COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2015/CLE/GEN/FP00217

BETWEEN

FREEPORT AGGREGATES LIMITED

Plaintiff

AND

FREEPORT HARBOUR COMPANY LIMITED

Defendant

BEFORE	The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES:	Mr Gregory Moss along with Ms Shavanthi Griffin-Longe for the defendant
	Mr Robert K. Adams along with Mr Dwayne Fernander and Ms Zia Lewis for the defendant
HEARD ON:	2015: 22, 28 July, 3 September
WRITTEN SUBMISSIONS:	
Plaintiff:	2015: 22 July; 24 September; 2016: (supplemental) 29 January;
Defendant:	2015: 11 September; 2016: (supplemental) 10 February

RULING

Gray Evans, J.

The Parties

1. The plaintiff, Freeport Aggregates Limited ("FAL"), is and was at all material times a company incorporated and existing under the laws of the Commonwealth of The Bahamas and a tenant of the defendant, Freeport Harbour Company Limited ("FHCL"), a company also incorporated and existing under the laws of the said Commonwealth of The Bahamas. FHCL is the owner and landlord of property situate at Freeport, Grand Bahama, containing approximately 9.170 acres including 636 meters of berth space at the northern end of the Freeport Container Port ("the demised property").

The Injunction

2. On 13 July 2015, the plaintiff obtained an injunction, ex parte, from Weekes J (Ag) which injunction was amended on 14 July 2015, in the following terms:

> **IT IS ORDERED AND DIRECTED** that the Order of this Court made on 13th July 2015 be and is hereby clarified and replaced by the following Order:
>
> 1) That in relation to the demised property as defined in the first schedule to the Indenture of Lease between the parties hereto dated 26th August 2013 ("the Lease") being "all that real property situate at Freeport on the Island of Grand Bahama containing an area of approximately 9.170 acres including 636 meters of berth space at the northern end of the Freeport Container Port" ("the demised property"), the defendant be and is hereby restrained whether by itself its officers, directors, servants, agents affiliates or otherwise by any other person acting on its behalf from engaging and/or continuing to engage in any and every one of the following acts pending the determination of the arbitration proceedings pursuant to clause 7 of the said Lease or otherwise pending further Order of this Court namely:
>
>   (a) From moving, removing, relocating or otherwise interfering with the plaintiff's aggregates, equipment and machinery located on the demised property;
>
>   (b) From obstructing, impeding or otherwise interfering with ingress and egress to the demised property by the plaintiff, its servants, agents, invitees and guests for any "Tenants Use" within the meaning of clause 4.20.1 of the Lease;
>
>   (c) From removing or otherwise interfering with any "security fencing" installed by the plaintiff "along the perimeter of the demised property" within the meaning of clause 4.20.2 of the Lease;
>
>   (d) From otherwise obstructing, impeding or otherwise interfering with the right of the plaintiff its servants, agents, invitees and guests to "peaceably hold and enjoy the Demised Property" for any "Tenants Use" within the meaning of clauses 5 and 4.20.1 of the Lease.
>
> 2) That the defendant shall forthwith remove or repair, as the case may be, any obstacles, obstructions or interferences which it has erected, placed or otherwise effected in or about the demised property or in or about any ingress or egress to the Demised Property inclusive of any berms, boulders, accumulations, trenches or other obstacles, obstructions or interferences whatsoever which in any manner impede or otherwise interfere with the use and occupation of the demised property by the plaintiff, its servants, agents, invitees and guest for any tenants use within the meaning of clause 4.20.1 of the Lease.

3) There shall be liberty to the defendant to apply on Three (3) days notice to the Counsel for the plaintiff to set aside or vary this Order.

4) That the costs of this application be costs in the cause.

The Application

3. By summons filed on 16 July 2015, the defendant applied to have the aforesaid injunction, as amended, discharged on the following grounds:

1) The ex parte application was an abuse of the process of the court as the plaintiff provided no basis upon which it could be found that the matter was so urgent that prior notice could not be given to the defendant;

2) The plaintiff breached its obligations of full and frank disclosure by failing to advise the court that it had rejected the site adjacent to the Bahamas Hotmix property as an appropriate site for a new lease;

3) There is no serious issue to be tried as:

    1) There is no dispute that the lease of 9.170 acres had come to an end as the term of two (2) years had expired;

    2) There was no lease in place for any other site;

    3) Under the terms of the lease of 26 August 2013 either party could terminate the lease upon giving the other party ninety (90) days written notice.

4) There is no bona fide dispute regarding the existence validity or termination of the lease of 26 August 2013.

5) That damages are an adequate remedy to compensate the plaintiff for any breach by the defendant (which is denied) of the lease of 26 August 2013.

6) Having regard to the damaging consequences to the defendant, Freeport Harbour Company Limited and the economy of Freeport by the consequent delay in the completion of the extension to the berthing area and container park for the Container Port, the risk of prejudice to the defendant is greater than the risk of prejudice to the plaintiff.

4. The summons is supported by the affidavits of Godfrey Smith filed 16 July 2015, 20 July 2015 and 22 July 2015 respectively.

5. In opposition to the defendant's application, the plaintiff relies on several affidavits of Marcus Callahan (i) sworn on 16 April 2015 and filed on 14 July 2015); (ii) sworn on 13 July 2015 and filed on 14 July 2015; (iii) sworn and filed on the 14 July 2015; and (iv) sworn and filed on 21 July 2015; and sworn and filed on 2 September 2015, respectively. The first two affidavits were sworn in support of the ex parte application.

6. A determination of whether the injunction should be discharged requires a consideration of whether the injunction ought to have been granted in the first place. In considering that issue, I bear in mind that the injunction having been granted on an ex parte basis, Weekes, J (Ag) did not have the benefit, as I now do, of hearing from both sides.

The Hearings

7. The hearing of the defendant's application commenced on 22 July 2015 and was adjourned to 28 July 2015. The parties were also advised by the Court that if the matter was not completed on that date, it would have to be adjourned to a date after 31 August 2015, as I was scheduled to begin my annual holiday on 29 July 2015 and was expected to return at the end of August. Counsel for the plaintiff did not complete his submissions in response at the adjournment hour on 28 July 2015, so the matter was further adjourned to 3 September 2015.

8. During the course of his submissions on 28 July 2015, Mr Moss for the plaintiff commented that the defendant could have always given 90 days' notice to the plaintiff to vacate the demised property and that they "still can give it". Indeed, in his 21 July 2015 affidavit Mr Callahan, at paragraph 7 thereof pointed out that to that date "FHC has still not served FAL with a written 90 days' notice as required by the lease."

9. During the adjournment, the defendant by letter dated 31 July 2015 addressed to the plaintiff and its attorneys gave the plaintiff 90 days' notice to vacate the demised premises. The letter was in the following terms:

"Dear Sirs:

Re: Freeport Aggregates Limited v Freeport Harbour Company Limited - Supreme Court Action No. 2015/CLE/gen/FP/00217

We refer to the hearing held on 28th July 2015 before The Honourable Justice Evans on the application by Freeport Harbour Company Limited (FHC) for an order dissolving the injunction issued on the earlier ex parte application made by Freeport Aggregates Limited (FAL) on 13th July 2015 in the above-referenced Action.

In the course of your presentation on behalf of FAL, you made the following representation to the Court –

> "....and they have the right to start the clock running by giving 90-days notice; we have actually conceded that in our submissions .....They could have always given the 90 days notice and they still can give it...." [Page 75, lines 15 to 21 of Transcript of Hearing, 29th July 2015]

As you are aware, FHC's position is that FAL was obligated to vacate and deliver up possession of the subject premises as of 31st August 2014 and that a yearly tenancy was not created thereafter by virtue of FAL's continued occupation of the premises during negotiations for a lease of an alternate site and the payment of rent by FAL.

Without admitting or conceding in any way that, as a pre-condition to FAL being legally required to vacate and deliver up possession of the subject premises FHC hereby gives FAL notice of the following

NOTICE

That, within ninety (90) days from the date hereof and no later than 29 October 2015 at 5:00 pm FAL must vacate and deliver up possession of all that," property situate at Freeport on the Island of Grand Bahama containing an area of approximately 9.170 acres including 636 meters of berth space at the northern end of the Freeport Container Port...." Which said parcel of land has such position shape, marks and dimension as are coloured pink and shown on the plan attached and marked Exhibit A to that Indenture of Lease dated 26th August 2013 [sic] between Freeport Harbour Company Limited and Freeport Aggregates Limited.

