

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2026/0173

BETWEEN:

CYPRIAN KOWALCYK

Claimant/Applicant

and

CARIBBEAN DEVELOPMENTS (ANTIGUA) LIMITED

Defendant/Respondent

Injunction-Interlocutory Injunction-Application to restrain the defendant company from carrying out fogging activities- whether there is a serious issue to be tried-whether damages an adequate remedy
-Balance of convenience/justice of the case

Appearances:

Mr. Cyprian Kowalczyk in Person - Claimant

Dr. Errol Cort, Alketz Joseph and Jada Cort of Cort & Cort for the Defendant Company

2026: June 4
July 9

RULNG

(Application for an Interim Injunction)

- [1] **STEPHENSON, J. (Ag):** This is an application by Cyprian Kowalczyk (the Claimant) for an interim injunction restraining Caribbean Developments (Antigua) Limited (“the Defendant”) from carrying out aerial and ground-based mosquito-control (“fogging”) operations within a 50-foot radius of the Claimant’s property, pending the trial of the substantive claim in trespass and private nuisance. The application is opposed in its entirety.

- [2] An interim injunction is a remedy which is granted to regulate the position of the parties until their rights are determined at trial. Our Court of Appeal in the case of **Notre Dame and another -V- Rowntree Trading Limited and others**¹ approved of a passage taken from **C.M. Row's Law of Injunctions**² which this Court finds very apt in the case at bar. It says:

“Interlocutory injunction are such as are to continue, until the hearing of the cause upon the merits, or generally until further order. The object of an interlocutory injunction is to preserve matters in status quo until the case can be tried. ... It cannot be considered in argument as affecting the ultimate decision of a cause. It does not assume finally to dispose of the right and will only impose such restraint as may suffice to stop the mischief complained of ... A man who comes to the Court for an interlocutory injunction, is not required make out a case which will entitle him at all events to a relief at the hearing. Yet it is for him to show that his claim is serious and capable of being substantiated. It is enough if he can show that he has a fair question to raise to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until such a question can be disposed of.”

- [3] The Claimant is the registered owner of a single parcel of land within a coastal residential community of Jolly Harbour comprising approximately 850 property owners spread over some 300 acres. This property is located adjacent to recognised mosquito breeding grounds. The Defendant is a developer of a residential and commercial development known as Jolly Harbour (“Jolly Harbour”). The Claimant alleges that the chemicals deployed in the course of fogging cause damage to his property and to his family’s health, particularly his daughter.
- [4] The Defendant denies that any actionable harm arises and contends that its operations are essential to the protection of residents of the Jolly Harbour Community

¹ NEVHAP2022/0009

² 11th Edition page 26

THE CLAIMANT'S CASE

The application for injunctive relief:

- [5] The matter concerns an application for an Interlocutory Injunction to restrain the Defendant company from carrying out fogging/spraying exercises on its property and to prevent chemical drift and to ensure he and his family's safe access to and from their home with specific protective terms to include a buffer zone, access route protection, and a saving clause for emergencies. The Claimant has submitted that the Court's order should reflect his rights and the Defendant's commitments.
- [6] The application is grounded on the following assertions that:
- a. The Claimant owns and has property rights over Parcel 573³, including airspace and easements.
 - b. Two property rights are involved: proprietary interest in the land and easement rights for access.
 - c. The Defendant is a fellow freeholder with no contractual or statutory authority over his land.
 - d. The restrictive agreement registered against the parcel is an incumbrance, not a contract, and does not grant personal rights.
- [7] The claimant has proposed that a "buffer zone" be created around his property and that the access route to the property be protected.
- [8] The Claimant insists that the relief sought is to enforce his lawful property rights.
- [9] It is the Claimant's case that the defendant holds a storage license for chemicals but lacks an operator's license. He states that the storage license under section 31 of the Pesticides and Toxic Chemicals Regulations 2013 is not an application license.

³ The claimant holds registered freehold title under the Land Act, Cap. 374.

[10] The Claimant further contends that no license under section 6 of the Pesticides and Toxic Chemicals Act 2008 has been exhibited and further it is asserted that even with all licenses, private nuisance or trespass is not authorized by regulation.

[11] The Claimant maintains that there are legal precedents which confirm that regulatory permits do not justify private nuisance or trespass.

