Neutral Citation No: [2018] NICh 3	*Ref:* McB10621
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 21/03/2018*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between

JOHN DRENNAN and SHARON DRENNAN

Plaintiffs

and

IAN WALSH

Defendant

_____

McBRIDE J

Introduction

[1] By Notice of Motion dated 29 January 2018 the plaintiffs sought an injunction pending the trial of this action for:

(a) An order that the defendant be restrained (whether by himself or by his employees, agents, contractors or in any other way) from carrying on the business of quarrying at Fishquarter Quarry in such a manner as to cause noise or dust so as to interfere with the plaintiffs' use and enjoyment of such premises.

(b) An order that the defendant be restrained (whether by himself or by his employees, agents, contractors or in any other way) from carrying on the business of quarrying at Fishquarter Quarry so as to exceed 55dB.

(c) Restraining the defendant from causing a nuisance to the plaintiffs' property.

(d) Restraining the defendant from causing a nuisance to the plaintiffs.

[2] On 1 February 2018 the defendant gave certain undertakings which were accepted by the plaintiffs and were incorporated into a court order. These undertakings were extended by agreement until 20 March 2018.

[3] At a review hearing on 12 March 2018 the defendant indicated that he would extend the undertakings until an early trial date on the basis that he was permitted to carry out a single blasting operation at the quarry on 23 March 2018. The plaintiffs were not prepared to accept an undertaking in these terms and the matter was therefore listed for hearing on 20 March 2018 in respect of the discreet issue whether the court should grant an interim injunction to the plaintiffs restraining the defendant from carrying out a blasting operation at the quarry on 23 March 2018.

[4] The plaintiffs were represented by Mr Gibson of counsel and the defendant was represented by Mr David Dunlop of counsel. I am grateful to all counsel for their well-researched and ably presented submissions which were of considerable assistance to the court.

Factual Background

[5] The application was based on an affidavit by John Drennan made on his own behalf and on behalf of the second named plaintiff, sworn on 26 January 2018. The defendant filed two affidavits. The first was sworn on 9 March 2018 and a second unsworn affidavit was presented to court on 20 March 2018 on the basis that it would be sworn and filed forthwith.

[6] The plaintiffs are husband and wife and are the joint owners of a residential property at Coulter's Hill, Kircubbin, Co Down, which is their principal residence ("the property").

[7] The plaintiffs purchased the property as a building site in or around 2001. The property was built on the site and the plaintiffs have resided in this property from 2002 to date. In or around 2016 the defendant began to operate Fishquarter Quarry, Kircubbin, Co Down ("the quarry") which had been disused for a number of years.

[8] The quarry is located close to the plaintiffs' property and in his affidavit Mr Drennan complains about noise, dust and damage to the property by reason of the quarrying activities. He states that these activities constitute a nuisance. The plaintiffs have challenged the operation of the quarry through representations to the local council and planning authorities. These endeavours have failed to cause the quarrying activities to cease and the plaintiffs have therefore now sought a private law remedy in respect of the activities carried out by the defendant at the quarry.

[9] Relevant to this hearing, the plaintiffs assert that the blasting operations at the quarry which have been carried out in the past have caused damage to their property. They engaged Dr James Leinster, Consulting Engineer, to carry out a

specific structural survey in order to investigate cracks that had developed in the walls and ceilings of their property. Dr Leinster prepared a report dated 19 December 2017. In this he reported that when he carried out a vision inspection of the property on 17 November 2017 he noted a number of cracks both externally and internally. He opined that the cracks were not structural but rather "defects which were aesthetic in nature typically cracks ranging from hairline up to 5 millimetres in width" which he considered would be readily addressed by redecoration or some repointing. Otherwise he was satisfied there was no evidence of structural failure. In respect of the question as to the likely cause of the defects he concluded as follows:

> "Many of the cracks observed and recorded herein are indicative of the property having been subject to the effects of the quarry blast on 9 November 2017. Although no technical information on the blast is available at the time of writing it is considered likely that some of the cracks in the walls of the building developed as a consequence of ground borne vibrations from the blast. It is also considered very likely that many of the cracks … are the consequence of air over pressure effects from the blast."