Further, without admitting or conceding in any way that FHC must serve the said notice above, in fulfilment of the requirements of clause 16 of the said Indenture of Lease, this letter is also addressed to FAL directly and has been duly 'signed' by FHC. Finally, we also confirm this notice will be served on the registered office of FAL.

FHC has not waived or otherwise abandoned any of its rights as Landlord under the said Lease dated 26th August 2013 [sic] made between FHC and FAL or in any way altered its position regarding its claims in the above-referenced Supreme Court Action.

Yours faithfully
Graham Thompson
Robert K Adams

Signed by:_____
Freeport Harbour Company Limited
By its Authorized Signatory: Godfrey Smith

10. Mr Callahan exhibited that letter to his fifth affidavit filed on 2 September 2015, and in connection therewith avers at paragraphs 21 through 25 as follows:

(21) I am informed by the Attorneys for FAL, and believe, that by that said letter FHC has effectively admitted that it had never previously given proper notice to vacate to FAL and has effectively admitted that the lease of the demised property was never previously terminated by FHC.

(22) FAL is in the process of complying with that notice and is exerting every reasonable effort to vacate the demised property before the expiry of that ninety (90) days' notice.

(23) At the expiry of that Lease FAL will instruct its Attorneys to give notice to the Court to the effect that the injunction is no longer required to protect FAL against FHC's continuing threat to trespass upon the demised property and to destroy or remove FAL's property and equipment, and to invite the Court to discharge the injunction with costs to be paid in FHC to FAL for having occasioned the need for the injunction.

(24) In the circumstances, as General Manager of FAL, I make this affidavit to request that the Court allows the injunction to remain in place pending the completion of the Arbitration proceedings or further Order of this court.

(25) In that regard, it is notable that to this day FHC has never denied that it will resume its trespass upon the demised property and its destruction or removal of FAL's property and equipment if the injunction is lifted by this Court.

11. When the matter resumed on 3 September 2015, counsel for the plaintiff continued with and completed his submissions in opposition to the defendant's application. He also pointed out that although the plaintiff had come for the injunction, the plaintiff was representing to the court, at paragraph 23 of Mr Callahan's aforesaid affidavit, that at the expiry of the defendant's notice on 29 October 2015, the plaintiff would come back to court for the injunction to be lifted and in those circumstances, the plaintiff was asking the court to continue the injunction to "protect the status quo".

12. At the end of his submissions, Mr Moss commented that: "the defendant is well able to make an application which the plaintiff would support, or would personally not object to, to have the injunction lifted in return for an undertaking from the defendant to preserve the status quo pursuant to the 90 days notice."

13. After completing his submissions in response to counsel for the plaintiff's submissions, and further discussion between counsel and the Court, Mr Adams indicated that the defendant would be willing to give an undertaking not to interfere with the plaintiff's use and enjoyment of the demised property up to 29 October 2015, the expiration date of the 90 days' notice, provided the plaintiff would, during the notice period, allow the defendant the opportunity to enter the demised property for the purpose of conducting reasonable works on the property without being considered to be in breach of their undertaking.

14. Mr Adams also made it clear that in giving the undertaking as aforesaid, the defendant was not thereby waiving its position that the injunction was improperly obtained; that it should not have been granted; and should, therefore, be discharged; and that the plaintiff would pay the defendant's costs on the application.

15. Mr Moss suggested that if the defendant were prepared to give the undertaking proposed by Mr Adams, the plaintiff in return would undertake that during its use, it would give to the defendant reasonable access to the demised property for the purpose of advancing the defendant's phase 5 and phase 6 expansions. However, he was of the view that it is the defendant who should pay the plaintiff's costs.

16. In light of the 90 days' notice, and counsels' cross-undertakings, the injunction was discharged by me on 3 September 2015, and the matter was adjourned for submissions on the issue of costs and a written ruling.

17. The matter resumed again on, 26 January 2016 for counsels' submissions on costs. The Court was also provided with further supplemental submissions by counsel for the plaintiff on 29 January 2016 and by counsel for the defendant on 10 February 2016.

The Issue of Costs

18. It is accepted that no party is entitled to recover costs of or incidental to any proceedings except under the authority of the Court, which has sole discretion in granting costs. See Rules of the Supreme Court (RSC) Order 59, rules 3(1) and 3(2), the latter of which also provides that in the exercise of its discretion, the Court shall order the costs to follow the event, except it appears to the Court that in the circumstances of the case, some other order should be made as to the whole or any part of the costs.

19. While there is no dispute, that as a general rule, costs follow the event, there is a dispute as to what is, in this case, considered to be "the event" for the purposes of an order for costs.

20. Counsel for the defendant argues that "the event" was the discharge of the injunction, which was the purpose of the defendant's application, while counsel for the plaintiff argues that "the event" was the defendant's concession in giving the plaintiff the requisite 90 days' notice to vacate the demised property pursuant to clause 2 of the lease and thereby "unilaterally" rendering the issue to be decided on the defendant's substantive application, "moot".

21. In that regard counsel for the plaintiff submits, where a party to proceedings makes a concession which renders the continuation of those proceedings moot, that party is to pay the costs of the proceedings. See Bennett v Customs & Excise [2001] EWCA Civ 1727; Secretary of State for Health and others ex parte Imperial Tobacco Limited and others, R v [2001] 1 All ER 850. Therefore, counsel submits, the defendant should be ordered to pay the plaintiff's costs.

22. In response to that argument, counsel for the defendant submits that it was the plaintiff who made a concession, as it was the plaintiff who no longer maintained its case that the defendant was obliged to permit the plaintiff to remain on the leased property until a new lease was executed, as originally argued; and that, counsel for the defendant submits, was the reason that the 31 July 2015 letter was written and the injunction dissolved.

23. Having heard the parties and considered the submissions, in my judgment, the injunction having been discharged after the Court had heard full arguments on both sides, "the event" is the disposition of the defendant's application.

24. The way I see it, if the determination of the substantive issue became moot it was because both sides decided to give the undertakings. It was clear from counsel for the plaintiff submissions on the last day of the hearing of the substantive application that he was not amenable to a discharge of the injunction just because of the notice; that his position was that notwithstanding the notice, the injunction should continue. It was he who suggested the defendant give the undertaking and it was clear that neither side would give the undertaking without the other's.

25. Moreover, I agree with counsel for the defendant that the only reason for the defendant

being asked, or offering, to give the undertaking was if the court were minded to accede to the defendant's application and discharge the injunction, otherwise the injunction would remain in place and there would be no need for the undertaking.

26. So in my judgment, the only way to deal with the cost issue is to award costs on the basis of the substantive application and in that regard, in light of the aforesaid undertakings, it seems to me that had the application not been made ex parte, the defendant may have been prepared to give the undertaking and there would have been no need for the injunction.

Background

27. The parties hereto entered into an Indenture of Lease dated 26 August 2013 ("the lease") whereby the plaintiff demised to the defendant the demised property for a period of two years commencing 1 September 2012, with a provision that either party may terminate the same on giving the other party 90 days' written notice.

1. The demised property has no buildings or vegetation and is used by the plaintiff to store or stage and warehouse aggregate (dirt) along with equipment used for assisting and facilitating the movement of the dirt to the site and dispensing also around the location.

2. In addition to the clause providing for early termination, the lease also contained, inter alia, the following provisions:

> "4.21 At the expiration or sooner determination of the Term (howsoever determined):
>
> (i) To quietly and peaceably yield up to the Landlord at no costs the demised property in such condition as shall be in accordance with the terms of the lease.
>
> (ii) To remove at no cost to the Landlord such fixtures and fittings and any building(s) as may be required by the Landlord to be removed.
>
> 7. Arbitration – Any dispute arising out of or in connection with this lease including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Act, 2009 of the said Commonwealth.
>
> 8 No implied waiver – No failure of the Landlord or Tenant to insist upon the strict performance of any term, covenant, or agreement contained in this lease or to exercise any right or remedy in connection therewith and no acceptance of full or partial payment during the continuance of any default, shall constitute a waiver of any such term, covenant or agreement or any such right or remedy or any such default, it being understood and agreed by parties hereto that any such waiver shall be effective only to the extent expressly and specifically set forth in a written instrument executed by the party against whom such waiver is sought. Any waiver of a default shall not be deemed a waiver of future defaults.
>
> 21 No oral amendment or modification –No provision of this lease may be amended or modified except to the extent any such amendment or modification is expressly and specifically set forth in a written instrument executed by the party against whom the amendment or modification is sought.
>
> SECOND SCHEDULE:
>
> RENT – The annual rent (the "Rent") of ...$90,000.00 for the use of the demised property is payable monthly in advance on the first day of each and every month of the term with the first payment falling due on the first day of September 2012. Should the term be renewed the Rent shall be reviewed by Management Provided however that in no event shall the Rent at any time be less than ...$90,000.00.
>
> WHARFAGE – Wharfage shall be payable by the tenant monthly in arrears at the rate of .25 cents per ton of material exported commencing 1 September 2012."

