred to.
(4) *Corbett* v. *Hill* (1870), L.R. 9 Eq. 671, referred to.
(5) *Daniel* v. *Ferguson*, [1891] 2 Ch. 27, distinguished.
(6) *Kelsen* v. *Imperial Tobacco Co. Ltd.*, [1957] 2 Q.B. 344; [1957] 2 All E.R. 343, referred to.
(7) *Redland Bricks Ltd.* v. *Morris*, [1970] A.C. 652; [1969] 2 All E.R. 576, followed.
(8) *Trenberth (John) Ltd.* v. *National Westminster Bank Ltd.* (1979), 39 P. & C.R. 104; 253 E.G. 151, referred to.
(9) *Woollerton & Wilson Ltd.* v. *Richard Costain Ltd.*, [1970] 1 W.L.R. 411; [1970] 1 All E.R. 483, considered.

B. Marrache for the plaintiff;
L.E.C. Baglietto for the defendants.

1 **ALCANTARA, A.J.:** This is an interlocutory *inter partes* application by the plaintiff for a prohibitory and a mandatory injunction against both defendants. The prohibitory aspect is that the plaintiff seeks to prevent the defendants from painting the north wall of a building known as Leon House. The mandatory aspect is that the plaintiff wants the defendants to remove new drain pipes which the defendants have placed on the said wall.

2 The plaintiff is the owner of a property known as Fortress House consisting of a house and garden, which is located next to the building known as Leon House, the north wall of Leon House being the south boundary of Fortress House. In fact, the plaintiff was originally the owner of the land and building on which Leon House was built. The plaintiff sold and conveyed the said land and building to the first defendant's predecessor in title on May 23rd, 1972. In cl. 2(5) of the said conveyance, the following covenant is to be found:

> "Any wall built by the purchasers on the north side of the premises more particularly described in the Second Schedule hereto and delineated on the plan hereunto annexed by the angles JJ and KK shall at all times be the property of the purchasers."

This is supposed to be the north wall of Leon House. Notwithstanding this covenant, the plaintiff claims that the said wall belongs to him.

3 The first defendant bought Leon House from the original purchasers on July 27th, 1990, and decided on a refurbishment programme. He engaged a contractor (the second defendant). Part of the programme was to render and paint the north wall of Leon House and to replace and re-route the rain-water drain pipes on the said wall.

4 Regardless of who owns the north wall of Leon House, the defendants needed the consent of the plaintiff to carry out the intended works, painting and re-routing of the drain pipes, for the simple reason that their workers would inevitably have to encroach into the airspace above the garden of Fortress House to execute the same. The defendants sought permission. The matter was discussed and meetings were held. The outcome was that in February 1991 the defendants' solicitor prepared a document for signature by the plaintiff, which I will set out:

> "*Licence to use airspace at Fortress House, 7–9 Cathedral Square, Gibraltar*
>
> I agree to grant you a licence for a cradle to be erected on your property, known as Leon House, Secretary's Lane, Gibraltar, to oversail my above-mentioned property on the terms set out below, upon your signifying your agreement to these terms by signing and returning the copy of this letter enclosed for that purpose. The terms are as follows:

1. In respect of my interest in the land affected, I permit you to overhang the said cradle along such elevations of Leon House as adjoin my property.

2. You agree to indemnify me and my successors in title and my tenants and authorized occupiers against all or any losses suffered in consequence of any damage to my property, or in respect of all or any losses, damage, injury or death suffered by any person in consequence of or caused by the operation, use or presence of the said cradle or anything being used in connection with it, whether as a result of your negligence or otherwise."

5 This document was never signed by the plaintiff. Notwithstanding this, the defendants allege that there was a subsequent agreement between the defendants and the plaintiff, in which permission was given to carry out the works. The plaintiff denies this. The existence or non-existence of such an agreement will be an issue at the trial. What is common ground is that, subsequent to the date when the above document was sent to the plaintiff, a number of meetings were held between the parties or their representatives, culminating in two letters dated April 9th, 1991, one of them by the plaintiff's solicitors and the other by the defendants' solicitors. I will extract two paragraphs from each of the said letters, as they give an indication of the state of play on the April 9th, 1991. The first are from the letter of the plaintiff's solicitors:

"As I explained in my letter to your good self of yesterday's date, my client intends to remove the present pipe which is encroaching on to his property and make your clients liable for any costs incurred in effecting the said removal.