He further emphasised as follows:

> "That should quarry blasting operations be carried out in the same manner again, it is highly likely that the cracks will re-open or perhaps even new cracks develop. Furthermore, if blasting operations are to be undertaken on a regular basis there is a distinct possibility that the development of the cracks could become accumulative eventually resulting in wider more serious cracks."

[10] The plaintiffs agreed to give an undertaking in damages to the defendant arising from any loss sustained by him in the event an interim injunction was granted and they were unsuccessful at trial. They set out in their affidavit evidence that the property was owned by them, it was unencumbered and in January 2016 when marketed by a local agent, had an asking price of £385,000.

[11] In his affidavit evidence the defendant denied that previous blasting and in particular the blasting carried out at the quarry on 9 November 2017 caused a nuisance and/or caused damage to the plaintiffs' property. The defendant relied on a report prepared by Brendan O'Reilly of Noise and Vibrations Consultants Ltd dated February 2018. In this report Mr O'Reilly considered the levels of blast of vibrations and other details of the blast on 9 November 2017. He concluded that the ground vibration levels were well below the threshold for superficial damage. He further opined that air blast damage would manifest itself in the form of broken

windows. He noted that no such damage was caused to the plaintiffs' property. He concluded that the ground vibration and air over pressure levels were below the threshold where any damage is likely and were well below British Standards guidelines.

[12] The defendant avers in his affidavits that a blasting operation on 23 March 2018 is necessary to allow the business of the quarry to continue. He states that it is necessary to blast rock as the quarry is running low on rock. The defendant further avers that if he is not able to carry out blasting the only way he would be able to produce rock for the quarry would be by use of a pneumatic rock hammer on a daily basis for long periods of time. The effect of the quarry running out of rock, he states would have a number of consequences. Firstly, it would mean that he would no longer be able to engage in his business with the consequent effect that he would be unable to pay his mortgage and provide for his family. Secondly, he presently employs 10 employees on a sub-contractual basis and if there was no rock then they would no longer be engaged by him. Thirdly, he would lose customers in all probability to a competitor quarry and finally he would unable to pay the hire purchase and lease agreement payments in respect of the equipment he uses at the quarry.

[13] The defendant exhibits to his affidavit a report from Exsol Ltd who are a specialist blasting company engaged by him to carry out the proposed blasting operation on 23 March 2018. This reports sets out details of the basis upon which the blasting operation will take place. In particular it states that the company will set up monitors at various locations around the quarry boundary and neighbouring houses and that they will engage an independent specialist engineer from a specialist monitoring company to carry out monitoring. The company further state that the blasting will be carried out by competent personnel and that the ground vibrations and air over pressure readings will be maintained within the approved limits set by the planning authorities to ensure that no cosmetic or structural damage occurs at residential properties.

[14] The defendant avers that he would agree to the plaintiffs' expert being engaged in the blasting protocol and that data obtained by Exsol Ltd will be provided to the court in the event that the blasting operation is permitted to proceed.

Relevant Legal Principles

[15] The grant of an interim injunction is a matter which lies at the discretion of the court and its grant will depend upon all the facts of the case. As noted by Laddie J in Service 5 Software v Clarke [1996] 1 All ER 853:

> "There are no fixed rules as to when an injunction should or should not be granted. The relief must be kept flexible."

[16] In the exercise of its discretion the court must do what is just and convenient in all the circumstances.

