For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

SAM'S FOOD DISTRIBUTORS, INC., and SAM'S MANAGEMENT, INC., Appellant/Defendant,	)	**S. Ct. Civ. No. 2018-0048** Re: Super. Ct. Civ. No. 181/2018 (STT)
v.	)	
NNA&O, LLC, Appellee/Plaintiff.	)	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Renee Gumbs Carty

Argued: December 11, 2018
Filed: June 9, 2020

Cite as: 2020 VI 7

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

Carol Ann Rich, Esq. (argued)
Malorie Winne Diaz, Esq.
Dudley Rich LLP
St. Thomas, U.S.V.I.
Attorneys for Appellant,

Kevin A. Rames, Esq.
Law Office of K.A. Rames, P.C.
St. Croix, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

CABRET, **Associate Justice**.

¶ 1 Sam's Food Distributors Inc. and Sam's Management Inc. ("SDI" and "SMI," respectively), appeal from the Superior Court's June 22, 2018 findings of fact and conclusions of law and accompanying order granting a permanent injunction ("injunction") in favor of Appellee NNA&O, LLC, and against Appellants SMI and SDI and nonparty Hector Gonzalez. Appellants argue that the Superior Court abused its discretion in granting the permanent injunction, and further erred by effecting an unconstitutional taking of Appellants' property, failing to consider unrebutted expert testimony, and improperly exercising jurisdiction over SDI and Hector Gonzalez. Because the terms of the Superior Court's injunction are far broader than necessary to restrain the unlawful conduct complained of in this case, we vacate the Superior Court's injunction and remand this matter for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 This appeal arises from a dispute between the parties concerning the scope of an easement over Lot 171, Estate Altona & Welgunst, St. Thomas, U.S. Virgin Islands. On January 25, 1980, Beth Paula Kimelman, then the owner of Lot 171, subdivided what was Lot 171 into Lots 171A and Remainder Lot 171. In a Warranty Deed executed that same date, Kimelman transferred Lot 171A to Prime Foods and Supply Corporation ("Prime Foods"). Lot 171A encompasses the area of what was then, and is now, 171's warehouse footprint, with property boundaries coextensive with the outer walls of the warehouse. Kimelman retained Lot 171 but conveyed an easement over Lot 171 to Prime Foods. This easement is expressly granted in the Warranty Deed conveying Lot 171A to Prime Foods providing for ingress and egress over Lot 171, but it is not defined by specific metes and bounds. The easement is described as follows:

> A non-exclusive easement over Parcel No. 171, Estate Altona and Welgunst, Nos. 3B and 3C, Little Northside Quarter, St. Thomas, Virgin Islands as Shown on P.W.D. Drawing No. G9-2980-T80
>
> Said easement to be used for the purpose of ingress and egress to Parcel No. 171A.

¶ 3 In 1999, Prime Foods transferred its assets, including Lot 171A, to PWKH, Inc., which continued to use the Lot 171A warehouse to operate a wholesale foods business until filing for bankruptcy. While PWKH was in bankruptcy proceedings, SDI, a Puerto Rico based food distribution company, leased Lot 171A from PWKH. DWILL Management, LLC subsequently acquired Lot 171 and later conveyed it to SMI, a St. Thomas corporation that currently owns Lot 171, which it in turn rents to Sam's Supermarket. Sam's Supermarket uses Lot 171 to store food in refrigerated containers. SMI, SDI, and Sam's Supermarket are all commonly owned by Hector Gonzalez. In the course of purchasing Lot 171, to survey the property SMI hired Charles Hamilton, who concluded in his survey report that the owner of Lot 171A holds an easement for ingress and egress to Lot 171A over Lot 171.

¶ 4 Appellee NNA&O is a limited liability company formed on St. Thomas for purchasing warehouse space to store furniture. NNA&O bought Lot 171A at auction in January 2017. As owner of 171A, NNA&O holds an express easement over Lot 171, memorialized in the original bargain sale and deed conveying Lot 171A to Prime Foods. NNA&O's predecessor in interest to Lot 171A, PWKH, previously entered into a lease agreement with SMI's predecessor in interest, DWILL, for increased access to Lot 171 for permanent parking.

¶ 5 The present dispute between the parties began in March 2018 when NNA&O sent a demand letter to Appellants' counsel requesting that Appellants cease and desist using NNA&O's building to mount electrical conduit used to provide electricity to a neighboring building. Appellants responded through counsel, arguing that since the wall is the dividing line between the

properties, the conduit is mounted on Sam's Food property and not on NNA&O's property. Counsel's response to NNA&O's demand letter clarified Appellants' position that while NNA&O held an easement strictly for ingress and egress—that is entering and exiting—to Lot 171A, any additional use of Lot 171 for parking, loading, and unloading would only be allowed pursuant to a written rental agreement between the parties. NNA&O subsequently filed a complaint in the Superior Court against SDI and SMI as well as a motion for preliminary and permanent injunction. The complaint and motion requested that the court preliminarily and permanently enjoin SMI from: (1) blocking NNA&O's access to any of its eight entry doors at its commercial warehouse, (2) blocking its ingress, egress, loading, unloading or parking on Lot 171, and (3) mounting its electrical conduits on NNA&O's warehouse.

