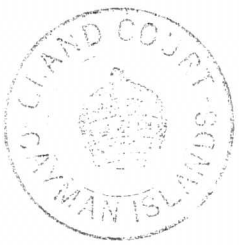


17/10/12
CJ.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO. 0382 OF 2012

BETWEEN	1.	DOEY COLLINS KELLY	
	2.	FRANK SIRLON EBANKS	
	3.	DAVE ERNEST LINDO KELLY	
	4.	NOEL BRYAN EBANKS	
	5.	DARNEY DUHANEY KELLY	PLAINTIFFS
AND	1.	FUJIGMO LIMITED	
	2.	THE PORT AUTHORITY	
	3.	THE ATTORNEY GENERAL	DEFENDANTS

IN OPEN COURT
HEARD ON THE 8TH , 9TH AND 17TH OCTOBER 2012
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Dr. Lloyd Barnett QC, instructed by Mr. Phillip Ebanks for the Plaintiffs
Mr. Mac Imrie and Mr. Stephen Alexander of Maples and Calder for the 1st and 2nd Defendants
Mr. Wayde Bardswell, Crown Counsel for the 3rd Defendant

JUDGMENT

1. This is the resumed hearing of the Plaintiffs' application for an injunction pending the trial of their claims.

2. An injunction was granted on the interim basis by Justice Williams on 20th September 2012. On that occasion, upon the Defendants having been given notice of the application, but on their election not to participate; Williams J heard the Plaintiffs' application because of what he found to be the urgency justifying the application.

3. Being mindful of the Defendants' objection at having been given shorter notice of the application than the rules require (by one day); Williams J. heard and granted the

application for the injunction for a limited period until the 8th October, when the application was set to be heard on the inter partes basis.

4. Despite that background, Mr. Imrie applies now by way of preliminary objection for the discharge of the interim injunction. His basis is the Plaintiffs' alleged failure to make full and frank disclosure of all relevant matters known to them, including matters helpful to the Defendants' case and harmful to their own, when they appeared before Williams J.

5. This is the strict duty of disclosure imposed by the case law upon an applicant for an injunction, applied with especially strict rigour when an application is made on the ex parte basis, for the obvious and settled reason that the other side is not present to put such matters, as may test the Applicants' case, before the Court. See, for instance ***R v Kensington Income Tax Commissioner ex parte de Polignac (1917) 1 KB 485 at 505 and Cable and Wireless v I.C.T. Authority 2007 CILR 273.***

6. I declined to hear Mr. Imrie by way of preliminary objection. This was first for the plain reason that the hearing before Williams J may not be characterised properly as an ex parte hearing. The Defendants had been notified but chose not to participate.

7. Among Justice Williams' reasons for proceeding notwithstanding the absence of the Defendants, is the following note from his ruling then given ex tempore:

> *"Mr. Alexander [(who then appeared for the 1st and 2nd Defendants)] informed the Court that he had instructions from his client only to apply for the adjournment and, if he was not successful in that application, he had no instructions to remain and participate in the injunction hearing.*

Although I was willing to abridge time for service [of notice of the Application] under the inherent jurisdiction, service being one day short of the required notice under the rules, Mr. Alexander indicated and advised that I should deal with the injunction application as if it were an ex parte application. In light of that indication, although there has been notice, I dealt with the hearing in his absence."

8. A party who resolves not to participate in such circumstances may not be allowed later to complain that the applicant failed to explain his defence to the Court for the purpose of blocking the further enquiry altogether.

9. While the opposing party – here the Plaintiffs – certainly remained bound throughout by the duty of full and frank disclosure, I came immediately to the view that, rather than embark upon the enquiry proposed by Mr. Imrie, it would be just and proper in the circumstances which have developed, to hear the Plaintiffs' substantive application for the continuation of the injunction and the Defendants' substantive objections to it. Mr. Imrie did not object to my proceeding in this way and this was not surprising, as the matters about which he would complain that the Plaintiffs had failed to disclose to Williams J, are the very matters upon which he would now rely in objection to the continuation of the injunction.

The terms of the injunction

10. The injunction applied for on the Plaintiffs' summons, granted on the interim basis by Williams J until this resumed hearing and now sought to be continued, is in these terms:

(1). The first defendant by itself, its servants or agent or otherwise (is) restrained from preventing or hindering the Plaintiffs from having access to or use of the location and/or docking facilities known as Safehaven Docks (Block 12C Parcel 374) until further order or the trial of this action; and

(2). The first or second Defendant (is) restrained from authorizing, directing or causing their servants or agents or anyone from proceeding with the construction or other works which will deprive the Plaintiffs of their right of access and use of the said location and docking facilities known as Safehaven Docks until further order or trial of this action.

11. The injunction would have expired upon the resumption of the hearing before me on 8th October, 2012 and so was extended until the delivery of this ruling. This was done upon Dr. Barnett's application and with the consent of Mr. Imrie.

12. Concerned about the excavation and other works which have already begun, the Plaintiffs also now seek a mandatory injunction (in terms of their amended summons) mandating the Defendants to remove:

> *"... the heaps of stones, boulders, earth and debris which have been piled on the access route and driveway to their docking facilities known as Safehaven Docks and to restore all docking facilities which have been damaged or destroyed since August 2012."*

13. In support of the proposition that the principles which govern the grant of an interlocutory injunction (and as will be identified below) also apply to the grant of a mandatory interlocutory injunction, Dr. Barnett cites and relies upon the Privy

Council decision in ***National Commercial Bank Jamaica Ltd. v Elliot Corporation [2009] 1 W.L.R. 1405***; which is to that effect.

The nature of the Plaintiffs' application

14. For the purposes of this application for an injunction pending trial, I am not required to conclude upon the merits of the case of either side as if engaged upon the conduct of the trial.

15. The proper approach was explained by Lord Diplock in ***American Cyanamid v Ethicon Ltd. (H.L. (E) [1975] A.C. 396 at 407 G-H:***

> *"It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claim of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial."*

16. The primary question which I am required to address at this stage is (as Lord Diplock also explained) whether I am satisfied that the Plaintiffs' claims "*show a real prospect of success*" or are "*not frivolous or vexatious, or in other words, that there is a serious question to be tried*", ibid 407G.

17. As later explained in the cases subsequent to Lord Diplock's pronouncement of the principles, the test of real prospect of success is preferred and the use of the expression "*frivolous or vexatious*" has been discountenanced in this context: per Megarry V.C. in ***Mothercare Ltd. v Robson Books Ltd. [1979] FASR 466 at 474.***

18. But this – notwithstanding the narrow scope of the factual enquiry to be undertaken – will inevitably involve some degree of assessment of the evidence, as invited by the

qualitative evaluation of whether the claim satisfies the test of a real prospect of success.

19. Accordingly, the case law admits of the following further approach as explained also in ***American Cyanamid*** (408B):

> *"...unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."*

20. This, the well established "*balance of convenience*" test, was that which was applied by Williams J. at the earlier hearing, remains the test to be ultimately applied now and has been recognised and applied by this Court on numerous occasions before. See, for instance, ***Cayman Islands Stock Exchange v Nealson 1999 CILR 359***. A practical formulation of the test and consistent with ***Stock Exchange v Nealson***, was set out by Laddie J in ***Series 5 Software Limited v Clarke and Others [1996] 1 All. E.R. 853 at 865*** in these terms:

> *"It appears to me that what is intended is that the court should not attempt to resolve difficult issues of fact or law on an application for interlocutory relief. If, on the other hand, the court is able to come to a view as to the strength of the parties' cases on the credible evidence, then it can do so.*

In fact, as any lawyer who has experience in interlocutory proceedings will know, it is frequent.ly the case that it is easy to determine who is most likely to win the trial on the basis of the affidavit evidence and any exhibited contemporaneous documents. If it is apparent from that material that one party's case is much stronger than the other's then that is a matter the court should not ignore. To suggest otherwise would be to exclude from consideration an important factor and such exclusion would fly in the face of the flexibility advocated earlier in American Cyanamid."

