[2018] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 14/2018

APPLICATION NO 33/2018

BETWEEN	**NATIONAL HOUSING TRUST**	**APPLICANT**
AND	**TREEBROS HOLDINGS LIMITED**	**RESPONDENT**

Lord Anthony Gifford QC, Manley Nicholson and Marlon Gregory instructed by Nicholson Phillips for the applicant

André Earle, Peter Mais and Mrs Nickeisha Young-Shand instructed by Earle & Wilson for the respondent

13, 14, 15 and 22 March 2018

IN CHAMBERS

F WILLIAMS JA

[1] Before me for consideration is an amended application for a stay of execution of a judgment, pending the hearing of the appeal. The judgment in respect of which the stay is being sought is that of Lawrence-Beswick J. It was delivered orally on 20 December 2017, with a written judgment delivered on 29 January 2018.

[2] A summary of the background to the claim in the court below and the findings of the learned judge made therein will be a useful precursor to the brief examination of the grounds of the substantive appeal and, more relevant to this matter, the grounds of this application.

Background

[3] By way of a claim form filed on 18 April 2013, the respondent (hereinafter referred to as "Treebros") sued the applicant, now also the appellant, ("NHT") in negligence, nuisance and for trespass. These claims arose from the discharge of surface water from the NHT's property onto Treebros' property (Lot 8). The NHT's property lies north of Treebros' property. South of Treebros' property are: (i) lot 2; and (ii) lot 24, which lies below lot 2. There is a downward slope of the land from the NHT's lot through lot 8 and then through lots 2 and 24. Because of the slope, surface and storm water flow through these lots through a natural gully course on its way to the sea, which is to the south of all the lots.

[4] The NHT's lot is being used for a housing development. It wishes to have the consent of the owners of lots 8, 2 and 24 for the grant of easements for the discharge of water through these lots. It would do so by upgrading the natural gully by the building of culverts and drains. These easements are of considerable importance to the NHT, in particular because of the existence of special condition 4 on the NHT's title. This special condition forbids the NHT from discharging water onto the roadway and in fact requires the NHT to intercept or divert the water flowing from its property before it reaches the roadway which separates the NHT's lot from lot 8.

[5] The NHT successfully negotiated easements with the owners of lots 2 and 24. However, negotiations broke down between it and Treebros, triggered in particular by what Treebros regards as the NHT's unreasonably-low offer of compensation to it, especially when compared with that offered to the owners of the other lots, having

regard to the respective sizes of the lots. At one point, in the course of what were then amicable discussions between the NHT and Treebros, Treebros gave the NHT permission for its workmen and machinery to enter onto Treebros' property. The NHT built a large galvanized storm-water pipe which discharges surface and storm water from its property onto lot 8. With the breakdown of negotiations, that consent was formally withdrawn by letter dated 13 December 2012.

The decision in the court below

[6] These are the orders that the court below made, and from which the NHT appeals:

> "1. Judgment for the claimant.
>
> 2. **Damages for nuisance and negligence** awarded to the claimant to be assessed and calculated in accordance with this judgment at paragraph[s] 129 and 130.
>
> 3. **Damages for trespass by the representatives and by the machinery** of NHT in the sum of $100,000 plus the amount for clearing the materials from Treebros' property. Treebros must present an invoice/bill to be paid by NHT for the cost of the removal of its material from the land, or if so agreed between the parties, NHT is at liberty to remove the material itself within 42 days of today.
>
> 4. **Interest** on all damages at the rate of 6% per annum commencing at the date of service of the letter dated December 13, 2012 from Treebros to NHT until judgment.
>
> 5. **Injunction** granted to restrain the NHT, whether by their directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever from permitting the discharge and/or flow of water onto its land or onto the roadway adjoining Treebros' property, where it would exit onto Treebros' property.

6. **Injunction** granted to restrain NHT, whether by their directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever from entering onto or remaining on Treebros' property.

7. **Costs** to the claimant, Treebros, including costs for 2 counsel on an indemnity basis.

8. **Execution of Judgment** stayed until 5 days after the delivery of the written judgement." (Emphasis as in original)

The notice and grounds of appeal

[7] By notice and grounds of appeal dated 6 February 2018 and filed on 7 February 2018, the NHT seeks to challenge the court's decision. These are the grounds of appeal:

"(1) The learned judge erred in holding that because there was no concluded contract between the parties, the defence of consent could not be maintained.