¶ 6 The Superior Court held a hearing on the merits of NNA&O's motion on May 11, 2018 and May 17, 2018, and subsequently granted NNA&O's motion for permanent injunction in its June 22, 2018 order and accompanying findings of fact and conclusions of law. Appellants timely filed their notice of appeal on July 20, 2018.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 7 "The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." V.I. CODE ANN. tit. 4, § 32(a). Because the Superior Court's June 22, 2018 order granting NNA&O, LLC's motion for permanent injunction is a final order under section 32(a), we have jurisdiction over the appeal. *Moses v. Fawkes*, 66 V.I. 454, 459 (V.I. 2017) (explaining that an injunction that "effectively adjudicated the entire case on the merits, . . . is . . . appealable as a final judgment pursuant to title 4, section 32(a) of the Virgin Islands Code").

¶ 8 We review the Superior Court's decision to grant or deny an injunction for abuse of discretion. *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012); *see also Caribbean Healthways, Inc. v. James,* 55 V.I. 691, 698 (V.I. 2011) ("The decision to grant or deny a permanent injunction is reviewed for abuse of discretion.") (quoting *In re Najawicz*, 52 V.I. 311, 328 (V.I. 2009)). "An abuse of discretion 'arises only when the decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *Stevens v. People*, 55 V.I. 550, 556 (V.I. 2011) (citing *Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir. 2003)). Furthermore, we review the Superior Court's factual findings of each injunction factor for clear error, and we exercise plenary review of its conclusions of law. *Yusuf v. Hamed,* 59 V.I. 841, 848 (V.I. 2013) (explaining that "we review the Superior Court's factual findings regarding likelihood of irreparable harm, harm to the nonmoving party, and whether the injunction is in the public interest only for clear error.").

III. DISCUSSION

¶ 9 On appeal, Appellants SDI and SMI argue that the Superior Court erred by extending its injunction order to SDI, a Puerto Rican company, and to nonparty Hector Gonzalez, because the court lacked personal jurisdiction over them. Additionally, Appellants argue that the Superior Court abused its discretion in granting NNA&O's motion for a preliminary and permanent injunction. Finally, Appellants contend that the Superior Court abused its discretion by failing to consider their expert's unrebutted testimony. We consider each of these arguments in turn.[1]

[1] SMI also argues that the Superior Court's order amounted to an unconstitutional taking of their property in violation of the Fifth Amendment to the Constitution of the United States. SMI, however, never raised this issue before the trial court. *See* V.I. R. APP. P. 22(m). In any event, because we vacate the Superior Court's injunction on other grounds and remand this case for the Superior Court redefine the scope of its injunction, we need not determine whether the court's original injunction effected an unconstitutional taking of SMI's property.

A. Personal Jurisdiction

¶ 10 As a threshold matter, Appellants argue that the Superior Court's findings of fact and conclusions of law and accompanying order are void with respect to Hector Gonzalez—who is not a party to this matter[2]—and SDI— a Puerto Rico based corporation that has not conducted business in the U.S. Virgin Islands in years—because the court lacked personal jurisdiction. Appellee's brief on appeal offers no responsive argument and is generally silent as to this issue.[3]

¶ 11 Because Hector Gonzalez is not named as a party in this lawsuit and was never served in his individual capacity, the injunction against him is invalid and is therefore void. *See Ernest v. Morris*, 64 V.I. 627, 639 (V.I. 2016) (finding that when the Superior Court never acquired personal jurisdiction over a party, the judgment as to him was not authorized); *see also Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc*., 96 F.3d 1390, 1394 (Fed. Cir. 1996) ("[C]ourts of equity have long observed the general rule that a court may not enter an injunction against a person

[2] Because Gonzalez is not a party in the underlying matter and did not appeal from the Superior Court's decision, Appellants would ordinarily lack the authority to assert legal arguments on his behalf on appeal. *See Benjamin v. AIG Ins. Co.*, 56 V.I. 558, 564-65 (V.I. 2012) (recognizing the standing doctrine as a non-jurisdictional claims-processing rule). This Court, however, may exercise its discretion to notice any error on appeal that affects substantial rights. *See* V.I. R. APP. P. 22(m). Importantly, this Court has already held that "[a]n error may also affect substantial rights where it would bind a nonparty to the suit." *Marsh-Monsanto v. Clarenbach*, 66 V.I. 366, 383 (V.I. 2017). Because this Court could exercise its discretion to *sua sponte* vacate the portion of the injunction directed to Gonzalez, Appellants are not precluded from bringing the error to our attention.