[17] The seminal case which sets out the appropriate principles to be applied by the court when granting an interlocutory injunction is the House of Lords judgment in American Cyanamid Company v Ethicon Ltd [1975] AC 396. Lord Diplock set out the guidelines which the court should apply in exercising its discretion in relation to the grant of an interlocutory injunction. Lord Diplock stated that the court must first be satisfied that there "is a serious question to be tried". If so, the court should then consider,

> "…whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction would normally be granted, however strong the plaintiff's claim appeared to be at that stage. If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure are recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, then there would be no reason upon this ground to refuse an interlocutory injunction.
>
> 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 might 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.

> 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."

Lord Diplock stated that in addition to these factors there may be other special factors to be taken into consideration in the particular circumstances of individual cases.

[18] In Dunnes Stores (Bangor Limited) v New River Trustees [2015] NI Ch 7 Deeny J at paragraph 5 quoted his analysis of the law in respect of interlocutory injunctions as set out by him in McLaughlin & Harvey v Department of Finance and Personnel [2015] NIQB 122. He stated as follows:

> "It can be seen that the test laid down by the House of Lords is sequential.
>
> (i) Has the plaintiff shown there is at least a serious issue to be tried?
>
> (ii) If it has, has it shown the damages would not be an adequate remedy for the plaintiff and would be an adequate remedy for the defendants if an injunction were granted and it ultimately succeeded?
>
> (iii) If there is doubt about the issue of damages the court will then address the balance of convenience between the parties.
>
> (iv) Where other factors are evenly balanced it is prudent to preserve the status quo.
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> (v) If the relative strength of one party's case is significantly greater than the other that may legitimately be taken into account.
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> (vi) There may be special factors in individual cases.
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> I would add, seventhly, the court has an overall discretion to do what is just and convenient in the circumstances. I would remind parties of the statutory basis for the exercise of the court's power in this regard. Section 91 of the Judicature (NI) Act 1978 empowers the court to grant a mandatory or other injunction 'in any case where it appears to the court to be just and convenient to do so for the purpose of any proceeding

> before it'. That again makes clear that the court has an overall discretion to exercise this power when it is 'just and convenient to do so'."

[19] Therefore when determining whether to grant an interlocutory injunction the court should ask the following questions sequentially:

(i) Is there a serious issue to be tried?

(ii) If yes, are damages an adequate remedy for the plaintiff and is the defendant in a financial position to pay them?

If yes, no interlocutory injunction should *normally* be granted.

(iii) If damages would not provide an adequate remedy for the plaintiff the court should then ask; would the defendant be adequately compensated under the plaintiff's undertaking as to damages?

If yes, there would be no reason under this ground to refuse an interlocutory injunction.

(iv) Where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both then the court should ask; where does the balance of convenience lie?

This basically means that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Whilst it is as Lord Diplock notes unwise to attempt even to list the various matters which may need to be taken into consideration in this exercise in National Commercial Bank Jamaica Ltd v Olint Corporation Ltd [2009] 1 WLR 1405 Lord Hoffman set out some matters which he considered the court may take into consideration. He stated at paragraph [18] as follows:

> "Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases."

If the balance of convenience lies in favour of the grant of an injunction then normally the court should grant the injunction. Similarly if the balance lies against the grant the court should normally refuse to grant the injunction, but this is subject to the exercise of its overall discretion to do what is just and convenient.

(v) In the event the balance of convenience is evenly balanced the court should take such measures as are necessary to preserve the status quo. The preservation of the status quo involves a consideration of whether the injunction would postpone the date upon which the defendant is able to embark upon a course of action which he had not previously undertaken or whether it would interrupt him in the conduct of an established enterprise and therefore cause much greater inconvenience to him since he would have to start again to establish his enterprise in the event that he succeeded at trial. In respect of this heading the court may take into account any delay by the plaintiff which has resulted in the defendant's activities now being at an advanced stage.

(vi) The court needs to consider whether there are any special features in the case.

[20] In the exercise of its overall discretion and in determining whether it is just and convenient to grant an injunction the court should take into account all of the above matters, any special features which exist in the case and all matters which are relevant to the grant of equitable relief including any delay by the plaintiff and whether he/she comes to the court with 'clean hands'.