(2) The learned judge erred in not holding that on the facts as found and/or were not disputed, the Respondent had permitted and approved and co-operated with the construction by the Appellant of the drainage system, the culvert, and the pipe, which were the very works which the Appellant later alleged to be a nuisance.

(3) The learned judge erred in law in not holding that it was a complete defence to an allegation or nuisance that a claimant had permitted and/or approved and/or acquiesced in the doing of acts by a defendant, which acts later caused damage to the claimant's land for reasons which both parties had not contemplated, namely in this case the failure of the parties to reach a concluded agreement for an easement.

(4) The learned judge erred in law in granting an injunction restraining the Appellant from permitting the discharge and/or flow of water onto the

Respondent's land, since by reason of rainfall and the laws of gravity it was impossible to prevent such discharge and flow.

(5) The learned judge erred in granting the said injunction, and a further injunction restraining entry by the Appellant onto the Respondent's land, when damages would be an adequate remedy, since in particular the most convenient means of draining water from the properties of both parties would be for the Appellant to carry out the works which had been agreed by both parties to be of benefit to them.

(6) The learned judge in granting the said injunctions, and generally in her awards, failed to take into account that the Respondent had failed to take reasonable steps to mitigate its loss, namely by allowing the said drainage system to be completed.

(7) The learned judge erred in law in failing to take account of the Floodwater Control Area (Declaration) (Creighton Hall, St. Thomas) (Confirmation) Order 2016, which had been made by the Minister of Transport, Works and Housing on 24th February 2016, pursuant to which the Appellant was obliged by law to enter upon the Respondent's land and to carry out the very works which the Appellant was restrained from carrying out.

(8) The learned judge erred in law in holding that the Appellant "drew on the power of the State to enforce its will", and in not holding that the provisions of the said order had been made in the public interest and had the force of law and could only have been questioned or set aside by the Supreme Court in the exercise of its judicial review jurisdiction.

(9) The learned judge erred in her awards of damages for nuisance in that such awards were based on the premise that the damage to the Respondent's land was permanent, whereas the implementation of the flood-water control scheme would put an end to most of the damage of which complaint was made.

(10) The learned judge further erred in using the relative size of the Respondent's property as compared with that of Lot 2 as being the determining factor in calculating the value of the use of the Respondent's land to the Appellant.

(11) The learned judge erred in awarding costs "on an indemnity basis" since the conduct of the Appellant was not highhanded or tainted with bias or by any other impropriety.

(12) The learned judge erred in law in awarding costs "on an indemnity basis" since such an award is not permissible under the law and procedure which applies in Jamaica."

The application for the stay

[8] The main order being sought in the amended notice of application for a stay of execution is:

> "1. A stay of execution of the final judgement [sic] of the Honourable Mrs. Justice Lawrence-Beswick which was handed down on 29 January 2018, pending the outcome of the appeal".

[9] The following are the grounds of the application for a stay:

> "I. There is a risk of injustice to the Appellant in the circumstances where it is impossible for the Appellant to stop rainwater from flowing down from its higher land onto the Respondent's lower land. Further, the Appellant could be held in contempt of Court and/or face sanctions for not complying with the injunctive order of the Honourable Mrs. Justice Lawrence-Beswick.
>
> II. There is a risk of injustice in the circumstances where the exorbitant costs and consequences of complying with the injunction could mean substantial works to reverse infrastructure within the housing scheme, and having to "re-purchase" lots already sold to third

parties to construct an alternative drainage system; thereby stifling the appeal.

III. The cost of implementing any alternative drainage system to comply with the injunction may likely not be recoverable from the Respondent if a stay is not granted and the Appellant is successful at the outcome of the appeal.

IV. There is a risk of injustice in the circumstances where the effect of the injunctions would be to prevent the carrying out of the works which both parties agreed to be the best way of channeling [sic] the storm water which will naturally flow downhill across the Respondent's land.

V. There is a risk of injustice in the circumstances where the Appellant would be in breach of its duty as undertakers under the Flood-Water Control Act requiring the Defendant to 'do all such acts or things as may be necessary to be done to give effect to any confirmed flood-water control scheme'.

