[2021] JMSC Civ 73

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV00692

BETWEEN	**THE LAGOONS MANAGEMENT LTD**	**APPLICANT**
AND	**STARFISH BAY HOLDING LIMITED**	**RESPONDENT**

IN CHAMBERS

Representation: Mr Aon Stewart and Ms. Ashleigh Ximines instructed by Knight, Junor and Samuels for the Applicant.

Mrs Denise Kitson Q.C. and Rachel Kitson instructed by Chancellor and Co for the Respondent.

Heard: October 13th, 2020 and April 30th, 2021

Injunction – Serious issue to be tried – balance of convenience – maintaining the status quo – incumbrance – novation – cleans hands – jurisdiction over the foreshore – privity of contract

CORAM: HUTCHINSON J

INTRODUCTION

[1] On the 20th of February 2020 the Applicant filed a notice of application for court orders in which they seek the following orders against the Respondent;

1. An interim injunction is hereby granted, for a period of twenty-eight (28) days from the date hereof, restraining the Defendant, whether by its servants, agents or otherwise from developing the foreshore

and/or carrying out any activity or dealings in relation to the development of the foreshore on the property situated on ALL THAT parcel of land part of Montego Freeport now known as part of The Lagoons (Section One) in the parish of Saint James being the Lot numbered R 34 on the said plan and registered at Volume 1291 and Folio 163

2. That a date be fixed for further consideration of this application.
3. The time for serving the Respondent be abridged.
4. The costs of this application are reserved pending the further consideration of the application.
5. Liberty to Apply.

[2] On the 22nd of June 2020, they filed a Fixed Date Claim Form supported by an affidavit from Johann Epstein. The notice of application was listed for a number of dates and was eventually heard on the 13th of October 2020. At the end of the hearing the Parties were permitted to file additional submissions on specific areas of law. This Judgment seeks to address all the evidence presented in respect of this application, as well as the areas of law which have been raised for consideration.

Summary of Applicant's Case

[3] The Lagoons is an exclusive gated waterfront community situated in the Montego Freeport area in the parish of Saint James. The Applicant, the Lagoons Management Ltd, (hereinafter referred to as the Society) have, for approximately twenty-six (26) years, been tasked with oversight responsibility in respect of the community, its development and its environs. Mr Johann Epstein is the Chairman of the Society and provided the affidavits on which they rely.

[4] The Respondent, Starfish Bay Holding Limited, (hereinafter Starfish Bay) is the registered proprietor of Lot numbered R34 registered at Volume 1291 and Folio 163 at Lagoons. The shareholders and directors of this company are Dr. Guna Muppuri and his wife Vishnu Muppuri who reside at Number 10 Marine Point in

the Lagoons Development and were the previous registered proprietors of lot R34. The Muppuris were signatories to a maintenance agreement dated the 19th of January 2016 at the time when they were still the registered owners of Lot R34.

[5] It is the Applicant's case that Dr. Guna Muppuri and Mrs. Vishnu Muppuri acted in their capacity as servants and/or agents of Starfish Bay by maintaining/continuing dealings with the Society and also when they abided by and respected, the Rules and Regulations implemented. In support of this assertion, copies of the Statement of Accounts for Lot R34 were exhibited to show the continued payment of maintenance by Dr. Muppuri after the transfer to the Respondent. Reference was also made to other conduct on the part of the Muppuris, the details of which are stated below.

[6] The Duplicate Certificate of Title was also exhibited, which contained an endorsement which stated that an agreement dated the 28th of May 1997 was registered by the Registrar of Titles on the 5th day of June 1997, as Miscellaneous No.: 977583. It was highlighted that this endorsement states in part that;

> *'the Lagoons Management Limited, its servants, agents and invitees for a period of ninety-nine years is granted licence, authority, full and free right and liberty at such times as is deemed necessary to enter upon the lands to ensure that the said lands are kept in accordance with the rules and regulations imposed from time to time'.*

[7] The Applicant noted that this endorsement appears on all the Duplicate Certificate of Titles for lands situated in the Lagoons. It was also stated that this endorsement creates a binding relation between the Society and the registered proprietors for the next seventy-six (76) years and subjects the Society and registered proprietors to any other rule and/or regulation which is created by the Society from time to time. In January of 2017, the Society implemented a regulation for home owners in the Lagoon known as the Lagoons Rules and Regulations for Development and Architectural Control (hereinafter referred to as 'the Regulations"). According to the Applicant all land owners, including Starfish Bay, through its agents and/or servants acknowledged and subjected itself to the terms of the said regulations. It was outlined that the regulations provide in part at Section A (1) as follows;