21. Following this advice, it could now be appropriate to recognise any obvious strengths or weaknesses revealed in the evidence or in the law affecting the case of either side.

22. Having regard to the fact that an injunction would be intended to preserve the status quo until the trial on the merits when the rights of the parties will be determined, the case law also requires a consideration now whether, instead of imposing an injunction, damages would be an adequate remedy available to the Plaintiffs at trial if they succeed. In this regard, it is for the Plaintiffs to satisfy the Court that damages awarded at trial would not be an adequate remedy: ***London and Blackwell RY Co. v Cross 31 Ch. V. 354 at 369.***

23. This burden derives also from those identified by Lord Diplock in ***American Cyanamid*** where (408 C-D) he stated:

"If damages in the measure recoverable at common law would be an adequate remedy and the defendant would be in a financial position to

pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

24. If the Plaintiffs show that damages would not be an adequate remedy, they may well still be required in turn to give an undertaking in damages to indemnify the Defendants for any damages found wrongfully to have been caused to them by the injunction, if the Defendants ultimately prevail at the trial.

25. These competing considerations also factor in the "*balance of convenience*" test as explained in ***American Cyanamid*** in these terms (page 406E):

> *"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiffs' need for such protection must be weighed against the competing need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiffs' undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies."*

26. And later (at 408 F)

> *"It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to*

attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case. When either factor appears to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo...."

27. Further, by way of identifying the legal principles for the injunctive relief, on the authority of ***Smith and Others v Inner London Education Authority*** ***[1978] 1 All. E.R. 411***

"Where a defendant is a public authority performing duties to the public, the court must look at the balance of convenience more widely and take into account the interests of the public in general to whom the duties are owed. This is an example of the "special factors" affecting the balance of convenience which are also referred to in American Cyanamid Co. v Ethicon" (at 409 C-D).

28. And finally, as to the identification of the guiding principles; it follows from allt he foregoing that where the grant or refusal of an injunction pending trial (here the refusal) would have the effect of putting an end to the proceedings, the likelihood that the Plaintiffs will succeed in establishing their right to permanent injunctions at trial is also a factor to be considered in weighing the balance of convenience. Conversely, where a defendant is a statutory body relying on statutory immunity, it will be required to show a high degree of probability that its reliance on immunity will

succeed, where the consequence of grant or refusal of an injunction in its favour would be disastrous to the Plaintiffs' claim.

29. In summary then, the competing considerations as they appear from the law and the evidence to be considered below are these:

(i) On the Plaintiffs' side, the disruption of their businesses as watersports and tour boat operators which depends on their established access to Safehaven Docks and the resultant loss of income, goodwill and reputation that would arise.

And further, the irreparable damage to the land upon which Safehaven Docks rest and the destruction of the equitable and prescriptive rights which attach to that land and which they claim; all if the injunction is not granted pending the determination at trial of their claims to these rights.

(ii) On the Defendant's side, the interference with the 1st Defendant's contractual licence and right to develop the property and the interruption of the works which have already commenced.

And further, the monetary costs of delay to the development project, costs which are already accumulating from the disruption of the work of the crew and machinery.

(iii) From the point of view of the 2nd Defendant as a public statutory authority; the interference with its statutory powers and responsibilities which it must fulfill in the public interest and its contractual obligations to the 1st Defendant to ensure the development of the project in the interest of the 1st Defendant as well as in the public interest.

30. Given the guiding principles identified above, my approach to the Plaintiffs' application for the continuance of the injunction until trial will be as follows:

(i) I am required to consider whether the Plaintiffs' claims give rise to a serious issue or issues to be tried and whether they have a real prospect of success.

(ii) For that specific purpose, I am required to consider the evidence presented on the application on both sides but without any requirement to resolve conflicts of evidence such as may arise on the affidavits.

The resolution of difficult conflicts of evidence and difficult questions of law are matters to be dealt with at trial.

(iii) If, however, it is readily apparent from the evidence presented, that one side's case is much stronger than the other's or that there is clear evidence in support of an important matter contended for by one side or the other, that is not a state of evidence to be ignored. That state of the evidence may well inform the decision on whether the injunction should be granted and so may well be an indication as to on which side the *"balance of convenience"* lies.

(iv) Undertakings in damages may be required from the Plaintiffs (as already required by way of the interim injunction) if the balance lies in favour of the continuation of the injunction. On the other hand, even if the Plaintiffs' case shows a real prospect of success, the injunction should be refused if damages will be an adequate remedy and the Defendants would, respectively, be in a position to pay. In this regard especially, it would be appropriate to have regard to the public interest objectives of the second Defendant.

Factual Background

31. The subject-matter of the action and injunction is an area of Crown land and canal ways contiguous to the North Sound and which are the location of the docking facilities known as Safehaven Docks. In the Plaintiffs' pleadings it is described as Block 12C Parcel 374 but in the affidavit filed in support of the Defendants case by Mr. Paul Hurlston, it is referred to as Block 17A Parcel 262. This is explained by what Mr. Hurlston, the Director of the Ports Authority, describes as "reparcellation". I will refer hereinafter to it as the "Disputed Site" or the "Old Site", to distinguish it from other sites of note in the dispute.

32. The disputed site is zoned Public Open Space and as appears from the Hansards, has been the subject of public and political debate for many years referable to concerns that it should be preserved as a public space and available to boaters and especially the watersports and tour boat operators. The Hansards show that this objective has been recognised and endorsed by the Legislative Assembly which resolved in June 1999 that parts of Safehaven which is Crown land, including the disputed site should be preserved for those purposes. It appears in the evidence from a letter written by their lawyer Mr. Giglioli, that the Plaintiffs have been among the principal protagonists in this cause.

33. There is also the undisputed evidence that the Plaintiffs have, for many years, operated their boats from the disputed site but it is not admitted that they have done so for the unbroken period of 20 years required by statute for the acquisition of the prescriptive rights which they claim.

34. In this regard, the Statement of Claim avers that in 1989 the 4th Plaintiff moved his business operation known as "Captain Bryan Sail and Snorkel Tours" to Safehaven and that in 1990, the 1st, 2nd, 3rd and 5th Plaintiffs moved their operations to Safehaven.

35. The Statement of Claim continues in paragraphs 6-9 in these terms:

> "6. *The said Safehaven location was selected by the Plaintiffs because it was an excellent location by virtue of its proximity to the Cruise (Ships) and it had suitable space and there was no objection to their doing so.*
>
> 7. *When they moved their boat operations to the said location the 1st, 3rd and 5th Plaintiffs built a new dock at a cost of approximately $2,000 (C.I.) at the said location to enable the docking of their boats.*
>
> 8. *When he moved to the said location, the 4th Plaintiff built a wooden dock at a cost of approximately $3,000 (C.I.) at the said location to enable the docking of his boats."*

36. The Statement of Claim goes on to describe the further expenditure on the site undertaken by the Plaintiffs (such as for the repair and expansion of docks and the installation of water and electricity supplies) and their further investments in boats and tour buses; all on the basis of continuous access to and use of the disputed site over the years since 1989/1990.

37. This continuous and open user, acquiesced in by the Crown and its successor in title the 2nd Defendant, continued for some 23 years until the 27 July 2012. That was the

date on which the 1st Defendant, with the consent of the 2nd Defendant, posted a notice confirming the commencement of construction works at Safehaven, including the disputed site, on 13 August 2012. That Notice also declared the requirement for all water sports and tour boat operators, including the Plaintiffs, to vacate the disputed site and relocate to two other sites (the "First and Second Interim Sites") prior to the 13th August 2012.