VI. There is a risk that if the Appellant is compelled to pay the judgment sums whilst the appeal progresses the Respondent may not be in a position to reinstate such funds and no such risk exists for the Respondent as the Appellant is a statutory body.

VII. The Respondent would still be in a position to enforce the judgment if execution is stayed pending the outcome of the appeal of this matter."

The law

[10] There is no real dispute between the parties on the law governing applications for a stay of execution. It is well known that the current position is reflected in the judgment of **Combi (Singapore) Pte Limited v Ramnath Sriram and Sun Limited FC** 297/6273; [1997] EWCA 2164. In that case, Phillips LJ observed as follows:

"In my judgment the proper approach must be to make that order which best accords with the interest of justice. If there

> is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered. This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice."

[11] This approach has since been applied in many cases in this jurisdiction. For example, the same approach was taken in the case of: **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1. In that case Harris JA opined that the court's approach now is to: "seek to impose the interests of justice as an essential factor in ordering or refusing a stay".

[12] In assessing whether there is any merit in the appeal it is also important to bear in mind the fact that the court, in considering the appeal eventually, will be guided by the admonition of Lord Thankerton in the case of **Thomas v Thomas** [1947] AC 484. There it was stated, at page 487-488, that:

> "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court,

> either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[13] This consideration is important, as the decision being appealed is the result of the judge's findings of fact after several days of trial in determining liability, awarding damages and granting injunctions.

Issues

[14] There are two broad issues for determination on this application: (i) whether there may be some merit in the appeal or the appeal is one "with some prospect of success"; (per Harrison JA in **Watersports Enterprises Limited v Jamaica Grande Limited and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, judgment delivered 4 February 2009, at paragraph 7); and (ii) if so, and some harm will be caused to either side if the stay is granted or refused, which party is likely to suffer the least irremediable harm. Or, more simply put: whether, in the interests of justice, the case is an appropriate one for the grant of a stay (see, for example, **Calvin Green v Wynlee Trading Ltd and Naylor & Turnquest** [2010] JMCA App 3).

Issue 1: Whether there may be some merit in the appeal

Summary of the submissions

For the applicant

[15] On behalf of the applicant, Lord Gifford QC argued a number of points that might be summarized as follows:

Nuisance

Where two neighbours agree on certain affairs and the result turns out to be different from what was planned and a nuisance occurs, the person who caused the nuisance might successfully plead acquiescence (citing the cases of **Pwyllbach Colliery v Woodman** [1915] AC 634 and **Lyttleton Times Company Limited v Warners Company Limited** [1907] AC 476). There is, therefore, a real prospect of success on the basis of the defence of acquiescence and encouragement.

The Flood Water Control Act

(i) Pursuant to the provisions of the Flood Water Control Act (the Act), the NHT has the power of entry and is empowered to do what-so-ever is necessary to implement effective flood-water prevention and/or control in respect of affected land. There are in force: (i) a confirmation order dated 25 February 2016 and (ii) a declaration gazetted on 13 August 2015 that have the effect of casting on the NHT a duty of entering lot 8 as soon as possible in order to carry out the works necessary. It would be an offence for any owner to obstruct the NHT in so doing.

(ii) By the time the trial had begun, everyone knew that the orders were in force. The learned judge had been informed that there was an order in existence which gave the NHT the power to do the work. That order could not be ignored, being a part of the law of the land. The learned judge was therefore bound to have taken it into account in deciding whether to grant the injunction. The NHT has at least an arguable case in this respect. It would not be right for the execution of the judgment to be allowed pending the hearing of the appeal.

Indemnity costs

Such an order is not lawful, as: (a) it is not recognized by the rules and (b) it is not justified. There is a serious issue to be tried in that the point of whether an indemnity costs order might be made has not been determined by this court.

For the respondent

[16] The following is a summary of the submissions that Mr Earle made on behalf of Treebros in seeking to convince the court that the NHT does not have a realistic prospect of success:

Nuisance

There is absolutely no evidence to support the contention that consent from Treebros exists or that permission was granted except in the very narrow circumstances surrounding the negotiations. In paragraph 13 of the affidavit of Helen Pitterson, it is admitted that the NHT's actions have resulted in damage: hence damages could not be an adequate remedy. The erosion to Treebros' property is continuing.