> *All construction and landscaping require a plan approved in writing, by the Board, based on recommendations by the Architectural Committee before commencing and must follow this approved plan and amendments to plans must be submitted for approval and that approval is based on the Lagoon's Rules and Regulations and may be may be refused where it appears that such approval would not be in the best interest of the Development.*

[8] In November 2017, it came to Mr Epstein's knowledge that Starfish Bay had sought and received approval from the National Environment and Planning Agency (hereinafter referred to as NEPA) and the Saint James Parish Council for the development of a house on the subject property. A situation which the Applicant noted was in breach of the regulations as approval had not first been sought from the Society. As a result of this discovery, the Society made a formal request of Dr. Guna Muppuri and Mrs. Vishnu Muppuri for copies of all documents, permits and approvals issued by the respective bodies for their consideration and approval. These were provided on the 29th of January 2018 and approval was granted. Subsequent to this approval being granted, the Society was informed that Starfish Bay had again applied to NEPA and the Saint James Parish Council for building permits for construction on the foreshore of the said property without first obtaining their approval.

[9] A request was made by the Society for copies of documents in respect of these applications and these were received on or about October 2019. An Extraordinary General Meeting of the Society was then held on the 7th of October 2019 which resulted in a unanimous vote against the construction as approved by NEPA and the Saint James Parish Council. It was averred by Mr Epstein that in spite of the Society's decision, Starfish Bay continued their construction of the foreshore. On the 5th of February, 2020, Mr Epstein along with Mr. Fredrick Moe, a developer and resident of the Lagoons, visited the construction site of the foreshore development. This visit was stated to have revealed a breach of the Regulations as well as the approvals received from NEPA. Mr Epstein stated that an officer from NEPA was notified of these breaches and he believed that Starfish Bay was asked to regularize same.

[10] In respect of the breach of the Regulations and NEPA approval, it was explained that the measurement of the length of the foreshore construction, starting from the high-water mark to the furthest point of the development extending into the sea, was approximately one hundred and five (105) feet whereas the measurement approved by NEPA for the construction and maintenance of rubble groyne was twenty-five (25) meters i.e. eighty-two (82) feet. It was also outlined that the Regulations measurements were exceeded by approximately forty-six (46) feet.

[11] The Applicant also raised a concern that if Starfish Bay was allowed to carry out the development of the foreshore in accordance with these specifications, it would have control and exclusive possession of lands outside out the boundaries of its registered property which would rightly be classified as Crown land. They also asserted that this would be contrary to the incumbrance endorsed on the Duplicate Certificate of Title and strip the Society of the opportunity to monitor the development, a situation which, it was stated, could create an unfair advantage to Starfish Bay.

[12] The Applicant asked that an injunction be granted as a matter of urgency, to restrain the Respondent from carrying out further development on the subject property. Mr Epstein in his capacity as Chairman of the Board, indicated that he was prepared to give an undertaking as to damages or to bear all costs likely to be awarded by the Court against the Society. In support of this undertaking, he exhibited Duplicate Certificates of Title for properties situated in Montego Freeport registered at volume 1357 Folio 271 and Volume 1291 Folio 133. He also provided banking details for accounts held at the First Global Bank USD Account No. 8743717 and JMD Account No. 874371 both of which contained an approximate sum of Eight Million Dollars (JM$ 8,000,000.00).

Summary of the Respondent's case

[13] This application was opposed by the Respondent. They acknowledged that on the 23rd of December 2015, Dr Muppuri and his wife were registered as the transferees of Lot R 34. It was also acknowledged that a condition of the purchase

of this land provided that they should execute an agreement with the Applicant, to protect its interest and role in maintaining the Common Area. This Maintenance Agreement was executed by the Muppuris on the 19th day of January, 2016.

[14] On the 13th day of February 2017, the Muppuris transferred their interest in the land to Starfish Bay by way of gift. At the time of the transfer, Starfish Bay was not required to execute a new Maintenance Agreement in favour of the Applicant and has never done so. It was averred by Dr Muppuri that although he and his wife are Directors of Starfish Bay, they never assigned or novated their Maintenance Agreement in favour of the Company for the benefit of the Applicant and as such Starfish Bay would not be bound by its provisions or the architectural rules. He accepted, that he and his wife had observed the provisions of these rules and regulations after the transfer to the Respondent, but stated that this was done as a matter of courtesy and in deference to collective compliance and harmonious relations between neighbours.

[15] In respect of the development complained of, Dr Muppuri asserted that Starfish Bay had sought and received approval from the Parish Council for the development of the house on the subject property. He also stated that approval had been obtained from the St. James Parish Council only and not from NEPA as they had been informed by the Architect that NEPA approval was not required for the construction of the residence.