[3] We take this opportunity to reaffirm that "[t]he rules that require a litigant to brief and support his arguments, both here and before the Superior Court, are not mere formalistic requirements. They exist to . . . give[ ] opposing parties the due process they deserve on appeal," which includes the "opportunity to respond" to arguments that they raise in support of their respective positions. *Simpson v. Golden*, 56 V.I. 272, 280-81 (V.I. 2012). Accordingly, when as here, an appellant "raises a debatable issue" in its opening brief, "the court, in its discretion, may find that an appellee's failure to . . . [respond] constitutes a confession of error" as to that issue, and the court may proceed to remedy that error. *See, e.g.*, *State ex rel. McDougall v. Superior Court*, 850 P.2d 688, 690 (Ariz. Ct. App. 1993); *State v. Greenlee County Justice Court*, 756 P.2d 939, 940 (Ariz. Ct. App.1988). However, it is well established in the Virgin Islands, as it is elsewhere, that "the parties cannot stipulate to the law, especially in a situation . . . where the decision may impact other pending or future cases." *Matthew v. Herman*, 56 V.I. 674, 682 (V.I. 2012). Given the significance of the issue of personal jurisdiction in this case, and its due process implications, we exercise our discretion to address it on the merits, notwithstanding any confession of error on appeal arising from the Appellee's failure to do so.

who has not been made a party to the case before it.") (citing *Scott v. Donald*, 165 U.S. 107, 117 (1897) ("The decree is also objectionable because it enjoins persons not parties to the suit.")).

¶ 12 Similarly, SDI—a Puerto Rican company that does not conduct business in the U.S. Virgin Islands—is not subject to the Superior Court's jurisdiction and the order against it is void as well. Although SDI was served with a copy of the summons and complaint, SDI filed a motion to dismiss the complaint against it on May 9, 2018 arguing that the purported service was ineffective and asserting that SDI does not conduct any business in the Virgin Islands and neither operates nor stores any vehicles or equipment on Lot 171. SDI's motion to dismiss was unopposed and Appellee does not contest SDI's factual assertions. And although the Superior Court never ruled on the motion—which itself constituted error[4]—the court's findings of fact and conclusions of law expressly found that SDI does not do business in the Virgin Islands. Because Appellee does not contest that SDI lacked the requisite minimal contacts with the Virgin Islands to support the Superior Court's exercise of personal jurisdiction, and because the record is devoid of any evidence to support the existence of even minimal contacts with this forum, we conclude that the court erred in exercising jurisdiction over SDI. *See Molloy v. Indep. Blue Cross*, 56 V.I. 155, 181 (V.I. 2012) (requiring continuous and systematic contact with the forum or minimum contacts to establish personal jurisdiction) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State.") (citations omitted).

[4] *See Garcia v. Garcia*, 59 V.I. 758, 771 (V.I. 2013) ("[A] court can never exercise its discretion to simply ignore a challenge to its . . . jurisdiction."); *Joseph v. Daily News Publishing Co.*, 57 V.I. 566, 580 n.4 (V.I. 2012) (expressing concern with the failure to rule on a motion to dismiss for lack of service, given the jurisdictional significance of proper service).

Therefore, because the Superior Court never gained personal jurisdiction over nonparty Hector Gonzalez and Defendant SDI, the orders purportedly applying to them are void. *Estate of Skepple v. Bank of Nova Scotia,* 69 V.I. 700, 732 (V.I. 2018) (explaining that "[i]f the trial court never obtained personal jurisdiction over [a party], any default judgment is void and must be set aside as a matter of law").[5]

B. Permanent Injunction

¶ 13 When determining whether to grant a motion for preliminary and permanent injunction, the Superior Court must consider the following factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

3RC & Co. v. Boynes Trucking Sys., 63 V.I. 544, 550 (V.I. 2015) (citations omitted). We have adopted a sliding scale standard for weighing these factors, under which "the Superior Court must make findings on each of the four factors and determine whether—when the factors are considered together and weighed against one another—the moving party has made 'a clear showing that [it] is entitled to [injunctive] relief.'" *Id.* at 557 (citing *Yusuf*, 59 V.I. at 847). Unlike a preliminary injunction, which requires only a showing of probability of success on the merits, to obtain a permanent injunction, the moving party must demonstrate actual success on the merits of the claim. *Moses v. Fawkes*, 66 V.I. 454, 461 (V.I. 2017). "[T]he party seeking an injunction [bears] the

[5] Although the Superior Court's order and accompanying findings of fact and conclusions of law generally refers to both SMI and SDI collectively as "Sam's," because we conclude that the court lacked personal jurisdiction over SDI, the remainder of this opinion refers only to the Superior Court's order as it pertains to SMI.

burden of proof as to all four factors." *Appleyard v. Gov. Juan F. Luis Hosp. & Med. Ctr.,* 61 V.I. 578, 591 (V.I. 2014).

1. Actual Success on the Merits

¶ 14 The Superior Court determined that NNA&O clearly demonstrated actual success on the merits of this case. Appellants do not dispute that NNA&O holds an express easement across Lot 171 as described in the 1980 bargain and sale deed. Rather, they argue that the scope of the easement is limited strictly to ingress and egress—entering and exiting the property—and contend that the Superior Court erred in concluding that the easement also grants NNA&O the right to park, load, and unload vehicles.