3. By letter dated 29 July 2014 the defendant wrote to the plaintiff advising that the lease was due to expire on 31 August 2014 and that the lease would not be renewed due to expansion plans for the Container Port.

4. The two year term expired by effluxion of time on 31 August 2014. However, the plaintiff remained in occupation of the demised property.

5. By letter dated 23 October 2014, the defendant notified the plaintiff that the lease had expired and advised the plaintiff to make arrangements to vacate the demised property by 1 December 2014. The plaintiff still did not vacate the demised property.

6. During this time, the parties were engaged in negotiations for an alternate site for the defendant to lease to the plaintiff. There appears to be some dispute as to whether or not those negotiations resulted in an agreement.

7. The plaintiff asserts that the parties agreed that the lease would be continued at an alternative site which had been identified next to the Bahamas Hotmix site and that the plaintiff was only awaiting a draft lease and a survey plan. At paragraphs 8, 9 and 10 of his 14 April 2015 affidavit, Mr Callahan averred, inter alia, as follows:

> "(8) In or about 28th October 2014 Mr Turnquest and I agreed that the alternate site for the continuation of the 2013 Lease would be a property contiguous to the property then being leased by the defendant to a company called and known as Bahamas Hotmix and that a survey plan would be prepared by the defendant after which a formal lease would be prepared for execution by the plaintiff and the defendant.
>
> (9) To date that remains the position and all that we are waiting for is the preparation of the survey plan by the defendant company so that their legal department can prepare a lease of that new site for us to execute. Once that is executed, we would start the relocation process.
>
> (10) It has always been understood and agreed that the plaintiff company would not leave the present site until the lease over the new site was executed because it would otherwise be prohibitively expensive to transport the aggregates situated on the leased property back to our Pineridge location and because the Ship Stacker/Ship Loading System and the Ready Mix Plant which we have on the leased property would be required to be used to complete the work which the defendant needs to be done to the dock and sea wall.

8. However, In his affidavit sworn on 16 July 2015 in support of the defendant's application to discharge the injunction, Mr Smith refutes the plaintiff's claim and he avers at paragraph 12 that the position asserted by Mr Callahan at paragraphs 9 and 10 of his said affidavit is not correct and he asserts as follows:

> "12) The site plan was prepared. There is now produced and shown to me marked Exhibit GS3 a true copy of a site plan prepared by Riviere & Associates. However, FAL on viewing the plan changed its mind and said that the site was not acceptable as it had no access to a berth. FAL then proposed that the area of the now expired lease be reconfigured. There is now produced and shown to me marked Exhibit GS4 an email from FAL's attorney dated the 24th April 2015 in which he proposed that the existing site be reconfigured. This was not the area of the Bahamas Hotmix site. This was not acceptable to FHCL and FAL was told this. There is now produced and shown to me marked Exhibit GS5 a true copy of the minutes of a meeting held on 14th May 2015 at which FAL was again advised that the demised property of the expired lease was not available to FAL. It should be noted that at the end of that meeting FAL threatened to seek injunctive relief

to prevent FHCL from requiring them to vacate the demised property notwithstanding that the lease had expired.

9. In any event, by letter dated 10 April 2015 the defendant again wrote to the plaintiff advising that preparations were being made by the defendant to ready the demised property for works and that "the premises must be cleared of all personal property and equipment no later than 16 April 2015."

10. The plaintiff, via its counsel, responded to that letter on 14 April 2015 demanding a retraction or clarification of the defendant's 10 April 2015 letter.

11. No retraction or clarification was forthcoming, but the plaintiff did not vacate the property on 16 April 2015. Instead, on that date, counsel for the plaintiff wrote to the defendants invoking the arbitration provision of the lease (clause 7); invited counsel for the defendant's confirmation before 12 noon on that date, that the defendant would not interfere with the plaintiff's tenancy of the subject property or its machinery, supplies and inventory situate thereupon and threatened to apply to the court for an injunction if he did not hear from counsel for the defendants by that time.

12. No confirmation was forthcoming, but also no application for an injunction was made to the Supreme Court at that time. However, the plaintiff remained in occupation of the demised property.

13. Notes purportedly taken at a meeting between representatives of the parties held on 14 May 2015, and exhibited to Mr Smith's 16 July 2015 affidavit, show that the plaintiff was advised by the defendant that it needed to vacate the demised property "forthwith"; that Mr Callahan for the plaintiff indicated that it would take nine months to dismantle and remove all of the plaintiff's equipment and when the plaintiff was advised that the defendant would serve it with another notice to vacate, counsel for the plaintiff advised that the plaintiff would proceed with legal proceedings, "putting an injunction on the eviction from the property".

14. On 11 June 2015 the defendant issued a "final notice to vacate" to the plaintiff requiring the plaintiff to vacate the demised property by 13 July 2015.

15. No application was made at that time for an injunction. However, on 25 June 2015, the plaintiff served the defendant with notice of the appointment of its arbitrator pursuant to clause 7 of the lease and pursuant to section 27 of the Arbitration Act, 2009, in respect of the purported 30 days' notice to vacate given by the defendant to the plaintiff under the defendant's letter dated 11 June 2015. The plaintiff also, on 25 June 2015, requested the defendant to appoint its arbitrator pursuant to clause 7 aforesaid. However, no application for an injunction was made. The defendant had not, at the date of the hearing of its summons, appointed an arbitrator.

16. In his second affidavit sworn on 13 July 2015 and filed on 14 July 2015, Mr Callahan avers at paragraphs 4 through 7 as follows:

> "4. The first affidavit was sworn but proceedings were not commenced because the plaintiff had initiated the Arbitration procedure and was awaiting the appointment by the defendant of its arbitrator. Further, the defendant had referred the plaintiff to the defendant's attorneys for all future response and the counsel for the defendant had agreed on behalf of the defendant that the defendant would not interfere with the plaintiff's use and occupation of the subject property for an importation of materials on 14 July 2015 thereby representing to the plaintiff that the defendant did not intend to breach the arbitration provisions of clause 7 of the lease.
>
> 5. This morning I was advised by our security company that at midnight last night the defendant padlocked the entrances to the leased property. Further, this morning I was

informed by the said security company that the defendant had started to haul our aggregates away from the leased property.

6. I went to the leased property and saw the defendant's employees hauling away our aggregates. They were being supervised by Mr Charles Rolle.

7. Our attorney Mr Gregory Moss informs me that he emailed and called Mr Adam's office this morning to protest what the defendant was doing but was informed by the receptionist that all attorneys and staff would be in a seminar until 12:30 this afternoon and could not be reached until then."

17. Hence the urgency, the plaintiff says, for applying ex parte for the aforesaid injunction.

Was there an urgency for the plaintiff's application

28. The defendant contends that there was no urgency about the plaintiff's application such that would require it to have been made ex parte and without notice to the defendant. In that regard, counsel for the defendant makes the following observations and or submissions:

a. An important characteristic of injunction applications is that notice of the application be given to the other side and applications without notice or ex parte can only be done in cases of exceptional urgency; and a case is urgent where there is a true impossibility in giving the requisite three clear days' notice. See Franses v Somar Al Assad and Ors [2007] EWHC 2442 (Ch) at paragraph 67.

b. It is apparent from the judgment of Henderson J in Franses v Somar Al Assad and Ors that: (i) urgency brought about by inaction on the part of the applicant is unlikely to attract much judicial sympathy; (ii) the reasons for proceeding without notice should not be confined to bare assertions. What is required is "a proper analysis of the issue and a reasoned explanation supported by references to the evidence."

c. The plaintiff was advised numerous times that it would be required to vacate the property once the lease would have expired.

d. The plaintiff had more than a month after the last notice to relocate its property or at least start the process of doing so. The plaintiff did neither.

e. Mr Callahan's first affidavit was sworn on 16 April 2015. The parties met in May and the plaintiff, when told it would be required to vacate, threatened injunctive relief. However, the plaintiff did nothing until the deadline for vacating the property to move the court, and, on an ex parte basis.

f. The plaintiff was given ample notice to vacate and that failure to do so would result in repossession of the defendant's property. If the plaintiff was of the opinion that this would have been in breach of its legal rights it had sufficient time to seek injunctive relief on an inter partes basis. The plaintiff's failure to do so can adequately be described as "urgency brought upon by inaction on the part of the applicant" and should not attract sympathy from this Honourable Court.

g. The plaintiff's inaction is a form of delay and again provides insight into its use of the court process as a tactical strategy to hold over.