[12] The Claimant contends that he has met the threshold for the injunction to be granted as set out in the American Cyanamid Case as follows:

a. **That there is a serious question to be tried.** That he has the following case:

- i. Private nuisance from ULV fogging reaching Parcel 573, admitted by defendant's evidence.
- ii. Trespass by noxious aerosol deposits on the claimant's property, confirmed by defendant's own evidence.
- iii. Substantial interference with the right of way, affecting safe passage and access, admitted by defendant.

b. **That damages are inadequate due to the nature of harm**, especially to children's health and property. The Claimant asserts that:

- i. His children are at particular risk, with documented health conditions.
- ii. That chronic inhalation of mineral oil aerosol poses irreversible health risks, including exogenous lipoid pneumonia.
- iii. That each fogging event is a fresh tort, with recurring property and water contamination.

That in the circumstances damages cannot be reasonably estimated or remedied solely by monetary compensation.

c. **That the balance of convenience** is in favour of granting the injunction. The claimant made the following assertions in this regard, that:

- a) The Defendant can control mosquitoes without infringing his rights.
- b) The Defendant has demonstrated operational feasibility of excluding certain areas.

- c) The Defendant's own evidence indicates a transition to safer methods, already partially implemented.
- d) The relief aligns with the Defendant's declared pest management program.
- e) The risk of irreversible harm to his children and property outweighs operational inconvenience.
- f) Public interest favors protecting private property rights and health over unlicensed private pest control.
- g) The Defendant is not a public authority and holds no public health license.
- h) Public interest considerations support limiting harmful fogging activities.

[13] The Claimant submitted that the current status quo is that the claimant's entitlement is to enjoy the property without chemical trespass. That since 5th May 2026, the Defendant has ceased fogging near Parcel 573. The Claimant maintains that keeping the order is essential to prevent reverting to prior harmful practices and noted that the existing arrangement has been effective for over a month.

[14] The Claimant offers an undertaking as to damages but submitted that, only a Court order with penal notice can enforce compliance. The Claimant states that an undertaking alone is not sufficient; a formal order with penalties is necessary.

THE DEFENDANT'S CASE

[15] The Defendant submits that the Claimant's case is based on an erroneous assumption, that the Defendant applies Zenivex E20 together with mineral oils, which he says degrades property surfaces and aggravates his and his family's health. This is denied by the Defendant. The evidence as adduced by the Defendant states that it applies only Zenivex E4, an adulticide registered with the United States Environmental Protection Agency and designated as a "Reduced Risk" product, applied in highly diluted form and that it leaves no oily residue.

[16] The Defendant further asserts that it relies on its transition to an integrated pest management ("IPM") programme. That programme is said to comprise biological larviciding using *Bacillus*

thuringiensis israelensis (Bti), the deployment of In2Care® mosquito traps, and a volumetric cap limiting aerosol applications to no more than 25 occasions per year.

[17] The Defendant contends that the measures which they have adopted and utilised does not merit judicial intervention.

[18] The Defendant also raises two further objections: first, that the Claimant lacks standing, or a sufficient interest, to restrain a community-wide public-health activity on the basis of harm to a single parcel; and secondly, that the Claimant does not approach the Court with “clean hands,” the application being, on the Defendant’s case, the latest in a series of litigation since 2021 connected to a dispute over community fees, the Claimant having paid for and accepted vector-control services until refusing to contribute in 2025.

THE APPLICABLE LEGAL PRINCIPLES

[19] The parties before the Court provided both written and oral submissions. It must be stated that the claimant has filed a voluminous bundle which in the circumstances of this case at this stage is wholly unreasonable. There is not much dispute as to the legal principles to be applied by the Court, they are well established.

[20] The locus classicus on the applicable legal principles is ***American Cyanamid Co v Ethicon Ltd***⁴, which is well settled law in this jurisdiction and has been repeatedly applied in our Courts and approved by our Apex Court. The Court must consider:

- i. Whether there is a triable issue;
- ii. Whether damages are an adequate remedy for the applicant;
- iii. Whether the balance of convenience or the justice of the case lies; and
- iv. Whether there are any special factors

[21] In the Privy Council in ***National Commercial Bank of Jamaica -v- Olint Corp Ltd***⁵ Lord Hoffman stated that the purpose of an interlocutory injunction is not simply to preserve a party’s asserted position, but to improve the chance of the Court being able to do justice after

⁴ [1975] AC 396

⁵ [2009] UKPC 16

trial. The overarching principle is to take whichever course appears to carry the lower risk of injustice to either party if it should turn out to have been wrong. The words of the learned Lord Justice were “*The purpose of such an injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the Court must therefore assess whether granting or withholding an injunction is more likely to produce a just result.*”⁶ “

- [22] It is not part of the Court’s function at this stage to resolve conflicts of evidence on affidavit or to decide difficult questions of law that call for detailed argument and mature consideration. The threshold of a “serious question to be tried” is not a high one; it requires only that the claim not be frivolous or vexatious. It is to be noted also that there will be no findings of fact at this stage as the evidence before the Court is untested.