¶ 15 Although this Court has only rarely had occasion to address the law of servitudes, certain basic principles are well established. "We start with the proposition that private persons, in the exercise of their constitutional right of freedom of contract, may ordinarily impose whatever restrictions upon the use of land which they convey to another that they desire to impose." *Pavel v. Estates of Judith's Fancy Owners' Ass'n, Inc.,* 2019 VI 23 ¶6 (quoting *Grubel v. MacLaughlin,* 6 V.I. 490, 507 (D.V.I. 1968)). In *Pavel,* we explained that the language of a restrictive covenant is construed according to ordinary principles of contract interpretation. *Id.* at ¶7. "Primarily, the question is one of intention, subject to the further principle that restrictive covenants are strictly construed in favor of the free use of property." *Id.* at ¶8 (citing 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 169 (footnotes omitted)). We do not hesitate to conclude that these same principles govern the construction of express easements. *See* 25 AM. JUR. 2D *Easements and Licenses* § 63 ("Easements are reviewed under the same principles that have been established for the interpretation of contracts."); *Phillip v. Marsh-Monsanto,* 66 V.I. 612, 624-25 (V.I. 2017) ("To determine whether a contract is ambiguous, we resort to principles of contract interpretation,

keeping in mind that our primary purpose is to ascertain and give effect to the parties' objective intent."). As explained in American Jurisprudence:

> The focal point in interpreting an [express] easement is the language of the agreement or deed itself, seeking to discern what a reasonable person in the position of the parties would have meant at the time it was effectuated. In determining the character and extent of an easement, the ordinary import of the language will be accepted as indicative of the intention of the parties unless there is something in the situation of the property or the surrounding circumstances that calls for a different interpretation. When the purpose of an express easement is not clear, a court must ascertain the objectively manifested intention of the parties to the original conveyance in light of the circumstances in existence at the time the easement was made, as well as the physical condition of the premises, and the use of the easement and acts acquiesced to during the years shortly after the original grant. Where the instrument is ambiguous, the court may evaluate extrinsic evidence.

25 AM. JUR. 2D *Easements and Licenses* § 63 (collecting cases).

¶ 16 In the present case, the express easement is described in the deed as: "A non-exclusive easement over Parcel No. 171, Estate Altona and Welgunst, Nos. 3B and 3C, Little Northside Quarter, St. Thomas, Virgin Islands as Shown on P.W.D. Drawing No. G9-2980-T80…. Said easement to be used for the purpose of ingress and egress to Parcel No. 171A." Thus, applying the principles of construction outlined above, we must determine whether the parties to the 1980 conveyance understood "the purpose of ingress and egress to Parcel No. 171A" to include the acts of parking, loading, and unloading as argued by NNA&O.

¶ 17 First, the record demonstrates that Lot 171A has, from the time of the original subdivision of Lot 171, consisted entirely of a commercial warehouse, with property boundaries coextensive with the outer walls of the warehouse that has existed on the property from the time of the initial conveyance. Additionally, all eight cargo bay doors granting access to the warehouse abut and open out into the common boundary between Lot 171A and Lot 171. Thus, based solely on the location of the warehouse and its cargo bay doors relative to Lot 171, we may reasonably infer that

the easement "for the purpose of ingress and egress *to Parcel No. 171A*" was, at a minimum, specifically intended to grant the easement holder a right of access to the eight cargo bay doors that would otherwise be inaccessible to the owner of Lot 171. In turn, access to the cargo bay doors of a commercial warehouse—generally used for the storage of commercial goods— is only meaningful if the right of access includes the incidental right to stop, load, and unload commercial vehicles carrying commercial goods for storage at the warehouse.[6]

¶ 18 Our interpretation of the right of "ingress and egress" in this context is consistent with the interpretation of similar provisions in various jurisdictions that have held that the right to ingress and egress includes the incidental right to actively load and unload. *See, e.g., Ben Joseph Burkhart Tr. v. Cramer*, No. 330609, 2017 Mich. App. LEXIS 946, at *15 (Mich. Ct. App. June 13, 2017) (unpublished) ("The trial court did not clearly err in finding that the express easement allowed Handicraft to actively load and unload in the right of way so long as it did not unreasonably interfere with the Trust's right to ingress and egress."); *Falk Corp. v. Ryan*, No. 94-3034, 1995 Wisc. App. LEXIS 1308, at *3 (Ct. App. Oct. 24, 1995) (unpublished) ("If not specifically restricted, ingress and egress includes the reasonable opportunity to stop vehicles to load or unload passengers or personal property."); *In re Shanor Elec. Supply, Inc. v. Fac Cont'l, LLC*, 905 N.Y.S.2d 383, 384 (N.Y. App. Div. 2010) (finding that use of an ingress and egress easement for loading and unloading of trucks is a reasonable use incidental to the purpose of the easement);

[6] Appellants argue that the history of prior use of the easement demonstrates that the original parties to the conveyance did not intend for the right of ingress and egress to include the incidental right to park, load, and unload goods because Prime Foods and PWKH, Inc., NNA&O's predecessors in interest, purportedly entered into a lease agreement with DWILL Management, LLC, SMI's predecessor in interest, under which Prime Foods and later PWKH paid DWILL to rent space in lot 171 for parking, loading, and unloading. However, the affidavits attesting to this arrangement convey the understanding of two employees who began working for Prime Foods in 1994, approximately fourteen years after the original conveyance creating the easement. Thus, this later use of the easement is of little relevance in ascertaining the intention of the parties to the original 1980 conveyance.