29. The plaintiff says that the defendant's actions in trespassing upon the demised property and hauling away millions of dollars in value of the plaintiff's personal property and equipment situated thereon, created the urgency that resulted in the plaintiff approaching the court on an ex parte, without notice, basis for the injunction.

30. In that regard, Mr Moss submits, the defendant had lulled the plaintiff into a false sense of security and then pounced upon the demised property a clear day before it had earlier

threatened to do so and in clear violation of the lease agreement, the arbitration proceedings, the Arbitration Act and the undertaking of its counsel that it would not do so,

31. The "undertaking" of the defendant's counsel to which Mr Moss referred is set out in an email sent from Mr Adams to Mr Moss on 8 July 2015 in the following terms:

> "I confirm FHC will cause the vessel blocking berth access at the subject property to be removed. In the meantime, please be advised that all of FHC's rights as landlord are expressly reserved. FHC has not waived any of its rights relating to the determination of the lease to your client, FAL. Regards, Robert"

32. In Mr Moss' submission, the defendant's recognition of the plaintiff's right to berth on 14 July 2015 was inconsistent with the defendant trespassing on the property on 13 July.

33. Consequently, Mr Moss submits there was an urgency to the plaintiff's application and such urgency was created by the defendant's conduct which, Mr Moss points out, the defendant has not denied.

34. The evidence is that on several occasions prior to 13 July 2015, the plaintiff had threatened to apply for injunctive relief when given notice by the defendant to vacate the demised property. However, it was not until 13 July 2015, the date on which the defendant's "final notice to vacate" expired that the plaintiff sought to make good on its threats and apply for injunctive relief.

35. While I note that the reasons given by the plaintiff for the urgent, ex parte, without notice, application were the defendant allegedly trespassing upon the demised property a day before the expiration of its final notice to the plaintiff to vacate the same, and the plaintiff's attorney inability to contact the defendant's attorneys because they were unavailable until 12:30 that afternoon, in my judgment, just as counsel for the plaintiff called the office of counsel for the defendant and was able to speak to a receptionist, and send an email at 9:42 that morning, he could also have called the office and left a message with the receptionist and or send an email informing counsel of the fixture for the ex parte application.

36. However, even giving the plaintiff the benefit of the doubt on the urgency issue, and that the defendant's alleged trespass was what actually spurred the plaintiff into action, in my judgment, the plaintiff has failed to show that the application was so urgent that it had to be made without notice to the defendant. This was not a case where an injunction, notice of which may have resulted in the act of which the plaintiff was afraid in fact happening as, for example, may be the case with a Mareva or an Anton Piller order.

37. To my mind, had the defendant been given some notice of the application, the defendant may have discontinued the alleged acts of trespass, realizing that the plaintiff was finally following through with its threat, made as early as April 2015, to seek an injunction against the defendant.

38. In addressing the issue of ex parte applications without notice, Lord Hoffmann at paragraph 13 in the Olint Corp case, expressed the following views:

> "Although the matter is in the end one for the discretion of the judge, audi alterem partem is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act...Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will

usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

39. I agree with and respectfully adopt those views.

40. Furthermore, it seems to me that had the plaintiff given notice of its application to the defendant, the cross-undertakings given by the parties at the hearing on 3 September 2015 could have been given as early as 13 July 2015, the date on which the ex parte application was heard, on 14 July 2015, the date on which the terms of the injunction were varied, again ex parte. The plaintiff, having sought and obtained the injunction ex parte, and without notice to the defendant, deprived the defendant of that opportunity.

41. So, while I note the reasons advanced by counsel for the plaintiff that the alleged actions of the defendant, which have not been denied, and accept that they may have been the reason the plaintiff finally made good on its threat to seek injunctive relief, I am not persuaded that the matter was so urgent that it had to be made ex parte and without notice to the defendant.

42. Particularly, as pointed out by counsel for the defendant, there were several occasions prior to 13 July 2015 when the plaintiff could have applied, inter partes, for injunctive relief. Indeed, having been given "final notice to vacate" the demised premises on 13 July 2015, the plaintiff could have applied, inter partes, on 12 July 2015, for injunctive relief, as by that time it should have been clear to the plaintiff that the defendant was not withdrawing its notice for the plaintiff to vacate the demised premises. In my judgment, if the situation had become urgent, such urgency was brought about by inaction on the part of the plaintiff and should not, as Henderson J in Franses v Somar Al Assad and Ors, opined, attract much judicial sympathy.

43. In the circumstances, I find that the plaintiff's application was not so urgent that it had to have been made without notice to the defendant. However, as observed by Lord Hoffman in Olint Corp., "the matter is in the end one for the discretion of the judge" and in this case, Weekes J (Ag) was clearly of a different view, as she not only heard the application ex parte but granted the injunction sought by the plaintiff, without requiring the plaintiff to give notice to the defendant, as she, in the exercise of her discretion, could have.

44. Consequently, I would not discharge the injunction on the ground merely that it was not so urgent that it had to be heard ex parte without notice to the defendant.

Did the plaintiff make full and frank disclosure

18. The defendant also says that the injunction should be discharged on the ground that the plaintiff breached its obligation to make full and frank disclosure in that the plaintiff:

1) Never brought to the attention of the court the fact that clause 2 of the lease provided for early termination;

2) Failed to disclose to the court that the alternate site with site plan as provided by the defendant was refused by the plaintiff, as it did not have berth access;

3) Failed to inform the court that the potential loss to the plaintiff by the defendant's insistence upon the plaintiff vacating the demised premises on 13 July 2015 was, on the plaintiff's evidence at paragraphs 19 and 20 of the affidavit of Maurice Callahan, quantifiable.

19. In counsel for the defendant's submission, the plaintiff's failure to bring the fact that clause 2 of the lease provided for early termination does not meet the heavy burden of full and frank disclosure. Memory Corpn Plc v Sidhu (No. 2) [2000] 1 WLR 1443; and by failing to disclose to the court that the alternate site with site plan as provided by the defendant was refused by the plaintiff as it did not have berth access, the plaintiff misrepresented matters to the court and should, therefore, be deprived of any advantage granted to it as a result of its breach of duty.

20. Counsel for the defendant pointed out that not only had the plaintiff failed to inform the court that the potential loss to the plaintiff by the defendant's insistence upon the plaintiff vacating the demised premises on 13 July 2015 was, on the plaintiff's evidence, quantifiable, but he also pointed out that the plaintiff also failed to draw to the court's attention the principles in the American Cyanamid case that when one makes an application for an injunction and the losses complained about are readily quantifiable, the law is that the remedy comes as damages and that where damages is an adequate remedy, no injunction should be granted.

21. Therefore, counsel for the defendant submits, in light of those omissions and failures on the part of the plaintiff, the injunction should never have been granted and should be discharged.

22. As evidence of the alleged instances of non-disclosure, Mr Adams referred to a letter dated 16 July 2015 from counsel for the plaintiff in response to counsel for the defendant's request for, inter alia, a note of counsel's submissions as to why the matter was urgent and that an inter pates application was not appropriate. As authority for the request counsel for the defendant cited the case of Interoute Telecommunications (UK) Ltd v Fashion Gosspi Ltd & Others (1999) TLR 762, in which Lightman J said that "it was the duty of counsel and solicitors, when making an ex parte application for relief, particularly in connection with freezing injunctions, to make in the course of the hearing a full note of the hearing either at the time or soon after, and to provide a copy of that note with all expedition to any party affected by the grant of relief. That was essential so that they might know exactly what had occurred, the basis and material on which the order had been made and be able to make an informed application for discharge."