Flood Water Control Act

At the close of the case, there was no application to amend and to rely on the Act. If the NHT had a good case otherwise, it would not be seeking to rely on the Act as the declaration was never put into evidence. The NHT should not be allowed to approbate and reprobate (citing **National Water Commission v Balteano Duffus** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/ 2002, judgment delivered 20 December 2004). Alternatively: (a) the NHT is stuck with its election; or (b) it is estopped from now relying on the Act, having already told the court that it was not relying on it; or (c) it has waived its

right to do so. Further, the NHT has not shown that the declaration was published in LN 194 A.

Indemnity costs

The NHT has put forward no good reason why costs on an indemnity basis should not be paid. There is no authority from this court stating that such costs cannot be ordered.

Discussion

Trespass

[17] The parties are agreed that there is no ground of appeal that relates to the court's decision on trespass; and so that is not a matter that needs detain me. That trespass concerns the entry onto Treebros' property without consent of workmen and machinery of the NHT. There being no appeal in respect of the finding and award of damages in relation to trespass, the other issues may now be considered.

Nuisance

[18] In approaching the consideration of this and the other issues in this application, I am required to come to some form of preliminary assessment of whether there is merit in the appeal. It is not for me, however, to delve into the minutiae of the case or to conduct what might amount to a mini trial. This, after all, is the hearing of an application for a stay of execution of a judgment; and not the hearing of the substantive appeal.

[19] That having been said, it seems to me that the central question for determination on this issue was whether there was, on the part of Treebos, conduct throughout its interaction with the NHT that could correctly have been taken to be consent, acquiescence or agreement to the discharge of water onto Treebros' property. On my preliminary assessment of the evidence in this case, it appears to me that it does not fairly admit of any interpretation that Treebros consented to the nuisance. In coming to this view I have had regard to the cases cited on behalf of the NHT. In my view, those cases do not directly address the issues raised by the particular facts and circumstances of this case. For example, the case of **Pwyllbach Colliery Company Limited v Woodman** dealt with circumstances in which there was evidence that the parties in that case had a complete agreement, but had not expected that the performance of their agreement would have resulted in a nuisance.

[20] Similarly, in the case of **Lyttleton Times Company Limited v Warners Limited**, while no exception can be taken to the statement of general principle in that case that "implied obligations in a contract must be governed by the common intention of the parties", the facts again, in my view, preclude any direct reliance on that case. There again, there was an agreement concluded in all respects but the parties were mistaken in their anticipation of the level of noise to be generated by the appellant's machinery. In the instant case, in contrast, there appears to have been, on my preliminary assessment, no concluded agreement. Going back to first principles in contract law, price, or consideration, is one of the fundamentals to be agreed in the formation of any contract. In **BJ Aviation Ltd v Pool Aviation Ltd** [2002] EWCA Civ

163, Chadwick LJ, at paragraphs 19-22 distilled from the authorities (which he noted were reviewed by Rix LJ in **Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD**, [2001] EWCA Civ 406) several principles. He observed, *inter alia,* that:

> "19. ...It is unnecessary, and would be superfluous, to review those authorities again in this judgment. It is I think sufficient to identify five propositions which, as it seems to me, are not capable of dispute.
>
> 20. First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance.
>
> 21. Second, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future - on the basis that either will remain free to agree or disagree about that matter - there is no bargain which the courts can enforce.
>
> 22. Third, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them - see Walford v Miles [1992] AC 128, at page 138G." (Emphasis added)

[21] Here, the price for compensation for the grant of the easement was not agreed. Neither had the parties agreed on any objective price-fixing machinery. In my finding, and based on a preliminary assessment, the applicant has no arguable appeal on this issue.