Feld v. Young Men's Hebrew Ass'n, 44 So. 2d 538, 540 (Miss. 1950) (explaining that right of way for ingress and egress includes "said purposes of ingress and egress, and not as a parking space for vehicles except such parking as may be reasonably necessary for the loading and unloading of goods, wares and merchandise transported to and from appellants' building").

¶ 19 However, while these undisputed factual circumstances surrounding the conveyance clearly indicate that the easement for ingress and egress was intended to include the incidental right to *stop*, load, and unload, nothing in the record supports the further inference that the parties to the conveyance intended the easement to include an additional right to not merely stop, but to park vehicles on Lot 171 for reasons other than the active loading and unloading of commercial goods. Indeed, the great weight of authority from jurisdictions interpreting ingress and egress easement provisions under similar circumstances holds that parking is not included within the right of ingress and egress. For example, Florida courts have found that where an easement specifies that it is for ingress and egress "[t[he intent of the developer to only grant an access easement is equally clear." *Avery Dev. Corp. v. Vill. by Sea Condo. Apartments*, 567 So. 2d 447, 448 (Fla. Dist. Ct. App. 1990). Similarly, the Court of Appeals of Indiana determined that "[t]he plain meaning of the terms 'ingress' and 'egress' does not include parking." *Kwolek v. Swickard*, 944 N.E.2d 564, 572 (Ind. Ct. App. 2011). *See also Hall v. Altomari*, 562 A.2d 574, 576 (Conn. App. Ct. 1989) ("Even when a right-of-way is granted in broad language, the owner of the dominant estate does not acquire an absolute right to park vehicles on the subject property."); *Franco v. Piccilo*, 853 N.Y.S.2d 789, 790 (N.Y. App. Div.) ("The right of egress and ingress does not confer upon dominant tenants the right to park vehicles along the right of way."); *Russo v. Stepp*, 475 A.2d 331, 332 (Conn. App. Ct. 1984) ("From the terms of the deed and from the surrounding circumstances it is plain that the defendant did not acquire a right to obstruct the driveway or to permit motor

vehicles to park in the driveway so as to interfere with its use by the plaintiffs."); *Cleveland v. Clifford,* 698 N.E.2d 1045, 1048 (Ohio Ct. App. 1997) ("[W]e hereby find that the term 'drive easement' does not permit parking thereon.").

¶ 20 Thus, the plain language of the express easement contained in the 1980 bargain and sale deed viewed in the context of the relevant factual circumstances surrounding the conveyance clearly demonstrates that the parties to the original conveyance intended for the ingress and egress easement to include the incidental right to stop, load and unload. Accordingly, the Superior Court did not err in concluding that NNA&O demonstrated actual success on the merits of its claim for a permanent injunction in this respect. However, the Superior Court erred in holding that the easement includes the further right to park vehicles on Lot 171 for reasons unconnected with stopping, loading, and unloading of commercial goods.[7]

2. Likelihood of Irreparable Harm to NNA&O

¶ 21 The Superior Court also found that NNA&O proved that it would suffer irreparable harm if an injunction was not issued in this matter. "Irreparable harm is 'certain and imminent harm for which a monetary award does not adequately compensate.'" *Yusuf v. Hamed*, 59 V.I. 841, 854 (V.I. 2013) (citing *Wisdom Imp. Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 114 (2d Cir. 2003)). Relying on our holding in *Yusuf* that "a party's right to control a business 'has intrinsic

[7] In reaching its conclusion that "the apparent purpose of the easement was intended to provide parking, loading, and unloading access," the Superior Court relied upon Public Works Drawing G9-2980-T80, depicting both lots, with the notation "parking loading & unloading" appearing directly above the words "Lot No. 171." While the description of the easement in the bargain and sale deed does incorporate drawing T80 by reference, it is unclear whether the map is referenced for the purpose of describing or depicting the easement, or merely for the purpose of identifying the property burdened by the easement. Additionally, while the map does include the notation "parking loading & unloading," there is no indication on the map itself that this language is intended to describe the scope of an easement. For these reasons, the purported description of the easement included on map T80 is unclear and ambiguous, and the Superior Court erred to the extent that it defined the scope of the express easement by reference to the language included in drawing T80, rather than by interpreting the language of the express easement itself according to the general principles of contract interpretation. See *Brodhurst v. Frazier*, 57 V.I. 365, 371-74 (V.I. 2012) (finding surveyor drawing of property referencing "joint use driveway" too ambiguous to interpret at summary judgment).

value' that cannot be compensated by money damages," 59 V.I. at 854, the Superior Court concluded that NNA&O would suffer irreparable harm if SMI was not enjoined from blocking NNA&O's access to its eight cargo bay doors, because without such access, NNA&O would effectively be incapable of utilizing its warehouse for its reasonable, intended commercial use: the storage of furniture.