Submissions by Counsel

[21] Counsel for the plaintiffs submitted that there was a serious question to be tried in respect of whether the blasting operations at the quarry caused damage to the plaintiffs' property. He referred to the fact that the plaintiffs had engaged expert evidence in this regard and submitted that this demonstrated there was clearly a serious question to be tried. He submitted that damages would not be an adequate remedy as the plaintiffs' loss related to an interference with their property rights. He further submitted that there was no proof before the court that the defendant was in a position to satisfy any award for damages that would be made in the event an injunction was not granted and the plaintiffs were successful at trial. He submitted that the court in these circumstances had to consider the question of the balance of convenience. He submitted the defendant had not provided any evidence to the court that the grant of an injunction would cause him prejudice as he could still continue to quarry using a rock hammer. Further, he submitted that the defendant had failed to demonstrate that closure of the quarry would cause him loss. The men who were employed were not actually employees but merely sub-contracted workers. In addition the HP agreement and lease agreements were not in the name of the defendant but the name of a third party company. Given all these facts he

submitted that the balance of convenience lay in granting the injunction. He also submitted that the preservation of the status quo meant granting an injunction as the quarry had been disused for a significant period of time.

[22] Mr Dunlop, on behalf of the defendant conceded that there was an arguable case. He submitted however that damages were an adequate remedy for the plaintiffs. He referred to the fact that Dr Leinster's report noted only cosmetic cracks to the property and submitted that damages were an adequate remedy in such circumstances. He therefore submitted that it was unnecessary for the court to go on to consider the balance of convenience. In the event the court had to consider this question he submitted that the damage to his client was irremediable. He further submitted that the status quo meant allowing the quarrying blasting operations to take place as these activities had been ongoing for approximately 18 months.

Consideration

[23] Having carefully considered the affidavit evidence and the expert reports I am satisfied that there is a serious question to be tried and this was, in my view properly, conceded by the defendant.

[24] In these circumstances the court has to then consider the question whether damages are an adequate remedy for the plaintiffs and whether the defendant is in a financial position to pay them.

[25] The plaintiffs submitted that damages were not an adequate remedy as there was an interference with their property rights. I am not satisfied that interference with a property right per se means that damages are an inadequate remedy. In determining whether damages are an adequate remedy in respect of interference with property rights the court needs to take into account the nature of the alleged interference, the extent of the alleged interference and the consequences of the alleged interference. I am satisfied having regard to all the evidence, that damages in this case would be an adequate remedy for the plaintiffs. The defendant is seeking to carry out one blasting operation and therefore the interference will be of a very short duration as it is a "single" event. The expert evidence of the plaintiffs is that such a blast will at most cause only cosmetic cracks. Such cracks, I find, are capable of remedy and the costs of remedial works to restore the property to its former state is capable of being calculated in monetary terms. I accept that different considerations may apply in respect of the application for a final injunction as at that stage the court will have to consider whether damages are an adequate remedy where the interference would be of a continuing nature and where the plaintiffs' expert evidence is that such activity on an ongoing basis would lead to more serious damage and which may then seriously affect the ability of the plaintiffs to continue to reside in the house and also to market the property. These are matters to be determined at final hearing. At this stage however I am satisfied that any damage caused by one blast is capable of remedy in damages.

[26] Given my finding that damages are an adequate remedy for the plaintiffs it is necessary to consider whether the defendant would be in a financial position to pay the damages which would be recoverable at common law. If a plaintiff wishes to make the case that a defendant is not in a financial position to pay an award of damages and for this reason damages are not an adequate remedy it is incumbent on the plaintiff to raise this issue in his/her affidavit evidence and present evidence in support of the proposition. The plaintiffs did not raise any issue about the inability of the defendant to pay common law damages in their affidavit evidence. As a result the defendant did not address this issue in his replying affidavits. As I consider the burden is on a plaintiff to raise this issue in the affidavits therefore if he does not raise it, the court is entitled to presume that the defendant would be in a financial position to pay any damages which may be ordered at a future date. If I am wrong about that, I am satisfied on the evidence available to the court that the defendant is in a financial position to pay damages. The defendant operates a business which appears to be successful. He engages 10 employees on a sub-contractual basis and he owns his own home although it is subject to a mortgage.