23. In that letter Mr Moss stated that he was providing the material points raised before Justice Hanna-Weekes on the hearing of the plaintiff's applications for the first and second orders, and he wrote, inter alia:

> "Without derogating from our request and comments above, we are, however, able to confirm that the following are the material points which were raised before Justice Petra Hanna-Weekes on the hearing of our applications for the first and second orders which were granted in the captioned matter:
>
> **Monday 13th July 2015**
>
> 1) We advised the Court that our application was urgent as your clients were in the process of trespassing upon the leased property, removing our client's aggregates therefrom and tearing down our client's fencing surrounding the same.
>
> 2) We drew the Court's attention to RSC Order 29 rule 1 as to the grant of interlocutory injunctions and especially to the commentary at 29/1A/11 as to the grant of interlocutory injunctions in support of arbitral proceedings.
>
> 3) We drew the Court's attention to its jurisdiction under the Arbitration Act 2009 sections 55 (2) (c) (i), 55 (3) and 55(5) as to the preservation, custody and detention of property and assets for the purposes of an in relation to arbitral proceedings if and to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.
>
> 4) We produced the unfiled affidavit of Marcus Callahan which was sworn on 16th April 2015 in anticipation of having to commence proceedings and advised the Court that it had not been filed as the parties were engaged in negotiations. We undertook to file the same and then read paragraphs 3 thereof and referred the Court to Exhibit MC 1 thereto being the lease agreement dated 26th August 2013 and to clause 7 thereof regarding arbitration.

5) We stated to the Court that we would not take the Court through the remainder of the affidavit as we were not asking the Court to consider or rule upon the substance of the matter but only to grant an interlocutory injunction to preserve the status quo in aid of the arbitration proceeding.

6) We also produced the second affidavit of Marcus Callahan sworn on 13th July 2015 and read the same into the record.

7) The Judge inquired as to whether the arbitration proceeding had been commenced. We then referred to the second affidavit of Marcus Callahan dated 13th July 2015 and read paragraphs 3 to 7 into the record. We then referred the Court to Exhibit MC 1 thereto and specifically to the Petitioner's Notice of Appointment and the Petitioners request to respondent for appoint of the respondent's arbitrator, each dated 25th June 2015.

8) We then read the draft Order and asked that the Court grant the Order as Prayed.

9) The Court granted the Order as prayed and directed that we immediately file and serve the same, together with the first and second affidavits of Marcus Callahan, on the defendant. The Court also directed that the writ of summons be filed forthwith.

Tuesday 14th July 2015

1) We informed the Court that the defendant had apparently adopted a very narrow reading of the Order of the Court which had been granted the previous day on 13th July 2015.

2) We informed the Court that service of the Order upon the defendant has been effected and that I had personally driven to the Freeport Harbour to attempt to access the site and handed a copy of the Order to Mr Kenneth Henfield, a security officer, who had indicated that he would deliver it to Mrs Berlice Lightbourne-Pintard, The legal Counsel for the defendant.

3) We informed Court that upon our attempt to access the leased property we observed berms (piles of soil and aggregates) which had been placed across the entrances to the leased property to prevent access thereto.

4) We referred the Court to the third affidavit of Marcus Callahan dated 14th July 2015 including a photograph at Exhibit MC 1 showing a picture of a berm that had been placed over one of the road accesses leading to the leased property.

5) We informed the Court that significant loss and damage had already been inflicted on to our client's property and asked the Court to clarify and vary its Order to make it clear that the parties were to preserve the status quo pending the determination of the arbitration proceeding.

6) We read into the record the draft second Order and prayed that it be granted.

7) The Court granted the second Order as prayed and directed us to file and serve it upon the defendant.

24. In response to the defendant's complaint that the plaintiff failed to make full and frank disclosure of all the material facts, counsel for the plaintiff makes the following observations and or submissions:

1) There was undoubtedly full and frank disclosure by the plaintiff.

2) The plaintiff's said letter did not purport to be a report on the ex parte proceedings, but actually the opposite in that it is a letter saying the defendant was not entitled to a report of the proceedings; that there was no such thing as an "interoute request"; and that if the defendant had a challenge with the injunction, it should make an application to set it aside and the matter would proceed in the normal way; but nonetheless, here are the material points.

3) Therefore, counsel's assertion that the court's attention was not drawn to paragraphs 19 and 20 of the affidavit of Maurice Callahan that conclusion is false and does not arise from the aforesaid letter.

4) The letter makes it very clear that that was only a succinct statement of the material points in respect of the hearing, not a report, and the weight which counsel for the defendant is attempting to put on the letter cannot be borne by that letter. He is misrepresenting what the letter actually said.

5) The court was advised of the plaintiff's initiation of arbitration proceedings, and that the purpose of the plaintiff's application was to preserve the assets pending the outcome either of the arbitration proceedings referred to in Mr Callahan's affidavit, or pending three days' notice by the defendant to say why it should not be in arbitration or further order of the court.

6) By exhibiting the lease to Mr Callahan's first affidavit, which was tendered to the court upon the hearing of the application on 14 [sic] July 2015, the plaintiff did disclose to the court the provision in the lease whereby either party may terminate the same on giving the other party 90 days' written notice", so there was no concealment of that provision from the court;

7) In any event, the defendant never purported to give any such 90 days' written notice to the plaintiff with the result that any specific or express reference to such provision would have been irrelevant;

8) The defendant's allegation that the plaintiff did not disclose to the court that it had been offered a site plan for an alternate site and had refused the same is untrue. It appears in paragraph 12 of the second affidavit of Godfrey Smith and was rejected in paragraphs 11 and 12 of the fourth affidavit of Marcus Callahan. Notably, the defendant has never proffered any alleged evidence of any tendering of such a site plan to the plaintiff - because the allegation is not true.

9) Therefore there has been no material non-disclosure as alleged by the defendant.

25. It is settled law that those who seek relief ex parte are under a duty to make full and frank disclosure. See Re S (A child)(Family Division: Without Notice Orders) [2001] 1 WLR 211.

26. In the English Court of Appeal case of Memory Corporation v Sidhu [2000] 1 WLR 1443, Mummery LJ at page 1459 opined as follows:

> "It cannot be emphasised too strongly that at an urgent without notice hearing for a freezing order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."

27. Failure to observe that high duty as aforesaid may result in the discharge of the injunction even if, after full enquiry, the court is of the view that the order was just and convenient and would probably have been made even if there had been full disclosure. Further, it is no excuse for an applicant to say that he was not aware of the importance of the matters not disclosed. (*R v. Kensington Income Tax Commissioners ex parte DePolignac* [1917] 1 KB 485).

28. The applicant must, therefore, make proper inquiries before making the ex parte application as the duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. See R (Shirley Ann Lawer) and Restormel Borough Council [2007] EWHC 2299 (Admin); and Brink's-Mat Ltd v Elcumbe and others [1988] 3 ALL ER 188. And he has an obligation to bring to the court's attention defences that would have been available to be taken by the defendant had he

been present at the application (*Lloyds Bowmaker Ltd v Britannia Arrow* [1988] I WLR 1337 at 1343 per Glidewell LJ).

29. Additionally, as observed by Mummery J in Memory Corporation v Sidhu supra: *"It is the particular duty of the advocate to see that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn by him to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed."*

30. There is no evidence that any written skeleton argument was lodged with the court prior to the hearing and served on the defendant with the aforesaid order. Indeed, had that been done, there would have been no need for the aforesaid letter from counsel for the plaintiff to the defendant providing him with "the material points".

31. Counsel for the defendant pointed out that in his letter, counsel for the plaintiff wrote that he read paragraph 3 of Mr Callahan's affidavit only and he specifically stated in that letter that "we stated to the court that we would not take the court through the remainder of the affidavit as we were not asking the court to consider or rule upon the subject of the matter, but only to grant an interlocutory injunction to preserve the status quo."

32. In my judgment, then, it is not unreasonable to draw from that statement a conclusion that the plaintiff did not disclose to the court, in that he did not refer specifically the court to:

1) the fact that clause 2 of the lease provided for early termination;
2) that the alternate site with site plan as provided by the defendant was refused by the plaintiff as it did not have berth access.
3) that the potential loss to the plaintiff by the defendant's insistence upon the plaintiff vacating the demised premises on 13 July 2015 was, on the plaintiff's evidence at paragraphs 19 and 20 of the affidavit of Maurice Callahan, quantifiable.

33. In relation to the 90 days' notice provision at clause 2 of the lease, as I understood Mr Moss' argument, while the plaintiff may not have drawn the aforesaid provision specifically to the attention of the court on the ex parte hearing, by exhibiting a copy of the lease to Mr Callahan's first affidavit, which was tendered to the court at the hearing, the plaintiff fulfilled its duty and did disclose the aforesaid provision to the court.