¶ 22 Appellants argue that NNA&O would not suffer irreparable harm because the warehouse may be accessed by an existing door facing the public street, and because "NNA&O could reopen one of the former roll down doors" accessible from the public streets. However, the record indicates that the existing door facing the public street is not a cargo bay door suitable for the loading and unloading of goods, but is an ordinary external building door providing access for pedestrian traffic. Additionally, there is no evidence in the record to indicate the existence of any "roll down" cargo bay doors accessible from the public street. Even if such access were possible, the grant of the easement itself indicates that the original parties to the conveyance considered such access to be insufficient for the owner of Lot 171A to make full reasonable, commercial use of its property.

¶ 23 Accordingly, we conclude that the Superior Court did not abuse its discretion in finding that NNA&O would suffer irreparable harm in the absence of an injunction.

3. Likelihood of Greater Harm to SMI

¶ 24 Appellants argue that the Superior Court erred in concluding that the balancing of harms favored NNA&O because an injunction requiring SMI to remove the refrigerated containers would result in the cessation of operations of Sam's Supermarket, SMI's principal tenant, which relies on the use of the refrigerated containers for the storage of fresh food products.

¶ 25 In weighing the harms to the nonmoving party, the trial court is required to determine whether and to what extent the nonmoving parties will suffer irreparable harm if the court enjoins them. *Yusuf,* 59 V.I. at 856. Here, the Superior Court examined the burden that would be imposed by enjoining SMI and determined that NNA&O would suffer significantly greater harm if it were not granted the injunction. The court found that SMI had alternative means of providing storage for Sam's Supermarket's cold food products without blocking NNA&O's access to the warehouse, while NNA&O lacked similar alternatives to conduct their business without accessing Lot 171A via its easement over Lot 171. Additionally, the court reasoned that any potential harm to SMI caused by the removal or relocation of the refrigerated containers was the result of its own historical, "complacent" business practice, as SMI had begun parking refrigerated containers in front of the warehouse during the period that SDI leased Lot 171A, but had simply failed to remove those containers following the sale of Lot 171A to NNA&O. For these reasons, the court determined that NNA&O faced much greater harm if the situation remained unchanged and found that the balancing of harms favored NNA&O.

¶ 26 Our review of the Superior Court's finding that the balance of harms favors NNA&O is limited to clear error, and we will "only reverse a factual determination as being clearly erroneous if it is completely devoid of minimum evidentiary support or bears no rational relationship to the supportive evidentiary data." *In re Estate of Small*, 57 V.I. 416, 428 (V.I. 2012). Here, the Superior Court based its assessment of the relative harm to the parties largely upon its finding that SMI has alternative means of providing storage for Sam's Supermarket's fresh food products other than by means of refrigerated trailers permanently parked directly in front of Lot 171A. Although the court did not expound upon this finding, evidence in the record establishes that the Sam's Supermarket building contains indoor refrigeration units of significant size. Additionally, as evidenced by the

Superior Court's decision to allow SMI to continue parking three refrigerated containers on Lot 171, the size and situation of the property itself indicates that SMI would be capable of parking at least some refrigerated containers on the property without blocking NNA&O's access to its warehouse. Accordingly, because the court's finding is rationally supported by evidence in the record, we conclude that the Superior Court did not abuse its discretion in finding that the balancing of harms favored issuance of an injunction restraining SMI from interfering with NNA&O's use of its easement across Lot 171.

4. Public Interest

¶ 27 Finally, the Superior Court found that granting NNA&O's motion for injunctive relief was in the public's interest because NNA&O had demonstrated actual success on the merits and irreparable harm, and because Appellants' suggested alternative—forcing NNA&O to open cargo bay doors onto the public streets—would prevent residents in the surrounding neighborhood from accessing their properties. We have explained that "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Yusuf*, 59 V.I. at 857-58 (citing *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))) (internal quotations omitted). We have further noted that the "[p]ublic interest can be defined a number of ways." *Yusuf,* 59 V.I. at 858 (quoting *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 197 (3d Cir. 1990)). The public interest factor "will typically favor the moving party 'if [it] demonstrates both a likelihood of success on the merits and irreparable injury.'" *Id.* at 858 n.11 (quoting *American Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994)).

¶ 28 On appeal, Appellants argue that the issuance of an injunction in this case is against the public interest because the injunction fails to sufficiently protect private property rights by

affording the easement holder "greater rights than the owner of record." However, this argument amounts to nothing more than a rehashing of Appellants' arguments with respect to NNA&O's success on the merits of the claim, which we have already rejected for the reasons discussed above.