38. According to Mr. Paul Hurlston, the permissions granted the Plaintiffs (and other operators) by the 2nd Defendant, for the use of and access to the Old Site, were terminated by that Notice, a copy of which is exhibited to his affidavit. This Notice is therefore germane to the 2nd Defendant's defence to the Plaintiffs' action, and is derived from powers and rights which are said to arise under the Port Authority Law and Port Regulations. The Port Authority Law and Regulations are said to apply because the land in the area of Safehaven (including the disputed site) were vested in the Port Authority by the Governor acting in the right of the Crown and thus became a "port area" and "port facilities", within the meaning of the Law and Regulations as at the date of the vesting in October 2003. This vesting in the Authority was however, as appears also from the Hansards; the fulmination of the Legislative Assembly's early resolution to protect and develop the disputed site and other areas of Safehaven for public use and enjoyment.

39. For its part, the 1st Defendant relies on a contract entered into with the Government on the 7th January 2009 ("the Main Agreement") and subsequent ancillary agreements with the 2nd Defendant, for the development of the Safehaven area, including the

disputed area. The Main Agreement and the development projects which it allows, include the construction of a public park and marina at Safehaven.

40. It is central to the Defendants' case (according to para. 6.3 of Mr. Hurlston's affidavit) that as a first step towards the development of the public marina, the Main Agreement required the reparcellation of the disputed site – Block 17A, parcel 261 (then Block 12C parcel 374) – so that the shape of the Parcel would be transformed to fit with the design of the proposed new marina. The disputed site, as well as other adjoining parcels, would then be excavated to create the marina basin and water ways of the project. The excavation requires that all vessels moored at the Old Site be relocated. The Old Site, as well as surrounding areas to be taken into the development, are already the subject-matter of a 99 year lease granted to the 1st Defendant by the 2nd Defendant.

41. Mr. Hurlston also deposes, that the 1st Defendant has developed adequate interim berthing sites that the Plaintiffs and other boat operators can use pending construction of the new marina. Once the new marina is operational, the Plaintiffs' vessels will be able to apply for berthing rights in the new marina.

42. This is all pursuant to certain provisions in the Main and Ancillary Agreements in the following terms and upon which the Plaintiffs, in turn, rely also for their further claim of a constructive trust binding the 1st Defendant to the observance of their rights.

43. First, in the Main Agreement at clause 2:

> *"The Developer hereby agrees that it will use its best endeavours to procure an agreement with the Port Authority which will require the Developer to develop a public marina on a suitable and appropriate*

location within or in close proximity to the Property which agreement shall be substantially in the same form and substantially on the same terms as the (Ancillary Agreement) annexed hereto as "Schedule 1".

44. And from the Ancillary Agreement at recitals (E) and (F)

"The Governor, the Authority and (the Developer) are desirous of having the Developer develop a public marina and associated facilities to be owned and managed by the Authority within close proximity to the development which the Developer intends to create (on adjacent additional land leased from the Crown).

To achieve the necessary layout of such a public marina, the Port parcels will need to be reshaped and reconfigured by way of reparcellation so as to create a parcel of the appropriate size, shape and alignment so as to allow for the creation of all of the necessary facilities required by the Authority for such public marina."

45. And at Clause 1:

"The Developer hereby agrees that it will...reconfigure and reshape the Port parcels from the existing shape and location shown hatched in green on the Reparcellation Plan annexed hereto into the shape and location shown hatched in red thereon so as to form one parcel for the public marina..." (Hereinafter the "*Port Marina Parcel*").

46. At Clause 2:

"The Developer will thereafter with all due despatch at its own expense...:

(i) *Firstly, create temporary berthing facilities along the north side of the Port Marina Parcel within the area shown hatched in blue and labeled as the "Interim Site" on the plans annexed hereto (hereinafter "the Marina Plan").*

The Interim Site shall provide similar facilities for berthing and for the provision of water and temporary restrooms as currently exists on Parcel 374 until such time as the permanent public marina is constructed in accordance herewith.

Upon completion of construction of the permanent public marina, all vessels berthed upon the Interim Site shall be moved to the new permanent marina and use of the Interim Site will be discontinued...."

47. And finally, for present purposes, at Clause 3 (i):

"Upon completion of the reparcellation and registration of the Port Marina Parcel the Authority shall:

(i) *Take the necessary steps to terminate any and all arrangements it may have with any persons with regards to the use and enjoyment of Parcel 374 as may exist immediately prior to the reparcellation and shall notify any persons who are using or occupying the same that they shall move their vessels to the Interim Site...."*

48. The Defendants rely on these provisions not only as evidence of their legal powers and entitlements, but also as evidence of the carefully planned nature of the

Safehaven public marina project, the steps taken in that context to preserve the public interest in the development of the project and, more specifically in this regard, the steps taken to protect and preserve the legitimate interests of the Plaintiffs to be able to continue to operate their businesses from the Interim Sites and later on the permanent basis, from the marina itself when it is completed.

49. Hence, Mr. Imrie's remark that the Plaintiffs, by seeking this injunction, are acting contrary to the wider public interests and their own interests, those which they have themselves campaigned for in the public and political domain for many years.

50. Dr. Barnett's response is that the Plaintiffs are not convinced that their rights are being protected, although they are pleased to note within the contractual arrangements between the Crown, the 1st Defendant and the 2nd Defendant; the implicit recognition of the existence of their prescriptive rights to operate their boats from the disputed site. This they say, is evidenced in particular by the requirement within the Agreements for suitable interim berthing facilities and for the availability of permanent berthing facilities within the new public marina when it is completed. These the Plaintiffs say, are provisions which, although the Plaintiffs are not contractually privy to them, give rise to a constructive trust in the Defendants such as to place an obligation on them to protect the Plaintiffs' interest which they recognise in their Agreements and, at the very least, to provide them with suitable access and docking facilities both on the interim and permanent basis. This head of claim, along with the others will be considered further below.

51. The immediate basis of the claim for injunctive relief is as the Plaintiffs allege, the unsuitable nature of the interim facilities which have been provided.

52. Paramount in this regard, is the Plaintiffs' assertion (supported by the expert evidence of a most senior and experienced mariner, Capt. Harris McCoy) that the interim facilities are, and the permanent facilities will be, unsuitable and unsafe for operation of their boats, especially those which are of the single engine or "single screw" types.

53. In this regard the Plaintiffs amended Statement of Claim avers further at paragraphs 15, 16, 24, 25 and 26 that:

> *"15. In 2012 it was proposed by and on behalf of the Defendants that the Plaintiffs should relocate their boat operations to a temporary marina. The Plaintiffs objected on the grounds that the alternative presented is unacceptable, unsafe and/or unsuitable.*
>
> *16. The Plaintiffs have been shown an alternative facility but it is unsuitable because it is a danger in that it has just a sea wall, no dock and the cruise ship passengers will be apprehensive and reluctant to use it nor will the cruise ship operators with whom they have contracts be satisfied as the facility is muddy and unsafe to walk on.*
>
> ...
>
> *21. A license has also been proposed to the Plaintiffs which indicates the Defendants intended to move the Plaintiffs (from) their present location without offering them any convenient or suitable alternative facilities.*
>
> ...