Flood Water Control Act

[22] Lord Gifford sought to rely on the Jamaica Gazette Act with a view to showing that the declaration made under the Flood Water Control Act was in fact in force at the time of the trial and so should have been taken into account by the court below. However, in my view, in keeping with Mr Earle's submission, questions arise on the NHT's case in this regard. For example, section 2 of the Jamaica Gazette Act reads as follows:

> "2. All issues of the public newspaper entitled the Jamaica Gazette and all Supplements thereto, and all Gazettes Extraordinary, hitherto printed and published at the Government Printing Office, or elsewhere, are hereby declared to have been, and all future issues in pursuance of this Act of such public newspaper, and of all supplements thereto, and of all Gazettes Extraordinary, shall be, and are deemed to be issues of the Jamaica Gazette, duly and legally printed and published, and shall have effect and be receivable in evidence accordingly." (Emphasis supplied)

[23] On a fair interpretation, the underlined portion of this section appears to require the tendering into evidence of a copy of any Jamaica Gazette on which a party is seeking to rely. It appears as well that the contents of section 6 of the Jamaica Gazette Act could also be regarded as lending support to this view. It reads as follows:

> "6. The modes of proof allowed by this Act shall be in addition to, and not in substitution for any other modes of proof allowed by law, and shall apply to all legal proceedings whether civil or criminal." (Emphasis added).

[24] Reference to "modes of proof" would suggest, on a reasonable interpretation, that any issue of the Jamaica Gazette sought to be relied on ought to be "proven" in the sense of being tendered and received into evidence. This observation, along with

the other concerns expressed by Mr Earle as to whether what was being put forward in this application was really LN194A, lead me to conclude that this point has no reasonable prospect of success.

[25] It is questionable as well whether this issue ought, strictly speaking, to be properly regarded as a ground of appeal, in light of how it was dealt with in the court below. From all indications, it was not relied on by the NHT in the court below and so did not feature in the court's deliberations otherwise than in passing, as is indicated in, for example, paragraphs [51], [52], and [173] of the judgment as follows:

> "[51] Counsel said that this was not a submission but rather information for the attention of the Court. NHT had purportedly been granted statutory power to enter onto land, including Treebros' land, to do such work as necessary and expedient for securing proper control of flood water. However, counsel states that NHT has not taken any action in that regard, choosing instead to submit itself to respond to Treebros' claim.
>
> [52] Counsel for Treebros objected vehemently to any reference being made to the Flood Water Act because it was never pleaded or argued during the case until the final submission. There had been no reference to it during the evidence from the witnesses. There had been no disclosure of the Gazettes.
>
> ….
>
> [173] Counsel for NHT submitted that the declaration of the area was not pleaded and was not being used in submissions. Rather, the purported Flood Water Area Order was being mentioned simply to ensure that the Court was aware of its existence...".

Indemnity costs

[26] It appears that the NHT is correct in its submission that the legal permissibility of an order for the calculation and payment of costs has not been decided by this court. In the case of **Norman Manley Washington Bowen v Shahine Robinson** [2015] JMCA Civ 57, Dukharan JA observed that the matter could not be decided in that case as no issue had arisen there on that point. In the light of the competing contentions on whether an order for the payment of costs on an indemnity basis might properly be made in this jurisdiction, it seems to me that the NHT's point on this issue might not fairly be said to be unarguable.

Issue 2: the least irremediable harm/hardship

[27] In respect of the question of hardship and the least irremediable harm, this is a summary of the submissions made by Lord Gifford on behalf of the NHT:

> The injunction against the discharge of water goes further than the letter of December 2012. The order requires the NHT to stop water from going on its land. That is impossible of performance. The effect of the order is to prevent the NHT from doing the very thing the parties accepted as the broad solution: the most convenient and satisfactory form of drainage. The injunctions are not appropriate when there is a reasonable step available to mitigate the damage (completion of the drainage system discussed).

[28] On behalf of the Treebros, on the other hand, the following is a summary of Mr Earle's submissions:

> (i) There are alternative methods of disposing of the water even on the evidence of NHT's own witness.
>
> (ii) There is no evidence that NHT has ever challenged the existence of special condition 4 on its certificate of title, requiring it to stop the water before it enters the roadway.
>
> (iii) NHT, by providing no information on the cost of alternative methods of addressing the nuisance, has not put the court in a position to weigh the injustice to them if no stay is granted. Thus NHT has failed to satisfy the court that it would suffer any hardship by going another route.
>
> (iv) A stay would work an injustice to Treebros.