34. Similarly as regards paragraphs 19 and 20 of Mr Callahan's affidavit at which the plaintiff's likely loss, in the event it was required to comply with the defendant's notice to vacate, was quantified and by which the court may have determined that damages were an adequate remedy for the plaintiff and refuse to grant the injunction.

35. As pointed out by counsel for the defendant, proper disclosure requires advocates not only to identify all relevant documents for the judge, but they should take the judge to the particular passages in those documents and ensure the judge is aware of the legal significance of the material.

36. In the circumstances, and in my judgment, the aforesaid matters should have been drawn expressly to the Court's attention, and I find that in failing to do so, the plaintiff was in breach of its duty to make full and frank disclosure of all material matters to the court.

37. It is accepted that the court has a discretion to continue or to grant interlocutory relief even if there has been non-disclosure and in the exercise of that discretion, the court will have regard to all the circumstances of the case, including the degree and extent of the culpability

with regard to the non-disclosure or misrepresentation: see *Brink's Mat Ltd v Elcombe supra* at pages 1357, 1358.

38. In this case, while I would not have discharged the injunction on the basis of the plaintiff's failure to disclose the fact of the 90 days' notice provision in the lease, or, the fact that the plaintiff had refused the alternate site offered by the defendant, in my view, had the fact of the plaintiff's likely loss been brought to the attention of the court on the ex parte hearing, and in light of the authorities regarding the granting of injunctions, the court may have determined that damages would be an adequate remedy for the plaintiff and refused the injunction.

39. I, therefore, accept the submission of counsel for the defendant, and, accordingly, find that the injunction should be discharged on the ground of material non-disclosure in that that the plaintiff failed to disclose to the court that the potential loss to the plaintiff by the defendant's insistence upon the plaintiff vacating the demised property on 13 July 2015 was, on the plaintiff' evidence at paragraphs 19 and 20 of the affidavit of Maurice Callahan, quantifiable.

The American Cyanamid principles

40. The defendant also applies to have the injunction discharged on other grounds. So, in the event I am incorrect in my finding on the material non-disclosure issue, I go on now to consider the other grounds, which I will refer to as the American Cyanamid principles.

41. The defendant accepts that at the time the plaintiff made its application for an injunction before Weekes, J (Ag) an arbitration had been commenced and that the application was made under section 55 of the Arbitration Act, 2009, in support of those proceedings on the basis that the tribunal was not yet been fully constituted, the defendant not having named its arbitrator.

42. At paragraph 42 of its statement of claim the plaintiff prays:

> "the assistance of this Honourable Court in preserving the plaintiff's access to, and use and enjoyment of, the leased property pending the determination of the dispute as aforesaid between the plaintiff and the defendant by arbitration pursuant to clause 7 of the lease and section 27 of the Arbitration Act, 2009."

Law and Authorities

45. The jurisdiction of the Court to grant injunctions generally is found in section 21(1) of the Supreme Court Act which provides that the Court has jurisdiction to grant an injunction in all cases in which it appears to the Court to be just and convenient to do so. The procedure for such applications is set out in the Rules of the Supreme Court (RSC), Order 29, which provides, inter alia, that where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, otherwise, such application must be made by motion or summons.

46. In relation to arbitral proceedings, section 55 of the Arbitration Act, 2009 provides that unless otherwise agreed by the parties, the Court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed in the section it has for the purposes of and in relation to legal proceedings. Those matters include, inter alia, the granting of an interim injunction.

47. Section 55, sub-sections 4, 5 and 6 of the Arbitration Act, 2009 provide as follows:

> (4) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(5) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(6) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard has no power or is unable for the time being to act effectively.

48. In the case of Permasteelisa Japan v Bouyguesstroi and Banca Intesa SPA [2007] EWHC 3508 (TCC), Ramsey, J. opined at paragraph 48 that in circumstances where, as in this case, the arbitral tribunal has not been fully appointed and, therefore, has no power or is unable for the time being to act effectively, the court should generally act as it would if the same dispute were before it in court, rather than attempting to adopt a different test so as to hold the position pending a future application to the arbitral tribunal.

49. While counsel for the plaintiff asserts that the principles regarding the granting of injunctions have been restated in the case of National Commercial Bank Jamaica Limited v Olint Corp. Limited [2009] UKPC 16 (28 April 2009), it is common ground that the guidelines which courts have traditionally followed when deciding whether or not to exercise their discretion in granting injunctions are those laid down in the speech of Lord Diplock in the case of American Cyanamid Co. vs. Ethicon Ltd (1975) A.C. 396, where he said at page 408:

> ...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.
>
> As to that, the governing principle is that the court should first 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 en joined 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 should 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 the 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 recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, 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 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.
>
> 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.

50. In National Commercial Bank Jamaica Limited v Olint Corp. Limited supra, a Privy Council case from the Court of Appeal of Jamaica, Lord Hoffman, delivering the opinion of the Board observed at paragraphs 16 and 17 as follows:

> "16. 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. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> 17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408: "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." [underline added]

Is there a serious issue to be tried?

51. The first issue, then, is whether there is a serious issue between the parties to be tried?

52. In determining that issue, I remind myself that I am not required on this application to resolve disputed issues of fact or to decide difficult questions of law. As observed by Lord Diplock in American Cyanamid at 407H:

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. 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 claims 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 the trial."

53. Further, while I may not refer to or rehearse all of the arguments advanced by counsel, it should suffice to say that in arriving at my decision, I have considered all of them.

54. The defendant's position is that the lease was a short term lease for a fixed period of two years, which expired by effluxion of time on 31 August 2014; that there was no provision, expressed or implied, in the lease for the renewal thereof and that while there were negotiations between the parties for a new lease over other property owned by the defendant, there was no agreement between the parties to extend the term of the lease or renew the same with respect to the demised property. Therefore, the defendant says, there is no serious issue between the parties to be tried.

55. The plaintiff on the other hand, says there is a serious issue to be tried. In that regard, the plaintiff asserts that the lease remains extant as the plaintiff not only remained in occupation of the demised property after 31 August 2014, but the plaintiff also continued paying the same rent as it did under the lease, which rent was accepted by the defendant up to July 2015.

56. I agree with the defendant that the lease expired by effluxion of time on 31 August 2014. However, there is no dispute that the plaintiff "held over", that is, remained in occupation of the demised property after that date. There is also no dispute that the defendant continued to

accept rent from the plaintiff up to July 2015, although the defendant says that the acceptance of the funds in July 2015 by the defendant's finance department was "purely an administrative error" and not a waiver of the final notice communicated to [the plaintiff] by [the defendant's] letter of 11 June 2015; and that the defendant returned the full amount paid under cover of its letter dated 21 July 2015.

57. The defendant's position, therefore, is that the plaintiff was no longer a "legal tenant" of the demised property and had no right to continue in occupation; that alternatively, the plaintiff continued as tenant at will of the defendant on a month-to-month tenancy terminable by one month's notice, which the defendant had given.

58. The plaintiff's position is that the plaintiff having remained in occupation of the demised premises after 31 August 2014, and paying rent in accordance with the terms of the lease, which rent was accepted by the defendant, a year-to-year tenancy was created, which, in the absence of an express stipulation to the contrary, could only be determined by the common law notice period of six months. However, counsel for the plaintiff accepts that such a tenancy would be subject to the terms of the expired lease so far as those terms are not inconsistent with a common law tenancy from year to year. In that regard, counsel says that since the lease in this case provided at clause 2 thereof for a notice period of 90 days, rather than the six months' notice required under the common law, the lease could be terminated by 90 days' notice, but not less.

59. The plaintiff, therefore, submits that the defendant's purported final notice of 11 June 2015 to the plaintiff to vacate the demised property was ineffective to terminate the lease.

60. In support of those submissions, counsel for the plaintiff relied on several landlord and tenant cases, including: Stirling v Leadenhall residential 2 Ltd [2001] 3 All ER 645; Hammersmith and Fulham London Borough Council v Monk [1992] 1 All ER 1, HL per Lord Bridge; Blackstone's Commentaries (Bl Co, 1st edn. 1766, 145-147); Oxley v James (1844) 13 M&W 209, 214; Cattley v Arnold, Banks v Arnold (1859) 1 John & H 651, 660; Prudential Assurance Co. Ltd v London Residuary Body [1992] 2 AC 386, 381 B-C, 394 F-G, per Lord Templeton; Doe d Clarke v Smaridge (1845) 7 QB 957, 959; Doe d Hogg v Taylor (1837) 1 Jur 960; King v Eversfield [1897] 2 QB 475, CA; Adler v Blackman [1953] QB 146, CA; Roe d Jordan v Ward (1879) 1 Hay Bl 97; and Elliott v Johnson (1866) LR 2 QB 120, 124.