24. *The Defendants have agreed among themselves to remove the Plaintiffs from the said location and facilities and the 1st Defendant has commenced to take action and to carry out operations to dismantle the Plaintiffs' property and facilities and to prevent their said access.*

25. *The Plaintiffs' primary business operation consists of the provision of water sports amenities to tourists and the cessation or interruption of the business operation will cause them financial ruin or serious damage to their business interest as well as adversely impact the tourist trade of the Cayman Islands.*

26. *The Defendants threaten and intend to continue this said obstruction and deprivation of the Plaintiffs of their rights unless restrained from doing so."*

54. From this pleaded case the prayer for the final declaratory relief is as follows:

"...the Plaintiffs claim

1. *A declaration that they are each entitled to a right of way from Turnberry Drive [(the public road through Safehaven)] to Safehaven (Docks) for themselves, their servants, agents and licensees on foot or by motor vehicles and other conveyances at all times and for the purposes of their boat operations;*

2. *A declaration that they are each entitled to a right of passage from the open space to the docking facilities on the said property for their boats at all times for the purposes of their boating business;*

3. *A declaration that they and each of them are entitled to use the said rights as legal rights under and by virtue of section 2 of the Prescription Law;*

4. *A declaration that the First Defendant is a constructive trustee having the duty to protect and preserve the Claimants' rights of way and access to the said location and docking facilities;*

5. *A declaration that the claimants and each of them are entitled by virtue of a proprietary estoppel to the said access and rights to the use of the said facilities."*

55. Having regard to the principles already identified and which govern this application for an injunction, I am now concerned to assess whether the Plaintiffs have a seriously arguable case in support of all or any of those claims.

56. First, it is important to note that the claims ultimately seek relief that will be declaratory in nature. The Plaintiffs seek orders by which the Court will declare that they have and are entitled to continue to have the rights which are claimed; that is: the rights of way by easement across the Disputed Site to Safehaven Docks, the right to use the Disputed Site for the maintenance of the facilities related to their business operations including the docks themselves, and the right of access to the docks along the Safehaven motor ways for their boats and the use of the docks as berthing for their boats.

57. The Plaintiffs will also seek orders from the Court declaring that the Defendants are bound to recognise their rights and in the case of the 1st Defendant, that it is under a duty as constructive trustee to protect and preserve those rights.

58. Properly understood then, it appears that the Plaintiffs are seeking declaratory orders from the Court that would require the Defendants to leave intact and preserve the Disputed Site, as that would be necessary for the continued enjoyment of the specific rights which they claim. Thus understood, what the Plaintiffs by their claims will be seeking at trial will be a permanent injunction preventing for all time, the excavation and reconfiguration of the Disputed Site. And it follows that what they seek now is an injunction pending trial so as to allow the permanent injunction, if granted, to become effective.

59. Accordingly, and notwithstanding the evidence placed before me upon this application as to the unsuitability of the Interim Sites and the further evidence from Capt. Harris McCoy as to the unsuitability and unsafe nature of the turning basin of the proposed public marina, there is no relief sought by the Plaintiffs, such as by way of mandatory injunction, that would require the Defendants to improve either the Interim Sites or the proposed public marina.

60. It is in this context of the understanding of the real nature of the relief being sought that I must now assess the relative strengths or weaknesses of the Plaintiffs' claims to answer the question whether there are serious questions to be tried; whether there is a real prospect of the claims **succeeding** and ultimately, where the balance of convenience lies.

61. There are four interrelated but distinct legal causes of action:

(i) The easement claim;

(ii) The claim to prescriptive rights;

(iii) The claim for proprietary estoppel;

(iv) The constructive trust claim

The easement and prescriptive claims

62. Dr. Barnett submits that the Plaintiffs are entitled to three interrelated incorporeal rights. First, the right to sail into and out of the docking area (which is also a public right); second, the right to proceed over the land of the Disputed Site to the docks at which their boats are berthed; and third, the right to berth their boats at the docks established by them on the Disputed Site. He submitted that an incorporeal right of way, such as any of these, may be appended to another incorporeal right, provided the one is capable of union with the other without any incongruity and none needs to be dependent upon what the doctrine of prescriptive easements regards as a "dominant" or "servient" tenement.

63. To the contrary, Mr. Imrie submits that an easement cannot exist unless the land over which it is claimed is servient to adjoining land which is the dominant tenement. An easement by right of way is, he submits, a right exercisable by the owner for the time being of an estate in land which is the dominant tenement, to the servient tenement over which the easement is claimed. The Plaintiffs own no such land but instead claim a right of way from the public road over the Disputed Site to docks where their boats are berthed. Such a right of way granted to a party who has no proprietary interest in a dominant tenement amounts to a mere licence.

64. For this proposition, Mr. Imrie relies on recent dicta from Gibson LJ in ***London v Blenheim Estates Ltd. v Ladbroke Retail Parks Ltd.*** *[1993] 4 All.E.R. 157* explaining the rationale for the rule as follows:

> *"If one asks why the law should require that there should be a dominant tenement before there can be a grant, or a contract for the grant, of an easement sufficient to create an interest in land binding on successors in title of the servient land, the answer would appear to lie in the policy against encumbering land with burdens of uncertain extent."*

65. In response, Dr. Barnett submits that the categories of easements are not closed, they alter and expand with the changes that take place in the circumstances of mankind: ***Dyce v Lady James Hay*** *(1852) 1 Macq. 305 (312-3).*

66. Thus easements have long included rights of way and the rights to use wharves and jetties and the textbooks provide many varied examples of easements that have been recognised by the courts. The three interrelated incorporeal rights claimed by the Plaintiffs are appurtenant and appended to each other and are capable of giving rise to the easements claimed. Further, that it is not detrimental to such easements that the corporeal or incorporeal rights may operate to the benefit of other persons (such as, in this case, other boat operators). Reliance is placed on five cases in particular: ***Hanbury v Jenkins*** *[1901] 2 Ch 401 (422);* ***Thomas W. Ward Ltd. v Alexander Bruce (1959) Grays Ltd.*** *2 Lloyds Rep. 472;* ***Todwick v Western national Omnibus Co. Ltd.*** *[1934] A.C. 228;* ***Pugh v Savage*** *[1970] 2 W.L.R. 634* and ***Foster v Warbington UDC*** *[1904]7] All. E. R. 366.*

67. Subject to the evidentiary issue of proof of user for the unbroken prescriptive period of 20 years, I am persuaded that the Plaintiffs' claim to these interrelated rights provide a seriously arguable basis for a claim to an easement, or if not to an easement strictly so called, then to prescriptive rights of way which were cognizable at common law (under the doctrine of lost grant rather than the time immemorial test)[1] and so came to be recognised by statute in the Prescription Law.

68. This brings me to the related second head of claim for prescriptive rights based on Section 2 of the Prescription Law which provides:

> *"... (a) Any profit of benefit;*
> *(b) Any way or easement;*
> *(c) Any water course; or*
> *(d) The use of any water,*
>
> *a claim to which may be lawfully made at common law, by custom, prescription or grant, has been actually enjoyed or derived upon, over or from any land or water of Her majesty the Queen, any person or any body corporate by any person claiming right thereto, without interruption for twenty years, the right thereto shall, subject to the provisos hereinafter contained be deemed absolute and indefeasible, unless it appears that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." (Emphasis supplied.)*

69. The words in emphasis – *"has been actually enjoyed or derived upon, over or from any land or water of Her Majesty the Queen"* – admit of the wider meaning of a prescriptive right of way contended for by Dr. Barnett as they are not premised, on

[1] See Gale on Easements, 16th Ed. London, Sweet, Maxwell 1977, Chp. 4.

the face of them, upon any requirement of the existence of a dominant tenement; or upon the existence of a dominant/servient tenement relationship. From this it is at least seriously arguable that the right can accrue in any person, whether adjacent land owner or not, who has actually enjoyed the right of way upon or over Crown land or water for the unbroken statutory prescriptive period of 20 years.