¶ 29 Additionally, Appellants argue that the injunction is against the public interest because it would drastically limit SMI's use of its own property, and would "cause Sam's Supermarket to close, depriving the Territory of a major food distribution service and causing harm to residents and visitors." However, Appellants have failed to point to any evidence in the record to substantiate their bald claim that issuance of an injunction would leave Sam's Supermarket with no recourse but to cease operations and close its doors. And, as we have previously observed in similar cases, a "lack of citation to legal or evidentiary support demonstrates that 'the consequences predicted ... are speculative, hyperbolic, and almost entirely of the [parties'] own making.'" *Yusuf*, 59 V.I. at 858 (citing *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230, 246 (2d Cir. 2013) (rejecting public interest arguments where the party "failed to present the [trial] court with any record evidence to support its assertions")).

¶ 30 Accordingly, because Appellants have not demonstrated that the trial court's finding regarding the public interest factor is "completely devoid of minimum evidentiary support or ... bears no rational relationship to the supportive evidentiary data," we cannot conclude that the Superior Court abused its discretion in finding that the public interest would be served by issuing an injunction restraining SMI from interfering with NNA&O's easement right to access its warehouse, and to stop, load, and unload commercial goods.

¶ 31 Because the Superior Court correctly found that NNA&O had demonstrated actual success on the merits, that NNA&O would suffer irreparable harm in the absence of an injunction, that the balance of harms to parties favored issuance of the injunction, and that entering an injunction

would serve the public interest, the court did not abuse its discretion in concluding that NNA&O is entitled to a permanent injunction restraining SMI from blocking NNA&O's use of its express easement for ingress and egress to Lot 171A, including the incidental right to stop, load, and unload commercial goods. However, for the reasons discussed below, we conclude that the terms of the injunction order entered by the Superior Court are defective in both form and substance, and are overly broad and unnecessary to adequately protect the rights of the parties in this case.

C. Scope of the Permanent Injunction

¶ 32 While a court of equity enjoys wide latitude in fashioning equitable remedies, "[a] court issuing an injunction must ensure that it is narrowly tailored 'to fit the particular circumstances of the case.'" *Caribbean Healthways, Inc. v. James*, 55 V.I. 691, 700 (V.I. 2011) (quoting *Brow v. Farrelly*, 994 F.2d 1027, 1038, 28 V.I. 345 (3d Cir. 1993)). Indeed, an "injunction 'cannot be broader than necessary to restrain the unlawful conduct.'" *Id.* Additionally, Virgin Islands Rule of Civil Procedure 65(d) governs the "contents and scope of every injunction and restraining order." The rule provides that "[e]very order granting an injunction… must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

¶ 33 As an initial matter, the body of the Superior Court's findings of fact and conclusions of law purports to enter an injunction "against Sam's Management, Inc., Sam's Food Distributors, Inc., and Hector Gonzalez," while the attached order is confoundingly directed to "Sam's warehouse," which is not a legal entity involved in this matter. For the reasons discussed above in Section III(A) of this opinion, the Superior Court lacked personal jurisdiction over Sam's Food Distributor's, Inc. and Hector Gonzalez, and therefore the court erred to the extent that it directed the injunction to those parties. Substantively, in addition to enjoining "Sam's warehouse" from

blocking NNA&O's access to Lot 171A by means of the easement over Lot 171 and requiring "Sam's" to remove all obstacles currently blocking access to the warehouse's eight cargo bay doors, the Superior Court's injunction further requires "Sam's" to clear Lot 171 of all personal property with the exception of three refrigerated trailers. The injunction also requires "Sam's" to immediately terminate any leases with third parties on Lot 171 that would "infringe upon the easement rights" of NNA&O, and restrains "Sam's" from entering into such leases with other parties in the future. Finally, the injunction order prohibits "Sam's" from attempting to engage in any negotiations with NNA&O for leasing or renting any portion of Lot 171.

¶ 34 The terms of the Superior Court's injunction—particularly the last three terms requiring the clearing of Lot 171 and prohibiting the leasing or renting of the property— are far broader than necessary to protect NNA&O's right to utilize the easement over Lot 171 and are substantially broader in scope than the relief sought in the complaint. As discussed above, NNA&O holds an express easement over Lot 171 for ingress and egress to its commercial warehouse on Lot 171A, including the incidental right to stop, load, and unload commercial goods. Critically though, SMI remains the owner in fee simple of Lot 171 and retains the right to use its property in any manner it desires, so long as that use does not substantially interfere with NNA&O's ability to utilize its easement. Accordingly, SMI has the right to park and store whatever vehicles, equipment, or other objects it wishes on its own property, subject to the sole restriction that the placement of those objects must not prevent NNA&O from accessing its warehouse. The Superior Court offered no explanation either for its arbitrary determination that SMI could park no more than three refrigerated containers on its property without substantially impeding NNA&O's ability to make reasonable use of its easement, or for its directive that those containers must be situated on the "most southern side of Parcel No. 171." It is possible that SMI could conceive of some

configuration by which it might park more than three refrigerated containers on its property without blocking NNA&O's access. For example, SMI could potentially elect to replace the large refrigerated containers currently in use with other, smaller containers that could be arranged differently to accommodate NNA&O's right of access.