Serious Question to be tried

- [23] The Defendant urges that the claim rests on a false premise, the Claimant having a mistaken identification of the chemical in use. That submission, however, can be seen as being against the Defendant at this stage rather than in its favour. There is plainly a dispute of fact between the parties as to which product is applied, in what concentration, and with what effect. The identity of the chemical, the existence of any residue, and the alleged effect on health and property are matters that can only be resolved at trial upon disclosure and, in all likelihood, expert evidence. There is a triable issue.
- [24] Where the activity complained of affects not only the parties but the wider community, the Court is entitled, and indeed bound, to take account of the public interest and the interests of third parties. In **Coventry and Others v Lawrence and another**⁷, while concerned principally with the choice between an injunction and damages at trial, this case confirms that the public interest may be a weighty consideration. The Court bears in mind, however, that **Coventry v Lawrence**⁸ equally affirms that an injunction remains the *prima facie* remedy for an

⁶ *ibid*

⁷ [2014] UKSC 13,

⁸ *ibid*

established nuisance, and that the public benefit of an activity informs the *form* of relief rather than extinguishing the underlying right.

[25] As to the Defendant's contention that the alleged health effects depend upon the Claimant's subjective hypersensitivity, in matters of the law of nuisance the Court is called on to assess the question of hypersensitivity by reference to a person of ordinary sensitivity this is also a triable issue and cannot be resolved on the material before the Court.

[26] It is noted, further, referencing the claim in trespass to land, if the fog or residue is shown directly to enter the Claimant's property, this is actionable without proof of special damage.

[27] As to standing, the ownership of the affected parcel ordinarily confers a sufficient interest to sue in trespass and private nuisance; the Defendant's submissions as to community reliance go to the balance of convenience and to remedy, not to the existence of a cause of action.

[28] In the round this Court is satisfied that the Claimant has raised a serious question to be tried.

Adequacy of Damages

[29] Turning to whether damages would be an adequate remedy. Insofar as the Claimant's complaint is of property degradation, which is the kind of harm that is, in principle, quantifiable and capable of compensation in money and insofar as the complaint is of injury to health, the position is less straightforward; but the evidence currently before the Court does not establish a risk of serious or irreparable harm of a kind that money could not address, particularly given the Defendant's unchallenged evidence that the product is EPA-registered, diluted, and applied on a strictly limited number of occasions.

[30] Conversely, were this Court to wrongly grant the injunction, the Defendant and, more importantly, the surrounding community would be exposed to harm that damages could not readily repair: namely, the elevated risk of mosquito borne disease. That lopsidedness is significant requiring further discussion below.

Balance of Convenience and the Public Interest

- [31] It is at this stage that the public dimension of the case assumes real importance. Based on the averments before the Court, the community comprises some 850 owners over 300 acres adjacent to mosquito breeding grounds. This is a region where Dengue, Zika and Chikungunya are established risks and one has to take into consideration the recent reports of the presence of malaria cases on the island which have been drawn to the Court's attention. The Defendant's contend that the relief sought by the Claimant of a 50-foot exclusion zone would be unworkable in a community of this density and would, practically, create an untreated pocket from which mosquitoes could disperse to the detriment of neighbouring owners who themselves rely on the programme. To restrain treatment around one parcel is not to confine the consequences to that parcel.
- [32] This Court attached little weight to the Defendant's reliance on a 2023 survey indicating that some 80% of the community favours fogging. The vindication of private rights in trespass and nuisance is not a matter to be determined by majority preference, and survey is in this Court's view not determinative of any question in issue it is, however, at most, a modest indication of community reliance.
- [33] This Court must also bear in mind, and it cuts in the Claimant's favour to a degree, that the Defendant's own evidence of its IPM programme — larviciding, biological traps, and a cap on aerosol applications — suggests that the most intrusive chemical fogging is neither constant nor, on the Defendant's case, indispensable. That said, these are measures within the Defendant's control, and the appropriate course is to hold the Defendant to its stated protocols rather than to impose a rigid exclusion zone whose effect on third parties would be disproportionate.
- [34] Having found that there is a serious issue to be tried on the claims in nuisance and trespass, and having considered the adequacy of damages. It is the balance of convenience, which in this Court's judgment is the decisive consideration on this application.