On the question of the injunction, I now have all the pleadings ready to go to court on short notice, and on the first indication that an encroachment is to take place I will proceed to court without any further notice."

The second extract is from the letter of the defendants' solicitors:

"Whilst noting your threat that your client will remove any down pipes my clients may have placed on their property, such removal would be a wrongful interference by your client with my clients' property and would be actionable civilly and criminally. Certainly my clients have no intention of removing any pipes other than those the subject of the agreement with your client.

On this latter point, I repeat that there is no question of my clients having unilaterally decided to carry out the relevant works without your client's consent. There is an agreement giving our clients permission to carry out such works which is binding on your client. This agreement was concluded in the presence of witnesses."

6 On Wednesday, April 10th, 1991 the plaintiff issued a writ against the defendants, claiming an injunction and damages for trespass, and also issued an *inter partes* summons for an interim injunction. The earliest date on which the *inter partes* interlocutory application could be heard was Tuesday, April 16th, 1991, and the plaintiff was so informed. On his making representation at the Registry about the extreme urgency of the matter, I agreed, as the judge available, to hear the said application on the afternoon of April 10th, if the defendants agreed to short notice. The defendants did not agree. Counsel for the plaintiff then sought audience with a judge on the grounds of extreme urgency to make an *ex parte* application without issuing an *ex parte* summons. I granted audience and heard the *ex parte* application. In the exercise of my discretion, I refused the *ex parte* application, but agreed to hear the application again, *inter partes*, on April 16th.

7 The reason I took such a course was that there were a number of allegations by the plaintiff against both the solicitor for the defendant, Mr. Baglietto, and against the defendants. The allegations against the solicitor were that either on the application for an injunction or at the action he was going to mislead the court and that he had broken faith in disclosing "without prejudice" negotiations. In so far as the defendants were concerned, there were allegations of harassment in the form of intentionally cutting the telephone lines to Fortress House and of taking unfair advantage of the plaintiff because of his Jewish faith.

8 I gave those allegations the seriousness they deserved and, in the circumstances, I reached the conclusion that the defendants should be represented at the hearing to answer, if need be, those allegations. In any case, I did not consider the application to be one of extreme urgency. True trespassing is a serious matter, but there was no question of irreparable damage.

9 The *inter partes* application came for hearing on April 16th, 1991, when counsel for the plaintiff sought an adjournment to April 18th to enable his client to file an affidavit in reply to a number of affidavits served rather late on behalf of the defendants. The application was heard on April 18th and 19th, 1991. On those dates, the situation was as follows. The defendants had on more than one occasion infringed the airspace belonging to the plaintiff by oversailing Leon House and placing a cradle to overhang the north wall of Leon House directly above the garden of Fortress House. The defendants had removed the old drain pipes and replaced them with new drain pipes, re-routing the same. This work had been carried out partly before April 10th and concluded on April 10th and 12th. A part of the old drain pipe has still to be removed, if only for aesthetic reasons. The defendants have not rendered or painted the north wall of Leon House. The oversail and the cradle had been removed.

10 Counsel for the plaintiff has referred me to a number of authorities. *Corbett* v. *Hill* (4) is authority for the proposition that the airspace belongs to the plaintiff. The invasion of the plaintiff's airspace is a trespass which can be restrained by an injunction: see *Kelsen* v. *Imperial Tobacco Co. Ltd.* (6); and *Anchor Brewhouse Dev. Ltd.* v. *Berkeley House (Docklands) Dev. Ltd.* (2). Such invasion can even be restrained by an interim injunction: see *John Trenberth Ltd.* v. *National Westminster Bank Ltd.* (8).