[16] He contended that the Applicant has conflated the Architectural Guidelines which had previously been in force, with those which were subsequently promulgated. In support of this position "GSM 1" which was exhibited as the previous Rules and Regulations for Development and Architectural Control was highlighted and the affiant noted that it was provided at paragraph 1 of page 2 as follows;

> *"No building, wall, fence, or other structure or improvement of any nature shall be erected, placed, demolished, or altered on any lot until the construction plans and specifications and a plan showing the location and design of the structure and the landscaping and the request for demolition have been approved in writing by the Board prior to submission to the Parish Council for approval. "*

A comparison was made with the 2017 Rules and it was asserted that the current rules did not contain the provision which required that plans be submitted to the Board prior to an application being made to the Parish Council.

[17] Clause 7 (b) of the Maintenance Agreement was highlighted and it was acknowledged that it outlines the following provision:

> "The Subscriber HEREBY COVENANTS AND AGREES as follows:
>
> For the duration of its membership in the Society,
>
> (b) To observe and abide by the regulations made by the Society from time to time in respect of the user of the Common Area and the Roads and in respect of the type and character of buildings to be erected and to remain on the said lot and the upkeep and beautification of the said lot and any other regulations which may be made by the Society from time to time". [emphasis supplied]

[18] Dr Muppuri stated that he and his wife had ceased to be members in the Society and unless the Applicant could show that Starfish Bay had succeeded to the obligations which they undertook in 2015, by operation of law as against a binding contract, there is no proper contractual basis for this action against the Company.

[19] He made reference to Restrictive Covenants numbered 1, 2,17, and 23 which were endorsed on the Title for the subject property and states as follows;

1. *No development of the said land shall take place except in accordance with the permission herein granted and in accordance with the provisions of the Town and Country Planning (St. James Parish) Provisional Development Order (Confirmation) Notification,*
   1982.

2. *Any development of the said land must be submitted to the Local Planning Authority (St. James Parish Council) in the form of an Application with detailed drawings for approval before any such development is started.*

17. Application shall be made to the Local Planning Authority (St. James Parish Council) for approval for all development planned for the said land before any form of construction commences.

23. No groynes, jetties or other structures shall be erected on the foreshore or in the sea adjacent to the development without the prior, written consent of the Natural Resource Conservation Authority or other relevant Governmental Authority

He asserted that Starfish Bay had complied with all of these provisions, specifically in relation to its groyne construction on the foreshore. He also questioned whether the Applicant could legitimately exercise concurrent jurisdiction with NEPA in respect of said works and construction now underway.

[20] The question was also raised by him whether the Maintenance Agreement established any right, role or responsibility in favour of the Applicant in respect of lands vested in the Crown under the provisions of the Beach Control Act. Dr Muppuri outlined that Starfish Bay had obtained four (4) licences from NEPA/NRCA bearing reference number 2018-08017-BL00014 and numbered L 3743, A, B, C & D respectively, these were dated the 10th October 2018, 3 of which were renewed on 26th July 2019 which showed that permission had been obtained to do the following:

a. To install and maintain fifteen (15) pylons in connection with a gazebo and boardwalk to be constructed over the foreshore and sea floor;

b. To reclaim part of the coastline using 661 cubic metres of material;

c. To erect and maintain one (1) rubble groyne which shall be 25 metres in length (including a mangrove garden) from the end of the permitted beach reclamation delimitation, and

d. To construct and maintain one (1) submerged breakwater.

[21] He said that on receiving a request from the Society, the licences were submitted to the Property Manager, Ms. McGann, in order for them to be considered by the Architectural Committee. The Building plans in respect of the waterfront development were also re-submitted. Stamped copies of the plans were then requested by the Applicant and Dr Muppuri explained that these were not submitted as Starfish Bay had never been provided with stamped copies by NEPA. He stated that inspite of providing these documents and communication

being sent to the Applicant by NEPA confirming their approval of the development the Company was still asked to provide Parish Council plans as well as NEPA approved waterfront plans for review by the Architectural Committee. He stated that copies of drawings presented to NEPA by Starfish Bay were also requested and on the 22nd October 2018, the site plan approved by NEPA was submitted to the Applicant.

[22] On the 2nd of November 2018, Dr Muppuri was notified by Ms. McGann of an invitation to meet with the Applicant's Executive Committee on the 12th November 2018 to discuss waterfront plans for the subject property. He declined this offer and on the 5th of November 2018, correspondence was sent to Ms McCann by his attorney, copying in the members of the Committee, in which the purpose of the meeting was requested as well as an agenda for same. A request was also made for a copy of the Architectural Committee guidelines upon which the Executive Committee intended to rely.