[27] I am therefore satisfied that the damages are an adequate remedy for the plaintiffs and the defendant is in a financial position to pay them. In these circumstances an interlocutory injunction should normally not be granted. I am also satisfied that there are no special reasons why an interlocutory injunction should issue. I further consider that there has been delay by the plaintiffs in seeking interlocutory relief. In the exercise of my discretion, taking all these matters into account I refuse the application to grant an injunction.

[28] If I am wrong in finding that damages are an adequate remedy and that the defendant is in a position to pay them, I accept that the court would then have to go on to consider the question where the balance of convenience lies. I consider that the defendant would suffer prejudice if he was unable to carry out the blasting operation. In particular, I accept that the quarry would cease to operate as rock hammering is not a serious alternative option especially as the plaintiffs have sought injunctive relief in respect of noise pollution and are likely to seek an injunction to stop such activity. I am further satisfied that if the injunction is granted the defendant may sustain loss of income from his business; 10 men would lose work and the defendant may be unable to pay his mortgage and provide for his dependants. I do not accept that the defendant's loss includes the amounts owed on foot of the hire purchase agreements as the exhibited documents show the obligation to pay is not placed upon the defendant but upon a third party. Equally so, I consider that the plaintiffs would suffer prejudice. I consider however that the prejudice of each party could be compensated by damages and the plaintiffs' undertaking is adequate to cover the potential loss to the defendant. I consider however that there is less likelihood of prejudice to the plaintiffs than the defendant. I find that the likelihood of prejudice to the defendant in granting an injunction is higher than the likely prejudice to the plaintiffs in not granting the injunction. This is because the defendant will definitely suffer serious prejudice if an injunction is granted whereas it remains highly disputed whether the plaintiffs would suffer

prejudice in the event that an injunction is not granted. The defendant has produced expert evidence indicating that the plaintiffs would not suffer prejudice and has also produced a report by Exsol Ltd indicating that the blasting operations will be carried out within limits which will not cause damage. It further appears that the amount of explosives to be used in the proposed are significantly less than those used in the November 2017 blast. In all the circumstances I am satisfied that the risk or prejudice is greater for the defendant than it is for the plaintiffs and therefore I find that tips the balance of convenience in favour of not granting an injunction.

[29] I further consider that the preservation of the status quo means that an injunction should not be granted. The defendant has been carrying out quarrying including blasting operations at the quarry for a period of approximately 18 months. An injunction would interrupt the status quo as it would interrupt an established practice.

Conclusion

[30] Having considered all the evidence and taken into account all the circumstances I refuse the application. This is because I am satisfied that although there is a serious issue to be tried, damages are an adequate remedy for the plaintiffs and the defendant is in a financial position to pay them. If I am wrong about this I find that the balance of convenience is tipped slightly in favour of the defendant because there is a higher likelihood of prejudice to the defendant in granting an injunction than the likelihood of prejudice to the plaintiffs in refusing the injunction. Further, I am satisfied that the preservation of the status quo and the delay by the plaintiffs all weigh against the grant of an interim injunction.

[31] For all these reasons I refuse the application and instead make an order that the defendant's undertakings will remain in place until an early trial date subject to the variation that the defendant will not carry out any blasting operations at the quarry save a blasting operation on 23 March 2018 which is to be carried out in accordance with the conditions set out in the Exsol Ltd report.

[32] I reserve costs and will hear counsel in respect of further directions required to set an early trial date.