70. Dr. Barnett submits that since the Plaintiffs have been enjoying the claimed amenities for over 20 years, they are entitled to the statutory prescriptive rights granted by section 2 of the Prescription Law.

71. Although it is disputed that the Plaintiffs have used the rights for more than 20 years, the evidence is, on balance supportive; as may be inferred from the aerial photographs going back to 1992 and which show boats at berth at the Old Site. Cpt. Harris McKoy's evidence also affirms of the existence of the public boat slip giving water access from the public road to the canal way at Safehaven from, at latest, 1989.

72. By reference to the Port Authority Law and Regulations, Mr. Imrie submits that even if the prescriptive rights claimed are cognizable at law, the 20-year prescriptive period required by the Law never accrued in the Plaintiffs. It was interrupted and determined when the Disputed Site was transferred to the Port Authority from the Crown, on 2nd October 2003.

73. Mr. Imrie submits that as of that date, the Disputed Site and docks became a "port area" and "port facilities" within the meaning of the Port Regulations. Section 2 defines "port facility" as including "any craft, dock, jetty, buoy, marker, machinery, light, building or land under the control of the Authority."

74. Further, whilst Port Authority facilities may be used by a wide range of persons and for a number of different reasons, such use does not take place with the mere "acquiescence" (as required by the Prescription Law in this case), of the Port Authority. If so, that would lead to an unworkable situation in which private property rights could be obtained by members of the public simply as a result of them using boat ramps, moorings, docks and other facilities regularly over long periods of time; that is: the Plaintiffs' argument in this case. It is for this reason his submissions go, that section 4 of the Port Regulations has provided since 1976 that:

> *"Use of the Authority's facilities constitutes a consent by the use of the terms and conditions hereof and is evidence of agreement on the part of vessels and other users of such facilities to pay all charges specified and be governed generally by these Regulations."*

75. Accordingly, says Mr. Imrie, the doctrine of prescriptive easement cannot apply because the 2nd Defendant did not "acquiesce" in the Plaintiffs' usage of the land, but rather permitted it by virtue of the statutory licence set out in section 4 of the Port Regulations. As a matter of binding covenant and agreement, the Plaintiffs used the facilities (that is: the land and docks) subject both to such terms and conditions imposed generally by the Regulations themselves (including regulation 34 which deals with mandating boats to comply with changes in berthing arrangements) as well as by virtue of written licenses agreements in place as between the Authority and the Plaintiffs since 2008 and 2009.

76. These license agreements, he further submits, defeat the doctrine of prescriptive easement independently of, but also in addition to, section 4 of the Regulations and so

the accrual of the prescriptive period would have ended if not on 2nd October 2003, then no later than the respective dates of the written licences in 2008 and 2009.

77. In response to this argument, Dr. Barnett's submissions can be summarised as follows:

78. The super-imposition of the Port Regulations by the transfer of the land to the Authority in October 2003 cannot defeat the accrual of the Plaintiffs' rights acquired under section 2 of the Prescription Law. This is because the statutory licence arising from Regulation 4 and for which Mr. Imrie contends, is not the consent or agreement "*expressly made or given for the purpose by deed or writing*" required by section 2 of the Prescription Law. Section 2 binds the Crown and as the Authority is successor in title to the Crown and the Port Regulations operate in right of the Crown; section 4 of the Regulations may not be construed as overriding section 2 of the Prescription Law which binds the Authority as well.

79. Further, as regards the written licence agreements of 2008 and 2009, it is the Plaintiffs' contention that they have no application to the location of Safehaven docks on the land in dispute, but to an area of canal ways and berthing subsequently excavated and developed on other Crown land at Safehaven also transferred to the Authority, but to the south of the land in dispute. This specific focus of these licences is, moreover, apparent on the face of the licence agreements themselves.

80. In support of his response to Mr. Imrie's reliance on Regulation 4 as a form of statutory licence terminating the "acquiescence" of the Crown on which the Plaintiffs rely, Dr. Barnett placed particular reliance upon the case of ***R v Oxfordshire County Council; ex parte Sunningwell Parish Council [1999] 3 W.L.R. 160***.

81. While this was a case in which the House of Lords (per Lord Hoffmann) affirmed claims of members of the public generally to public prescriptive rights over a village green, the Judicial Committee also discussed the development of the law of acquisition, both of public and private rights, as it has come to be expressed in modern statute law.

82. From the judgment the following principles, applicable equally under the Prescription Law based as it is on the English statute, are drawn as identified by Dr. Barnett in his submissions:

(i) The use and enjoyment of a person claiming rights of way and other easements without interruption for 20 years bars any remedy by the owner of the property and defeats his claims.;

(ii) The use and enjoyment of these rights give rise to the presumption that the rights have lawful origin;

(iii) If this long enjoyment to the right can be shown, the court will strive to uphold it by regarding it to be of lawful origin;

(iv) Even if there is direct or circumstantial evidence that no grant was ever made, the law adopts the position that there was a lawful grant unless existence of the grant is impossible;

(v) Unless the owner can show that there was a written agreement or deed granting the rights over the property, the statutory perfection of the right of user comes into existence;

(vi) The open, peaceful and continuous use of the property for over 20 years is all that is needed.

83. It is the fifth of these principles that is most germane to the Plaintiffs' contention that Regulation 4 by itself could not have operated as a licence or "consent" such as to put an end to their uninterrupted continuous user of the Disputed Site. As Regulation 4 is not, in the terms of section 2 of the Prescription Law "*consent or agreement expressly made or given for that purpose by deed or writing*"; it cannot operate as consent or agreement for those purposes.

84. The fact of the matter is therefore, say the Plaintiffs, that they continued even after 2nd October 2003; to have the uninterrupted open and uncontested user of the Disputed Site with the acquiescence of the Authority and the mere fact that upon the Disputed Site being transferred to the Authority in October 2003, the Port Regulations became applicable, could not and did not determine the accrual of their prescriptive claim which was by then well advanced, well known publicly and fully recognised by the Crown. They received no written form of licence or consent in October 2003 and continued in their uninterrupted use of the disputed site being assured that their prescriptive rights would be recognised.

85. Whether or not Regulation 4 operated as the kind of "consent…expressly made or given by …writing" and required by the Prescription Law so as to deem the determination of the acquiescence upon which the Plaintiffs rely, is, I conclude, a seriously arguable issue to be tried.

86. As to the written licenses requested by the Plaintiffs and variously issued to them in 2008 and 2009 by the Authority, there are disputed issues of fact not given to resolution now.

87. For instance, as regards the 4th Plaintiff Noel Bryan Ebanks who claims a prescriptive right dating back to 1989; as the licence was issued to him in August 2009, his 20-year prescriptive right may already by then have accrued.

88. And, as regards all the three licences issued in 2008 and 2009, there is the dispute already identified above, over whether they are referable to the Disputed Site or to that other more southerly site (bearing different Block and Parcel numbers) and which is specifically indentified in a map annexed to those licences.

89. Questions of construction of these licences, arising from the presence of terms in them relied upon by Mr. Imrie as indicating relevance to Safehaven generally such as "*the use of Safehaven*" and "*the immediate area of Safehaven should be (kept) clean and free of debris at all times*"; are not given to resolution now but only, if they remain moot, at trial.

90. But at the moment, there are indicia of a seriously arguable case for the Plaintiffs' opposite contention of what those licences mean.

91. In the first place, they were neither sought by the Plaintiffs nor issued until 2008-2009, some five to six years after Safehaven was transferred to the Authority; thus indicating that a need for written licences had come into existence.