61. Having heard the parties and having considered the affidavit evidence and the authorities cited, it seems to me that the plaintiff remaining in occupation of the demised property after 31 August 2014, and paying rent in accordance with the terms of the lease, which rent was accepted by the defendant, at least up until July 2015, raises the issue of the nature of the tenancy between the parties post 31 August 2014. Further, whatever the tenancy, "year-to-year", as contended by the plaintiff or, "at-will", as contended by the defendant, whether or not the notice contained in the defendant's letter of 11 June 2015 was sufficient to terminate such tenancy on 13 July 2015; or whether such tenancy could be legally terminated otherwise than on 90 days notice as provided at clause 2 of the lease; or simply put, whether the lease exists or has been terminated, are, in my judgement, all issues to tried.

62. Clause 7 of the lease provides that any dispute arising out of or in connection with the lease including any question regarding its existence, validity or termination, shall be referred to and finally be resolved by arbitration.

63. In the circumstances, I find that at the date the injunction was granted, 13 July 2015, there was a serious issue between the parties to be resolved by arbitration.

Whether damages would be an adequate remedy?

64. The plaintiff having met the threshold test in American Cyanamid, the next issue to be considered is, whether damages would be an adequate remedy if the injunction was not granted or is discharged? Or whether granting or withholding the injunction is likely to produce a just result which, as I understand Lord Hoffman in the Olint Corp. case, involves a consideration of whether damages would be an adequate remedy.

Defendant's Submissions

65. Mr Adams for the defendant argues that in determining whether damages are an adequate remedy, the key factor to be considered is whether irreparable damage will occur for the plaintiff if an injunction is not granted; or, in this case, the injunction is discharged. In his submission, irreparable damage will not be established if relief in monetary terms is possible. Cunnington Investments Pty Ltd v Matheson [2009] FCA 1529.

66. Mr Adams argues further that the only injury to the plaintiff is the potential loss caused by the cost of removal of its inventory and equipment or any damage to its property, which he submits, can be remedied in damages. In that regard, Mr Adams points out that in his 14 July 2015 affidavit, Mr Callahan quantified the likely cost to the plaintiff if the plaintiff were required to comply with the defendant's notice to vacate the demised property. Therefore, he submits, by the plaintiff's own admission, damages are an adequate remedy, which damages the defendant is well able to meet.

67. On the other hand, counsel for the defendant submits that while damages would be an adequate remedy for the plaintiff if it is decided that the defendant has in fact breached the lease, which the defendant denies, the plaintiff's refusal to vacate the demised property will result in a delayed time of completion of the defendant's multi-million dollar project; that any delay poses a risk of cancellation, which would not only result in damaging consequences to the defendant but also to the economy of Grand Bahama as it was expected that the project will provide an influx of jobs for the people of Grand Bahama. Additionally, counsel argues, cancellation of the project will hurt the defendant's business relationships with several third parties and compensation for that kind of damage is "extremely difficult to assess".

68. Counsel for the defendant, therefore, submits that the potential loss to the defendant is incalculable and or is greater than the loss the plaintiff would suffer; that, taking that into consideration along with the potential damage to the economy of the Island of Grand Bahama, the balance of convenience lies on the side of the defendant.

69. In his submission, as the potential damage to the plaintiff, if it is decided that the defendant was in breach would not be irreparable and could be fully compensated in damages, while the defendant could not be, the injunction should not have been granted and should be discharged on the ground that damages are an adequate remedy for the plaintiff and, as well, that the balance of convenience is in favour of the defendant.

Plaintiff's Submissions

70. On the other hand, counsel for the plaintiff submits that damages would be an adequate remedy for the defendant, but it would not be an adequate remedy for the plaintiff as damage would be suffered by the plaintiff in respect of its business through its contractual use and occupation of the land, with the result that the interlocutory injunction herein should be maintained.

71. Moreover, counsel for the plaintiff submits, the traditional statement of the common law, as stated in the American Cyanamid case, and as relied on by the defendant, has been "significantly restated" in the Olint Corp. case in which, counsel argues, the classical American

Cyanamid approach of refusing or setting aside an injunction where the defendant is able to pay damages has been departed from by the Privy Council. In his submission, the position now is that once the court is satisfied that there is a serious question to be tried, it should then go on to consider the balance of convenience and grant the interlocutory injunction to preserve the status quo. See also Eng Mee Yong (f) and others v V. Letchumanan (Malaysia) [1980] AC 2331; 1979 UKPC13.

72. Counsel for the plaintiff argues that the dicta in Olint Corp. has done away with the previous "mechanical approach" of allowing a malfeasant to avoid or set aside an injunction where he shows that he is able to pay damages. In his submission, the basic principle now is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other; and, in giving effect to that approach, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

73. In that regard, counsel for the plaintiff submits, the defendant ought not to be permitted to breach the terms of the lease as to giving the requisite notice to the plaintiff to vacate the demised property; ignore its contractual obligations under the lease to have the matter of its termination determined by arbitration; breach the provisions of the Arbitration Act, 2009; and exercise the most egregious conduct in relation to the plaintiff by trespassing upon the demised property and hauling away the plaintiff's property and equipment simply because it has money and is able to pay damages. In his submission, that is not the law and to permit the defendant to behave in that manner would not be a just result.

74. Counsel for the plaintiff submits further, that as there is a serious issue to be tried, the cross-undertaking given by the plaintiff would provide the defendant with an adequate remedy and Weekes, J (Ag), faced with an urgent application and the prejudice to the plaintiff, determined that the undertaking in damages would be adequate and, therefore, the injunction was granted.

75. Counsel for the plaintiff submits further that, at the end of the day, the justice of the case is ordinarily what the court should look at and take whatever course seems likely to cause the least irremediable prejudice to one party or the other; and in his submission, the justice of the case and or the balance of convenience is in favour of maintaining the status quo: leaving the interlocutory injunction in place pending the determination of the Arbitration proceedings; and not to reward the defendant for its high-handed actions as aforesaid.

76. So, Mr Moss submits, whether the court applied the test in American Cyanamid or in Olint Corp., the injunction should have been granted and should be continued pending the determination of the arbitration proceedings.

My Analysis

77. Lord Diplock in American Cyanamid opined that "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 should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

78. As I understood Lord Hoffman's speech in the Olint Corp. case, while the court at the interlocutory stage must assess whether granting or withholding an injunction is more likely to produce a just result, if damages will be an adequate remedy for the plaintiff, and, of course, the defendant is able to pay such damages, that would be a "just result", and there would be no grounds for granting the injunction. Further, it is only if damages would not be an adequate

remedy for the plaintiff should the court go on to consider other issues that may assist it in determining which course is likely to cause the least irremediable prejudice to one party or the other.

79. At paragraph 18 of Olint Corp., Lord Hoffman said those matters may include:

> "...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."

80. Ultimately, in my view, as I indicated to counsel during the hearing, it seems to me that the "restatement" in the Olint Corp. case to which Mr Moss refers is really the "balance of convenience" point in American Cyanamid.

81. As I understand Lord Diplock's comments in American Cyanamid, where there is a serious issue to be tried and damages would not be an adequate remedy for the party adversely affected by the grant or refusal of the injunction, then the court must consider where the balance of convenience lies. To my mind, that is the same course being recommended by Lord Hoffman in the Olint Corp case where he recognizes that in practice it is not always easy to say whether damages would be an adequate remedy for either side, and in such circumstances, the court, in deciding whether or not to grant the injunction, ought to consider and take whatever course seems likely to cause the least irremediable prejudice to either party.

82. So, as I understand the decision in Olint Corp., in considering the justice of the case, the court must consider the issue of damages as an adequate remedy firstly for the plaintiff and then for the defendant (in the form of the plaintiff's undertaking as to damages). Where the court is of the view that damages will be an adequate remedy for the plaintiff, and the defendant is able to pay, the court need look no further, as there will be no grounds for interference with the defendant's freedom of action by the grant of an injunction (American Cyanamid and Olint Corp). If the court is of the view that damages will not be an adequate remedy for the plaintiff, but the defendant will be adequately compensated by the plaintiff's undertaking in damages, then the court should grant the injunction.