Discussion

[29] In relation to this ground, there are two parts of the evidence and one other factor that are determinative of the preliminary assessment. In the written judgment, the learned judge records the following in respect of the NHT's witness, Ms Norma Breakenridge (at paragraph [85]):

> "[85] The witness agreed that there exist alternative methods for properly dealing with the run-off water, including soak-away pits..."

[30] At paragraph [34] of the said judgment, this is what is recorded in respect of the NHT's witness and project manager, Mr Dwayne Pryce:

> "[34] As project manager he was aware that discharging the surface water from NHT's property onto Treebros' property was the most cost effective manner of removing the water. He had not, however, made checks as to alternative methods available or their cost." (Emphasis added)

[31] At the hearing of this application, an attempt was made to rely on the affidavit of Mr Wayne Reid, apparently with a view to supplementing or providing information on alternative methods; but on Treebros' application, I ruled that this affidavit could not be relied on. I did so on the following basis: that in the said affidavit, Mr Reid seemed to be purporting to give expert evidence, when there was no compliance whatsoever with part 32 of the Civil Procedure Rules. As a subsidiary matter and in passing, I also considered the fact that, in any event, Mr Reid had been associated with the applicant since around 2010 but had not given evidence at the trial. From all indications, the evidence that he was seeking to give, would not have met the test for the admission of fresh evidence in **Ladd v Marshall** [1954] 3 All ER 745, even considering the matter against the background of what would be required in the interests of justice. However, it is important to note that there was before me no oral or written application for the admission of fresh evidence.

[32] In light of these considerations, I accept the submissions of Mr Earle for Treebros that, in the absence of such information as to the effect on the NHT of the injunction and the impracticability of using alternative methods, I have not been

assisted sufficiently or at all with the painting of a clear picture of the challenges the NHT faces in complying with the injunctions granted by the court below.

[33] In my view this issue of hardship or injustice should also be considered against the background of the findings of the court below (although I recognize that they are being challenged on the appeal) that the NHT was "...doggedly holding to its intention to use Treebros' land for its own purposes" (See paragraph [175] of the judgment of the court below). It was also noted that during the trial the NHT was continuing to do work on at least one of the other lots. As a consequence of a consideration of all of these matters, my finding is that a consideration of the interests of justice does not favour the NHT.

Conclusion

[34] The main thrust of the complaint being made against the orders in the court below is the impracticability and the injustice arising from the grant of the injunctions. That impracticability and injustice have not been demonstrated to me. It seems to me that the injunction ordered at paragraph 5 of the orders require from the NHT no more and no less than what is required of it by special condition 4 on its certificate of title. The focus of the order is to prevent continued erosion to Treebros' property. In my view, a proper interpretation of the order would see emphasis being placed on the last seven words contained therein as indicated in the underlined portion quoted as follows:

> "5. Injunction granted to restrain the NHT, whether by their directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever from permitting the discharge and/or flow of

> water onto its land or onto the roadway adjoining Treebros' property, where it would exit onto Treebros' property." (Emphasis added)

[35] I can discern no irremediable harm to the NHT if the stay should be refused. On the other hand, the erosion to Treebros' land continues and, while the appeal progresses, it would be unable to develop its land. It has not been established that the refusal of the application for the stay of execution, while it will cause some inconvenience to the NHT, will cause any or any greater detriment to the NHT than that caused to Treebros. The only really arguable ground of appeal seems to me to be that relating to the making of the order relating to indemnity costs. A stay, however, need not be granted on that basis: Treebros has demonstrated (in the further supplemental affidavit of Mr David Williams, filed 9 March 2018) that lot 8 has an unencumbered value of some $95,000,000. The NHT might proceed against this, in the event that it succeeds in this argument on appeal, the costs are ordered to be repaid and payment from Treebros is not forthcoming. Considering all the circumstances of this case and the material put before me, I find that it would not be in the interests of justice to grant the application for a stay of execution of the judgment.

[36] Like Lawrence-Beswick J, I would also suggest to the parties that reasonable discussion might be the best approach to be taken in the circumstances of this case. Alternatively, it is advisable for the parties to do all that is possible to effect an expeditious hearing of the appeal.

[37] In the result, the orders on this application are as follows:

(i) The application for a stay of execution is refused;

(ii) Costs of the application to Treebros to be agreed or taxed.