92. This may be regarded as contrary to a view of Regulation 4 as operating automatically to bind the Plaintiffs from October 2003, immediately upon the vesting of Safehaven in the Authority.

93. Secondly, the process leading to these licences was initiated by the Plaintiffs and not by the Authority in the purported assertion if its rights and powers under the Law and

Regulations or in purported fulfilment of a requirement under the Prescription Law for the expression of its consent.

94. Moreover, the process was initiated by the Plaintiffs by their letters, not for permission for their continued use of the Disputed Site, but specifically for additional berthing and rights of way at the more southerly site, thus expressly and implicitly acknowledging that that permission from the Authority was necessary for those purposes.

95. Having regard to these three factors in particular, there seems to me to be a seriously arguable issue whether the licences issued in 2008-2009 may be regarded as licences that could affect the Plaintiffs' uninterrupted use of the Disputed Site, operating as licences by which the Authority expressly determined its acquiescence to the Plaintiffs' user of the Disputed Site.

96. There are other arguments on both sides which go to the questions raised by the Plaintiffs whether the Authority has acted and seeks to continue to act outside or ultra vires the powers vested in it by the Port Law and Regulations. These relate to the steps taken by the Authority to delegate, by agreement or licence to the 1st Defendant and its agents, power to evict the Plaintiffs and to destroy the docks and other berthing facilities installed by the Plaintiffs on the Disputed Site and the very destruction of the site itself by way of excavation.

97. In essence, Dr. Barnett submits that no such powers are vested in the Authority. That its powers given by section 6 of the Law and related powers in Regulation 34 are clearly given for the specific purposes only of maintaining safety, preventing congestion and maintaining orderliness in ports and coastal waters.

98. These include the establishment of berths, the supervision of navigation and berthing within existing ports or marinas.

99. The powers are not given to allow the Authority to arrange or effect the destruction of existing berths or to develop marinas for some general purpose or to foster the interests of a private developer; all as involved in what is proposed here.

100. Moreover, the discretionary power granted by section 11 of the Port Authority Law requiring all owners of vessels within the jurisdiction to comply with directions of the Authority, is not absolute and at large. Those powers, which include the power to give directions as to navigation and berthing, when interpreted in context may not, for instance, be used to prevent a vessel from mooring at an established and suitable berthing: citing ***The Excelsior (1868) L.R. 2 A & E 268.***

101. Very importantly, continues the argument, the Port Authority Law should not be interpreted so as to deprive persons of existing proprietary rights. The principle of construction is that a legislative enactment is not to be read as prejudicially affecting accrued rights or existing status *"unless the language in which it is expressed requires such a construction:* ***Main v Stark (1890) 15 App. Cas. 384 at 388.***

102. An unfettered discretion is inimical to the Rule of Law and so it is necessary to examine the true intent and meaning of the empowering enactment in order to determine whether the Authority has the powers which it has purported to assign or delegate by contract to the 1st Defendant to effect the cessation of the use of the Plaintiffs' established berthing for all times; citing among others: ***Dick v Badort, Freres (1883) 10 Q.B.D. 387*** and ***Hughes v Fowley Harbour Commissioners [1927] 96 L.T. (PDA) 42.***

103. These I also consider to be, albeit in varying degrees, seriously arguable issues.

Proprietary estoppel

104. Related to the questions as to the powers of the Authority, is this argument by the Plaintiffs which, based on equity as it is, must be regarded as contended for even if the Authority were found to have been acting within its statutory powers.

105. The Plaintiffs have not particularised the estoppel claim in the Statement of Claim, it appears only in the prayer for relief. It has been explained in Dr. Barnett's written submissions as follows.

106. The Plaintiffs, by reliance on the acquiescence of the Crown and the Authority, have expended significant sums of money in erecting and re-erecting and improving their docking facilities, installing amenities and in the expansion of their businesses by the acquisition of boats and tour buses.

107. In *Snell's Equity 31st Ed. para 101-5*, a proprietary estoppel is explained as being capable of arising in such circumstances:

> *"Equity has a long tradition of enforcing or granting rights in or over land to those who have been induced to invest in or improve land owned by others either as a consequence of their own mistake (acquiesced in by the owner) or by direct encouragement or informal agreement."*

108. In ***Taylor Fashions Ltd v Liverpool Victoria Trustee Co. Ltd. Noted at [1982] 1 Q.B. 133***, Justice Oliver (as he then was) granted a decree of specific performance for an option to renew a leasehold on the basis of the finding of a proprietary estoppel. In doing so, he followed and applied (at 154 G-H) the following dicta from Lord

Denning MR in ***Moongate Merchantile Co. Ltd. v Twitchings*** *[1976] Q.B. 225 at 241*:

> *"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J. put it in these words: "the principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."*
>
> *Sir Owen said so in 1937 in Grundt v Great Boulder Proprietary Gold Mines Ltd. (1937) 59 CLR 641, 674.*
>
> *In 1947 after the High Trees case (Central London Property Trust Ltd. v High Trees House Ltd. [1947] L.B. 130), I had some correspondence with Sir Owen about it: and I think I may say that he would not limit the principle to an assumption of fact, but would extend it, as I would, to include an assumption of fact or law, present or future. At any rate, it applies to an assumption of ownership or absence of ownership. This gives rise to what may be called proprietary estoppel. There are many cases where the true owner of goods or of land had led another to believe that he is not the owner, or at any rate, is not claiming an interest therein, or that there is no objection to what the other is doing.*

In such cases, it has been held repeatedly that the owner is not to be allowed to go back on what he has led the other to believe. So much so that his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by his conduct – what he has led the other to believe – even though he never intended it."

109. For the enquiry at trial, if the factual premises of the Plaintiffs' case are shown to exist; the issue will simply be whether, in all the circumstances of this case, it would be unconscionable for the Crown or its successors in title (the Defendants) to deny the reasonable understanding upon which the Plaintiffs relied in making the expenditures which they did by way of improving the Disputed Site and acquiring boats and buses; all the while expecting to be able indefinitely to operate their businesses from the Disputed Site.

110. An important aspect of the principle in the instant case submits Dr. Barnett, is that the assurances given may be passive and need not be sufficiently certain to be enforceable as a contractual right. It is not necessary to look for an irrevocable promise, since it is the other party's detrimental reliance on the promise (in this case that the user and rights of way would be allowed indefinitely) which made it irrevocable: ***Gillett v Holt [2001] Ch. 210.*** See also ***Denson v Bush and Bush 1980-83 CILR 41***; where the equity acquired by the Plaintiffs' indefinite occupation of a house and expenditure for repairs to it, were recognised by the grant by this Court of an indeterminate licence.

111. Further, that the expenditure may have been made, not only on improving the defendant's property, but also for the acquisition or improvement of the claimants' own property or for his own benefit, in reliance on the right granted by the defendant in the latter's property.

112. Accordingly, expenditure incurred by the Plaintiffs here in procuring new boats, or buses or other equipment specifically to operate from the facility of the Disputed Site, can be of additional import in support of the claim: ***Rochdale Canal Co. v King*** ***(No. 2) 1853 Beav. 630).***

113. In response, Mr. Imrie submits that the Plaintiffs have so far and will at trial fail to establish that the 2nd Defendant has (i) made a representation or promise; or (ii) has acquiesced in the Plaintiffs' mistaken belief that they have or will have a proprietary interest in the relevant land.

114. He argues that at best, the Plaintiffs' evidence (per their affidavits) is that in the year 1990, a member of the Executive Council (now the Cabinet), informed them that the particular land was to be for commercial boat operators and indicated that there were to be no inhibitions to their using it for their operations. This, he says is wholly inadequate:

(a) The alleged statement is not the kind of unambiguous assurance repeated on many occasions over a number of years as was held to found the proprietary estoppel claim in ***Gillett v Holt*** (above). In fact, it is nothing more than what was referred to in that case as a "mere statement of intention that can be withdrawn" at any time.