- [35] The principles are well settled. This Court applies the guidance in ***American Cyanamid Co v Ethicon Ltd***⁹ where the competing considerations are evenly balanced it takes the course that appears to carry the lower risk of injustice should it transpire at trial that the decision was wrong: Re: ***Films Rover International Ltd v Cannon Film Sales Ltd***¹⁰.
- [36] This Court also bears in mind the guidance provided by Lord Hoffmann in the ***Olint***¹¹ case where he emphasised that the Court should adopt the course likely to cause the least irremediable prejudice to either party. It is understood that this principle stresses the need to balance the potential harm to both sides when deciding whether or not to grant the injunction.
- [37] The injunction sought would restrain the defendants from carrying out fogging exercises directed at the control and extermination of mosquitoes. The Claimant's complaint is that the conduct of those exercises causes an actionable interference with the use and enjoyment of his land and an incursion upon it. It is accepted that if established, such interference is capable of sounding in damages, and the claimant has not satisfied me that the apprehended harm is of a character that it could not be adequately compensated in damages at trial.
- [38] Weighing more heavily to this Court's mind, is the wider interest affected by the relief sought. Fogging of this kind is directed at the suppression of the mosquito population and, with it, the risk of vector-borne disease within the community. To restrain the exercises on an interim basis would expose not merely the parties but the public at large to a risk to health issues that cannot readily be measured or compensated, and which the defendants would have no means of recovering against under the undertaking in damages. The prejudice to the Claimant from the continuation of the fogging pending trial is, by contrast, of a limited and essentially compensable nature.
- [39] In these circumstances, it is this Court's view that the balance of convenience falls clearly against the grant of interim relief. The risk of injustice in restraining a measure taken in the interest of public health outweighs the risk of injustice to the Claimant in declining to do so,

⁹ *supra*

¹⁰ [1987] 1 WLR 670

¹¹ *supra*

the Claimant's loss being one for which damages would be an adequate remedy. I therefore refuse the application for an interim injunction and leave the parties to their remedies at trial.

The “Clean Hands” Objection

- [40] The Defendant invites the Court to refuse relief on the ground that the Claimant does not come with clean hands, the application being said to be a tactical adjunct to a dispute over community fees. The equitable maxim is well recognised, but its reach is confined: the misconduct relied upon must have an immediate and necessary relation to the equity sued for and must touch the very relief sought rather than the parties' dealings at large. A collateral commercial dispute over fees, and the bringing of earlier proceedings, do not without more disqualify a litigant from pursuing a genuine claim in trespass or nuisance. This Court is not persuaded that this objection, on the present material, bars the application; whether the Claimant's conduct ultimately bears on the discretionary relief granted at trial is a matter for the trial judge.

Disposition

- [41] Drawing these threads together; the Claimant has shown that there is a serious question to be tried, but damages would in substance be an adequate remedy for the property harm alleged, and the evidence does not establish irreparable harm to health. The balance of convenience, weighed with the interests of the wider community and of third parties as *Coventry v Lawrence* requires, falls decisively against the grant of the broad injunction sought, the proposed exclusion zone being unworkable and apt to endanger others.
- [42] This Court therefore declines to grant the interim injunction in the terms sought. This is without prejudice to the Claimant's right to pursue the substantive claim, in which the contested questions of chemical identity, residue, and effect on health and property will fall to be determined on full evidence.
- [43] Recognizing, however, that the Claimant's concerns are not frivolous, and in order to hold the position pending trial, I would invite the parties to consider, in lieu of the relief refused, an order recording the Defendant's undertaking to adhere to its stated IPM protocols, including

the volumetric cap on aerosol applications and the provision of reasonable advance notice of fogging to the Claimant.

[44] IT IS THEREFORE ORDERED THAT:

1. The application for an interim injunction is dismissed.
2. Costs of the application are reserved to the trial judge / to be the subject of written submissions within 14 days.
3. The parties have liberty to apply.

[45] It is to be noted that I have not rehearsed the well expressed submissions made by the parties in this matter for the sole reason of issuing a well-timed decision in the matter. I am grateful however for their assistance. It is also to be noted that this Court had recourse to all the necessary documents filed and relied on by the parties in coming to my decision.

M E BIRNIE STEPHENSON

High Court Judge (Ag)

BY THE COURT

REGISTRAR