11 In seeking a mandatory injunction, counsel relies quite heavily on *Daniel* v. *Ferguson* (5), the headnote to which in the *Law Reports* reads ([1891] 2 Ch. at 27):

> "The Defendant in an action to restrain him from building so as to darken the Plaintiff's lights, upon receiving notice of motion for injunction, put on a number of extra men and by working night and day ran up his wall to a height of nearly 40 feet before receiving notice that an *ex parte* interim injunction had been granted. It appeared to be a question of some nicety whether the lights were ancient lights. On the motion coming on, *Stirling* J, restrained the Defendant from further building, and from permitting the wall he had erected to remain:—
>
> *Held*, on appeal, that this order was right, as the Defendant had endeavoured to anticipate the action of the Court by hurrying on his building, and that what he had erected ought therefore to be at once pulled down, without regard to the ultimate result of the action."

12 Counsel for the defendants distinguished the above authority from the facts in the present proceedings. In the present proceedings there is an alleged agreement, there was no sudden activity of works after April 10th, and no question of Fortress House being deprived of light. What there was only amounted to a re-routing of the drain pipes. That had not been an attempt to steal a march.

13 Counsel for the defendants seeks to rely on the House of Lords' decision in *Redland Bricks Ltd.* v. *Morris* (7), in which Lord Upjohn laid down the general principles on the granting of a mandatory injunction, and said ([1969] 2 All E.R. at 579):

> ". . . A mandatory injunction can only be granted where the plaintiff shows a strong probability on the facts that grave damage will accrue to him in the future. As Lord Dunedin said . . . it is not sufficient to say 'timeo'. It is a jurisdiction to be exercise sparingly and with caution but, in the proper case, unhesitatingly."

Counsel argues that there is no grave damage in relation to the drain pipes. In fact, the re-routing is as much a benefit to the plaintiff as it is to the defendants.

14 Finally, we come to the somewhat controversial decision in *Woollerton & Wilson Ltd.* v. *Richard Costain Ltd.* (9), on which the Court of Appeal in *Charrington* v. *Simons & Co. Ltd*. (3) reserved their decision as to whether it was correct. In the *Woollerton* case, on a motion for an interlocutory injunction restraining the defendants from causing or permitting their crane's jib from passing over the plaintiff's land, it was held ([1970] 1 W.L.R. at 411) that—

> ". . . as the trespass had caused no damage, the plaintiffs' only effective remedy was an injunction, and since the defendants had admitted trespassing over the plaintiffs' land and had threatened to continue to do so, the court would exercise its discretion and grant the plaintiffs an interlocutory injunction but, since the defendants had offered the plaintiffs a substantial sum of money in compensation, the plaintiffs at the start of the action, were not in the position of a plaintiff whose only remedy other than an injunction was nominal damages and, as the air space had only assumed value by reason of the defendants' practical necessity to continue to use the crane and they had not acted in flagrant disregard of the plaintiffs' proprietary rights, the injunction would be postponed until November 1970, to give the defendants time to complete the building."

15 Applying the principle in *American Cyanamid Co*. v. *Ethicon Ltd*. (1), as summarized in 1 *The Supreme Court Practice 1991*, paras. 29/1/2 and 29/1/3, at 497–498, I find that the balance of convenience lies in prohibiting the rendering and painting of the north wall of Leon House, as damages would not be a sufficient remedy and, in any case, difficult to assess. If, at the trial, it turns out that the wall belongs to the plaintiff, he is perfectly entitled not to have it painted. If it belongs to the defendants, the question will arise whether in equity they can compel the plaintiff to abide by the agreement. In any case, there is always the possibility of taking the action the judge took in the *Woollerton* case (9), on which, as the Court of Appeal did in the *Charrington* case (3), I express no views.

16 On the mandatory injunction point, I will follow the *Redland Bricks* case (7) and hold that, on the facts, there is no strong probability that grave damage will accrue to the plaintiff in the future. In any case, should the plaintiff succeed at the trial, he has a good chance of obtaining a mandatory injunction to have the drain pipes removed. Damages can be assessed in this case as the plaintiff in his first affidavit has deposed that by re-routing the drain pipes he has been deprived of the rain water which irrigated his garden. The mandatory injunction is refused, but a prohibitory injunction will be granted.

Order accordingly.