83. Where, however, the court is of the view that damages will not be an adequate remedy or it is difficult to say, then the court should go on to consider the balance of convenience or take whichever course seems likely to cause the least irremediable prejudice to one party or the other.

84. See also the Privy Council's decision in an appeal from the Federal Court of Malaysia, in the case of Eng Mee Yong (f) and others v Letchumanan s/o Velayutham, No. 25 of 1977 [1979] 3 WLR 373 at 377, in which Lord Diplock, delivering the decision of the Board said that: "the guiding principle in granting an interlocutory injunction is the balance of convenience", which is also referred to as the "balance of justice". See also Caterpillar Logistics Services (UK) Ltd v Huesca De Crean [2011] EWHC 354 (QB); and Merck Sharp Dohme Corp & Anor v Teva Pharma BV & Anor [2012] EWHC 627 (Pat) (M15 March 2012).

85. In his affidavit sworn on 16 April 2015 and filed on 14 July 2015 Mr Callahan avers that the plaintiff's machinery and inventory of aggregates situate upon the demised property was valued at approximately $3,050,000.00 and that to remove them and relocate the same to another site would likely cost approximately $315,000.00, made up by the underlined amounts shown hereunder:

19) The plaintiff has situated upon the demised property "personal property and equipment" (being its machinery and inventory of aggregates) in the value of approximately $3,050,000.00 being comprised of 38,299.84 tons of construction aggregate material valued at approximately $1,019,873.70, a Ship Stacker/Ship Loading System for the offloading and on loading of construction aggregate materials valued at approximately $1,500,000.00, a Concrete Ready Mix Plant valued at approximately $450,000.00, together with other movable site improvements.

20) It is impossible for our company to remove or relocate our equipment and material from the property within the six (6) day time frame that was demanded by the Legal counsel for the defendant. Our company has four (4) trucks which are used for hauling and even if we were to shut all of our other customer business down and devote every truck to that effort (which we would not do) it would still take approximately nine (9) months to remove and relocate all of our machinery and property from that site as follows:

Aggregate Inventories

We have a total of 38,299.84 tons of material at the leased property valued at $1,019,873.70. To move that inventory to our Pineridge location during business hours (Monday through Friday 8am to 4pm) would involve 1,915 trips. That would require 4 trucks carrying 479 loads each at the industry best practice average of 6 loads each per day, being 80 business days which, at 5 days per week, is equivalent to 16 weeks or four months.

The cost to our company to move that aggregate inventory to our Pineridge location would be $175,000.00.

This would be on a best case scenario without any rain delays or other unforeseen contingencies.

Equipment/Production Facilities

We have a Ship Stacker/Ship Loading System valued at $1,500,000.00. To dismantle and move that to our Pineridge location during business hours (Monday through Friday 8am to 4pm) would require 4 weeks or one month on a best case scenario basis subject to availability of the required crane and engineer and to the time required to obtain relevant works permits for skilled persons to be brought in to oversee that operation.

The cost to move that to our Pineridge location is $45,000.00.

This would be on a best case scenario without any rain delays or other unforeseen contingencies.

Ready Mix Plant

We have a Ready Mix Plant valued at $450,000.00. To dismantle and move that to our Pineridge location during business hours (Monday through Friday 8am to 4pm) would require 16 weeks or four month on a best case scenario basis subject to availability of the required crane and engineer and to the time required to obtain relevant work permits for skilled persons to be brought in to oversee that operation.

The cost to move that to our Pineridge location is $95,000.00.

This would be on a best case scenario without any rain delays or other unforeseen contingencies.

Overall

These numbers are based on our current staff. So based on that, we need at least 9 months to move from the leased property to our Pineridge location.

86. I note here that while that affidavit was filed on 14 July 2015 in support of the plaintiff's ex parte application, it was in fact sworn on 16 April 2015 and Mr Callahan deposed that it was sworn in support of an ex parte summons. However, no ex parte summons was filed on that date.

87. By the time the plaintiff made its application on 13 July 2015, approximately three months and another notice, set to expire on the date of the ex parte application, had passed. Additionally, although the lease was a two year lease set to expire on 31 August 2014, it provided for 90 days notice for early termination, which to my mind means, that the plaintiff ought to have been in a position at any time up to 91 days prior to the 31 August 2014 to be ready to move on 90 days' notice, and certainly by no later than 31 August 2014.

88. Furthermore, approximately one month prior to the date the lease was due to expire, the defendant by letter dated 29 July 2014 reminded the plaintiff that the lease was due to expire on 31 August 2014 and that the same would not be renewed "due to the plans for the expansion of the Freeport Container Port." Counsel for the plaintiff pointed out that in that same letter, the defendant acknowledged that there were ongoing discussions between the parties for a lease of an alternative site which discussions, presumably, were expected to be concluded by 31 August 2014.

89. Then, approximately two months after the lease expired, in October 2014, the defendant sent a reminder to the plaintiff that the lease had expired on 31 August 2014. The defendant also invited the plaintiff to "make arrangements to vacate the property by 1 December 2014; and noted that "Management" had advised that discussions with the plaintiff regarding an alternative site for the plaintiff's operations had been unsuccessful.

90. On 16 April 2015, after receiving a further notice, on that occasion being given a mere six days to vacate the demised property, the plaintiff was asserting, through its counsel, that it needed nine months to remove and relocate all of its machinery and property from the demised property to another site. Yet, three months later, on 13 July 2015, the plaintiff had not commenced the process. By that time it ought to have been clear to the plaintiff that the defendant did not intend to extend the lease of the demised property and it appears from the evidence that by that time the parties had also not been able to agree a lease of other property owned by the defendant.

91. In the circumstances, I agree with counsel for the defendant that by quantifying the likely costs to the plaintiff of complying with the defendant's notice to vacate the demised property, and, therefore, the losses the plaintiff was likely to have sustained if the injunction had not been granted, that damages would have been an adequate remedy for the plaintiff.

92. There is also no question that the defendant has the means to satisfy an award in damages to the plaintiff if it turns out that the defendant was in breach of the terms of the lease.

93. At paragraph 22 of his 16 July 2015 affidavit, Mr Smith avers that:

> "If FAL has a right to remain on the demised property (which is vehemently denied) and is being forced to vacate in breach of any alleged right to remain on the property, then FHCL will meet any claim in damages that FAL may have as a result of any breach by FHCL of such an alleged right. FCHL is able to satisfy any claim for damages which it may be held to be liable in the event it ought not require FAL to vacate the demised property."

94. Then, in his second affidavit filed 20 July 2015, as evidence of the defendant's ability to satisfy any claim in damages which the plaintiff may have, Mr Smith produced a letter from Scotiabank (Bahamas) Limited confirming that the defendant company has balances on account with that bank in the "low eight figures"

95. So, while I am satisfied that there is a serious issue to be tried, I am also satisfied that if the injunction had not been granted or were now discharged, not only would damages be an adequate remedy for the plaintiff, but any losses suffered by the plaintiff could be quantified in monetary terms, which, on the evidence, the defendant would be able to meet.

96. There can be no dispute that the expansion of the Freeport Container Port can be crucial to the economy of Grand Bahama and I accept the defendant's evidence that it is a project that is expected to create substantial employment and involve a substantial investment. Delays in connection with that project cannot be good, particularly if such delay can be avoided.

97. So, for the reasons advanced by counsel for the defendant, with which I am in agreement, I find that damages would be an adequate remedy for the plaintiff. In the circumstances, the injunction ought not have been granted and should, therefore, be discharged.

98. On the other hand, I am not persuaded that the defendant would be adequately compensated under the plaintiff's undertaking in damages if it is prevented from proceeding with the aforesaid expansion.

99. If I am incorrect in that finding, I find that the balance of convenience is in favour of discharging the injunction to permit the defendant to proceed with the expansion project, notice of which was provided to the plaintiff prior to the execution of the lease of the demised property and the reason for the short-term lease of two years.

100. So, in light of my decision on the defendant's substantive application to discharge the injunction, and on the principle that costs would generally follow the event, the plaintiff is to pay the defendant's costs of the application.

101. It is merely left for me to apologise to counsel and the parties for my delay in delivering this ruling, the reasons for which I need not bore you; and to thank you for your patience.

DELIVERED this.....day of November 2016

Estelle G. Gray Evans

Justice