¶ 35 Additionally, as explained above, NNA&O's easement for ingress and egress does not include the right to park vehicles on Lot 171 beyond the incidental right to temporarily stop or park commercial vehicles for the purpose of loading and unloading commercial goods. However, if NNA&O wishes to obtain the right to more permanently park vehicles on Lot 171, the parties are free to execute a contract extending this right to NNA&O under whatever terms they may deem appropriate. Similarly, as the owner of Lot 171, SMI is free to contract with third parties to rent or lease space for parking or storage on Lot 171, so long as the terms of that arrangement do not substantially impede NNA&O's ability to make reasonable use of its easement. By categorically prohibiting SMI from entering into such lease agreements with either NNA&O or with third parties—a form of relief never requested by NNA&O—the Superior Court's order unnecessarily and improperly infringes upon SMI's property rights as the owner of Lot 171 as well as SMI's freedom of contract.

¶ 36 In summary, the Superior Court did not abuse its discretion in concluding that a balancing of the relevant factors for consideration clearly weighed in favor of granting NNA&O's motion for a permanent injunction restraining SMI from blocking NNA&O's use of its express easement for ingress and egress to Lot 171A, including the incidental right to stop, load, and unload commercial goods. However, the court erred in crafting its injunction order to include terms that are far broader than necessary to restrain SMI's unlawful conduct and that impermissibly restrict SMI's ability to exercise its property rights as the owner in fee simple of Lot 171. Additionally,

the court erred in directing the injunction to parties over which the court lacks personal jurisdiction—SDI and Hector Gonzalez—and further erred in purportedly directing the injunction to "Sam's warehouse," which is not a legal entity involved in this matter. Accordingly, we vacate the Superior Court's June 22, 2018 injunction, and remand this matter for the court to issue an injunction that is narrowly tailored to prevent the specific unlawful conduct at issue in this case as outlined in this opinion.

D. Hamilton's Unrebutted Expert Testimony

¶ 37 Appellants also argue that the Superior Court erred by failing to accord any weight to Hamilton's unrebutted expert testimony. Specifically, they argue that the Superior Court improperly disregarded Hamilton's testimony that NNA&O's easement is solely for ingress and egress and does not include other rights such as the right to park, load, or unload vehicles. fBecause this purported error may potentially recur on remand, we exercise our discretion to consider Appellants' claim notwithstanding our decision to vacate the injunction. *Smith v. Turnbull*, 54 V.I. 369, 374-75 (V.I. 2010).

¶ 38 In a bench trial, such as the one in this case, the judge sits as fact finder. In this role, the judge must weigh the evidence introduced by the parties, including the testimony of their witnesses. *Hendricks v. Central Reserve Life Ins. Co.,* 39 F.3d 507, 513 (4th Cir. 1994) ("Evaluating the credibility of experts and the value of their opinions is [also] a function best committed to the [trial] courts, and one to which appellate courts must defer."). In this role, it is within the judge's discretion whether to credit the expert testimony provided to the court. *Malloy v. Reyes*, 61 V.I. 163, 184 (V.I. 2014*); Farrington v. People*55 V.I. 644, 658 (V.I. 2011) ("It is well established that credibility determinations are within the province of the jury or a judge sitting

as the fact finder."). "When the testimony of a witness is not believed, the trier of fact may simply disregard it." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 512 (1984).

¶ 39 Here, Hamilton testified to the legal meaning of ingress and egress. However, as discussed above, the legal meaning of these terms is properly determined as a matter of law according to general contract principles. Therefore, Hamilton's testimony concerning the interpretation of these terms is irrelevant and any potential error the Superior Court committed by not considering his testimony is harmless. *Antilles Sch., Inc. v. Lembach,* 64 V.I. 400, 413 (V.I. 2016) ("No error or defect in any ruling or order or in anything done or omitted by the Superior Court . . . is ground for granting relief or reversal on appeal where its probable impact, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties") (quoting V.I. R. APP. P. 4(i)). *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 671, 696 (V.I. 2015) ("[T]his Court typically will not disturb an order under review if any legal errors were ultimately harmless.") (citing V.I. R. APP. P. 4(i)).

IV. CONCLUSION

¶ 40 Although the Superior Court did not abuse its discretion in concluding that NNA&O is entitled to a permanent injunction restraining SMI from interfering with NNA&O's use of the express easement for ingress and egress over Lot 171, including the incidental right to stop, load, and unload commercial goods, the court did abuse its discretion in crafting its injunction order to include terms that are far broader than necessary to restrain SMI's unlawful conduct and in directing its injunction order to non-parties and the non-existent legal entity "Sam's warehouse." Accordingly, we vacate the Superior Court's June 22, 2018 injunction and remand this matter for further proceedings consistent with this opinion.

Dated this 9th day of June, 2020.

BY THE COURT:

/s/Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court