(b) The alleged statement is not a representation or promise that the Plaintiffs had or would have any proprietary interest in the specific area of land in question, namely the Disputed or Old Site, which is essential to establish a proprietary estoppel claim: citing ***Western Fish Products v Penwith District Council [1981] 2 All. E.R. 204***

(c) The 2nd Defendant formally acquired the land in question in October 2003 and, although it has been aware of the Plaintiffs' use of the land since then:

(i) At no time until this application has it been suggested to the 2nd Defendants that the Plaintiffs had any proprietary or equitable rights to access and use of the land (see Mr. Hurlston's affidavit).

(ii) At no time have the Plaintiffs made any attempt to register their alleged rights in accordance with section 138(2) of the Registered Land Law. (A provision which allows but does not mandate the registration of easements or profits acquired by prescription by "peaceable, open and uninterrupted enjoyment for a period of twenty years").

(iii) Moreover, says Mr. Imrie, the 2nd Defendant's permission for the Plaintiffs to construct water pipes and connect electricity to the Disputed Site, cannot reasonably be viewed as any sort of representation or promise that the Plaintiffs had or would have a proprietary interest in land. And the Plaintiffs' further evidence regarding detriment by expenditure undertaken for the construction of docks and acquisition of boats and buses, does not establish that such

expenditure was undertaken in reliance upon representation or promise from the 2nd Defendant or indeed, upon any belief on the part of the Plaintiffs at the times of the expenditure, that they had or would have a proprietary interest in the land at the Safehaven Docks. The Plaintiffs' evidence is entirely consistent with the expenditure being undertaken on the understanding that they had the 2nd Defendant's permission to use the site to moor their vessels until further notice and nothing more.

115. It will be immediately apparent from all the foregoing, how fact sensitive will be the enquiry to be undertaken into the questions of reliance by the Plaintiffs upon the assurances given or upon the acquiescence of the Crown and its successor in title the 2nd Defendants.

116. Similarly fact sensitive will be the enquiries to be undertaken into the question of what detriment may have been suffered by the Plaintiffs by their reliance in those regards (or "benefits obtained" as Mr. Imrie would assert to the contrary) and thus ultimately into whether it would be "unconscionable" (in the ***High Trees*** sense) for the Defendants to deny the Plaintiffs' claim to proprietary estoppels. The Courts have not yet attempted to set out a definitive list of factors relevant to the question of unconscionability in a proprietary estoppel claim.

117. Seen in this light, it is my view that the claims for proprietary estoppels present a serious issue to be tried.

Constructive Trust claim against the First Defendant

118. This claim also is not yet particularised in the Statement of Claim, although it appears in the prayer for relief. Dr. Barnett described it in his submissions as follows.

119. The undertakings entered into between the Governor and the Authority with the Developer (the 1st Defendant) purports to confer certain benefits and privileges on the Plaintiffs in substitution for their existing rights (as set out above at paras 43-47 of this ruling). These undertakings certainly place an obligation on the 1st Defendant to provide the Plaintiffs with a satisfactory substitute for their existing facilities. It is obvious that the water sport and tour boat owners and operators were recognised as having a viable legal claim to the user of Safehaven and that the 1st Defendant has been granted the licences and contractual rights with full knowledge of those rights or claims and are required to provide some appropriate alternative facility. Clearly, the 1st Defendant took with knowledge of the undertakings given by the Crown through the Government and the 2nd Defendant that the Plaintiffs (and other boat operators) who had been enjoying the benefits of access to the existing piers and docking facilities would be adequately provided for. There is also (within the contractual arrangements) a recognition that the Plaintiffs have established physical facilities on the disputed site.

120. While the Plaintiffs may not be able to sue on the basis of a contracted right (not being parties to the arrangements between the Crown, the 1st Defendant and the 2nd Defendant), it is submitted that the 1st Defendant has become a constructive trustee having an obligation to protect the Plaintiffs' interests and at the very least to provide them with suitable interim and permanent access and docking facilities. Dr. Barnett cited and relied upon two cases in particular: (i) ***Linden Gardens Trust Ltd. v***

Lenesta Sludge Disposals Ltd. & Sir Robert McAlpine *[1984] 1 A.C. 85* and (ii) ***Darlington, Borough Council v Wiltshire Northern Ltd.*** *[1995] 3 All. E.R. 895.*

121. Mr. Imrie was at a disadvantage in responding to this head of claim because of lack of particularization and the minimal nature of the arguments in support of it presented before Williams J. at the earlier stage. It is, to say the least, a novel argument. Unlike the circumstances in those two cases cited and relied upon by Dr. Barnett; here neither the Crown nor the 2nd Defendant has assigned its right to enforce any obligation under the contractual arrangements against the First Defendant to the Plaintiffs. Strictly therefore, unlike in those cases, the Plaintiffs have been and continue to be in the position of non-parties to the arrangements.

122. What Dr. Barnett seeks to invoke are broad principles having general applicability, relying on dicta from those two cases in which rights were enforced for the benefit of third parities.

123. First, from the ***Linden Gardens*** case (per Lord Browne-Wilkinson from the lead opinion):

> *"In such a case [(where a party to the contract had specifically contracted that rights of action acquired under it could not, without its consent, be transferred to third parties who later became owners or occupiers of houses constructed under the contract)], it seems to me proper...to treat the parties as having entered into the contract on the footing that [one party] would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to*

hold [(the other party – then McAlpine)] liable for the breach. It is truly a case in which the rule "provides a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it"."

124. In the second case cited by Dr. Barnett – ***Darlington Borough Council*** – the subject was again an assignment of rights under a building contract in respect of which the assignee, who was not the employer but a third party to the actual agreement, was found to be entitled to sue the contractor to recover substantial damages for defects in the performance of the contract and where it was found to be foreseeable that such defects would cause loss to the third party.

125. The court also held (per Dillion and Waite LJJ as taken from the head note) that, in light of the terms of the contract, if the employer had, before the assignment, sued in its own name for damages for the alleged breaches of the building contract, it would have held any damages recovered as a constructive trustee for the Plaintiff and would have been accountable in equity. The employer could therefore have recovered from the contractor the losses of the plaintiff to whom it stood, in that respect, in a fiduciary relationship.

126. The present case plainly stands at some distance from the circumstances described in those two cases relied upon by Dr. Barnett in support of the constructive trust claim. First, this is because there has been no assignment to the Plaintiffs of any rights of the Crown or 2nd Defendant under the contractual arrangements with the 1st Defendant.

127. Furthermore, and, perhaps more difficult for the Plaintiffs, is the fact that far from alleging any breach or anticipatory breach on the part of the 1st Defendant of those arrangements, the 2nd Defendant appears to be supporting the position of the 1st Defendant in all material respects.

128. For all these reasons, and flexible though the emergent principles found in the cited cases may be; I am unable to conclude as I have in respect of the other heads of claim, that the Plaintiffs have shown serious issues to be tried or a real prospect of success at trial on a constructive trust claim.

Adequacy of damages

129. But having found prospects of success at trial in respect of the other heads of claim, I must now consider whether damages would be an adequate remedy for the Plaintiffs, instead of the injunction.

130. It must of course be immediately recognised, that refusal of the injunction allowing the continuation of the works by the 1st Defendant, would result in the immediate destruction by excavation of the Disputed Site and all the berths and other facilities which stand on it.

131. While the contractual arrangements between the Crown and the 1st and 2nd Defendants call for reconfiguration of the Disputed Site and the development of the permanent public marina as encompassing the reconfigured site, the excavation of the site and destruction of the Plaintiffs' berths and other facilities would be permanent and irreversible.

132. The ejection of the Plaintiffs from the Disputed Site and their facilities thereon which they have been undisputedly using for over 20 years is described, by Dr. Barnett, as

not only disruptive and harsh, but also potentially ruinous to their businesses and injurious to their ongoing commercial activities. The interruption of a person's business activities is detrimental to their vocation as well as to their finances. The loss of credibility or patronage and of goodwill which the ejection and interruption threaten cannot be compensated adequately by damages. Accordingly, the argument is that there is no clear alternative open to the Plaintiffs but to seek an interlocutory injunction until their claims are resolved at trial. There is, on the other hand, submits Dr. Barnett, an obvious alternative open to the Defendants. As part of their understanding and agreement to respect and protect the interests of the Plaintiffs, they can and should arrange for adequate and safe alternative facilities with interim, and ultimately, permanent assured legal rights of user and occupation for the Plaintiffs.

133. Mr. Imrie responds that even if the Plaintiffs' concerns about the suitability and safety of the interim sites and safety of the permanent marina basin are reasonably premised, a claim for damages would remain the appropriate remedy and, indeed, it is pleaded in the Plaintiffs' prayer for relief. The measure of damages would be the diminution of their commercial activities and/or costs incurred arising from relocating their operations elsewhere. He asserts that there is an aura of unreality about the Plaintiffs' claims: they can operate their businesses in any way they see fit, and from any location they see fit. And from the affidavit evidence of Rachel Baxendale in particular (filed on behalf of the Defendants) the Court is invited to conclude now that the Plaintiffs are already successfully operating from the Interim Sites provided by the Defendants and from other locations. If they do not like the facilities at the Interim Sites, they can (temporarily or permanently) operate from elsewhere. The

suggestion being made by the Plaintiffs and which is unrealistic, is that no new marina facility can be created unless the Defendants take responsibility for safeguarding their business in the meantime.

The balance of convenience

134. The undisputed evidence is that these Plaintiffs, as indeed the other boat operators, have carried on individually and collectively a very substantial business enterprise from Savehaven Docks, including the Disputed Site.

135. From this enterprise they generate very significant economic activity for themselves and those they employ as they provide their services to tens of thousands, if not hundred of thousands, of cruise ship and other visitors each year.

136. Even the temporary disruption or diminution of their ability to operate their business (let alone for the minimum period of a year contemplated by the contractual arrangements) could result in very significant loss of reputation and revenue for their businesses and loss of reputation for the Islands' tourism product.

137. This is all as explained in the Plaintiffs' evidence.

138. No undertaking in damages is forthcoming from the Defendants, either jointly or severally, to compensate for any such losses as the Plaintiffs might experience after reasonable efforts to mitigate.

139. Instead, the Defendants' arguments on where the balance of convenience lies, would emphasize the consideration, which is true, that the ultimate purpose of the works, disruptive though they may be, will be the creation of a new public marina facility, which the Plaintiffs, *"if they so wish"*(as Mr. Imrie puts it) will be able to use.

140. There is no dispute, says Mr. Imrie, that the new marina is a project which is in the public interest undertaken by or under the supervision of a public authority and with regard to which, as the case law advises (as discussed above with reference to ***Smith and others v Inner London Ed. Authority)*** the Court should be slow to interfere.

141. In this case, he emphasizes the fact that the temporary facilities at Safehaven are being replaced by a purpose-built public marina, from which both recreational and commercial vessels will be able to operate. Although the Plaintiffs claim that their commercial operations are being hindered by the creation of this new facility, consideration must be given to the wider public interests and the interests of the other commercial operators. Furthermore, the Plaintiffs' arguments must be put into context having regard to what Mr. Imrie described as misleading information put before the Court, at the earlier hearing with regard to the use of the vessels currently docked at the disputed site. These he says are non-serviceable vessels which can be moored or docked elsewhere and the Plaintiffs are reported as already operating their businesses from the Interim Sites offered elsewhere at Safehaven and from other locations.

142. These submissions of Mr. Imrie are however, all predicated upon the Court now finding in favour of the Defendants that the Plaintiffs' claims have no prospect of success at trial.

143. But that premise is not available, in light of the findings above in this ruling to the contrary.

144. In the event of these findings of prospect of success in favour of the Plaintiffs, it is Dr. Barnett's submission on the balance of convenience as follows.

145. First, if there is doubt as to the inadequacy of damages in respect of the competing business and public interest activities of the respective parties (and such doubt is not conceded in respect of the injury to the Plaintiffs), the balance of convenience should be assessed on the basis of the third limb of the ***American Cyanamid*** authority as follows. They must have regard to the fact that the 1st Defendant developer is still in the initial stages of its operations at Safehaven but the Plaintiffs have been operating at the disputed site for over 20 years. Thus the approach indicated by Lord Diplock is appropriate where he said (408G):

> *"Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him [(or here the Plaintiffs)] in the conduct of an established enterprise would cause greater inconvenience to [(them)] since [(they)] would have to start again to establish it in the event of [(their)] succeeding at the trial."*

146. The Plaintiffs, who have been successfully operating their businesses from the disputed site for more than 20 years, have not been the driving force behind the proposed development. While they, other operators and the public at large are intended to be the beneficiaries of the new marina, the Plaintiffs are concerned that

the real impetus behind the project, are the aims and objectives of the adjacent private development of the 1st Defendant; which are to be accommodated and facilitated by the excavation of the disputed site and the enlargement of the navigable canal basin of which the permanent public marina will be but a secondary part.

147. A concern of the Plaintiffs, supported by the expert evidence of Cpt. Harris McCoy, is that the overall emphasis of the entire development will be skewed too heavily in favour of the private interests and so to the ultimate detriment of the size and safety of the turning basin of the public marina and the berthing facilities (numbering only 20 berths as shown in the plans) available to the public.

148. These are the facilities for which, it seems, from the proposals, the Plaintiffs and other boat operators will have to compete among themselves (as well as perhaps among the wider public).

149. When what is proposed is compared to the fixed and settled site and facilities from which they have been operating at the Old Site, the Plaintiffs' concern is that as they put it, their interests "*are being sold away by the Second Defendant.*"

150. The Defendants, on the other hand, are concerned to progress the works to avoid waste of resources and money as already explained.

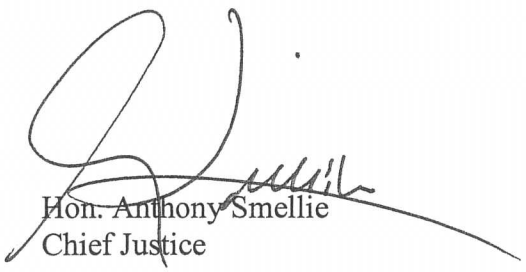
151. With all these concerns, as well as those expressed about the suitability of the Interim Sites in mind, I am satisfied that this is a case in which the balance of convenience comes down in favour of the grant of the injunction until trial and I so order.

152. Ancillary to this, it is necessary to grant the mandatory injunction in the limited terms also sought by the Plaintiffs and I so order as well.

153. However, in the exercise of the Court's case management initiative and discretion, I believe that I should invite the parties to mediate in the hope that the concerns which have been identified and perhaps now more openly and fully explained, can be resolved without the trouble, time and expense of going to trial.

154. Accordingly, I invite the parties to attend before a judge of this Court who will be available for the purposes of mediation and I may be consulted in chambers about the arrangements for those purposes.

155. The costs of these interlocutory injunction proceedings are reserved to the trial or to mediation, as the case may be.



Hon. Anthony Smellie
Chief Justice

October 17 2012