[23] Dr Muppuri averred that the Applicant failed to provide his Attorney with the material requested and also failed to provide notice in writing advising of its decision in respect of the plans for the foreshore works. He stated that as a result of what he described as the Applicant's neglect and refusal to consider the application, the approval provided by NEPA expired in March 2019 and by email dated July 19, 2019 Starfish Bay was informed that their request for contractor passes to enter the Lagoons Common Area to commence foreshore works was being refused.

[24] On the 26th of July 2019, renewals of the four (4) licenses were obtained by Starfish Bay and these were forwarded to the Applicant on or about the same date. Dr Muppuri acknowledged that on or about the 20th of July 2019, the Applicant had begun issuing passes to the Company’s foreshore works contractors once more. He stated that on the same day he sent an email to Mr Epstein indicating a desire to have the matter resolved and pointing out that Starfish Bay had fully satisfied the requirements under the Regulations.

[25] A number of emails were exchanged between the Parties and Dr Muppuri was informed of the Applicant's concern that the drawings submitted for review did not "match up" to the NEPA approval, an indication which has been denied. It was also denied that a neighbour had a concern that the construction would obstruct their view and a letter was exhibited to prove that Starfish Bay had personally obtained the written consent of these neighbours to the relevant works. Dr Muppuri also insisted that NEPA was never consulted on this issue and the Applicant had only made an access to Information application concerning the approval obtained.

[26] He asserted that it was not true that the construction on the foreshore was in breach of approvals received from NEPA and stated that periodic inspections of the site were conducted by NEPA and had there been a breach they would have been served with written notice. Dr Muppuri also stated that given the fact that the construction was still underway, it was premature to suggest that Starfish Bay is in breach of these approvals. He questioned the visit of Mr Epstein and Mr Moe to the property and described them as trespassers who had no lawful business there. He also raised concerns about the absence of an independent witness to the measurement purportedly taken by them. He rejected the assertion that the measurement was 105 feet and stated that the actual measurement is approximately 22 metres or 75 feet. He also questioned the Applicant's right to inspect any ongoing projects at any time.

[27] Dr Muppuri outlined that Starfish Bay is obliged to submit periodic reports to NEPA concerning various matters on which its licence impinges, including water turbidity testing, the status of mangrove garden construction and beach reclamation and noted that this information had been provided to officers from NEPA's monitoring branch by email on the 5th of February 2020. He also averred that NEPA was invited to carry out its inspection of the works underway and during the second week of February 2020, their officers visited the Respondent's site and no adverse report concerning the length of their groyne or any other works underway was ever issued.

[28] He made reference to an article which had been published in the Jamaica Observer dated Monday, February 3, 2020, in which NEPA was quoted as stating that "the development …owned by [the Respondent] was approved after extensive investigations and environmental checks.' He also highlighted that in addition to stating that other homeowners in the development had engaged in construction without their approval, the representative from NEPA added that "it is confident that its decision to grant [the Respondent] permission for its construction can survive any investigation and/or judicial review."

[29] Dr Muppuri expressed the view that the Applicant had no right in law to obtain an injunction to prevent Starfish Bay from acting in accordance with the licenses granted by NEPA. He asserted that there was no serious issue to be tried, and pointed out that the Applicant had not up to this point filed a Claim or Particulars of Claim. This situation was however addressed on the 22nd of June 2020. He also questioned the titles exhibited by Mr Epstein in support of his undertaking as to damages and noting that these were registered in the respective names of Lagoons Development Company Limited and Azure Limited, neither of whom were parties to this application and neither of whom had committed their assets to secure this injunction.

[30] On the issue of the balance of convenience, Dr Muppuri stated that the Company had borrowed funds exceeding JMD $20,000,000 for construction work to date which it is liable to repay and the debt service cost exceeds JMD $2,000,000 per annum. He raised a concern that the sums disclosed by Mr Epstein might be insufficient to meet the damages and legal costs likely to be incurred by the Company if the Application is granted. He stated that in contrast, Starfish Bay are the owners of the subject property which is worth in excess of USD $1,200,000 and are willing to give an undertaking in damages and as such the balance of convenience should lie in their favour.

[31] Dr Muppuri also stated that the Applicant was not in a position to move the Court to grant this application as Mr Epstein, its Chairman, had begun construction on Lots numbered R35 and R36 in the Lagoons in breach of the regulations and without approval from NEPA. He also highlighted five other instances in which he

said that the Applicant failed to adhere to the Rules and Regulations for the Lagoons Development by directly or tacitly approving and permitting developments in breach of same. These were noted to include the permission of an extension to a resident's balcony and the variation of the rules to allow another resident to construct a three story residence whereas only 2 stories had previously been permitted. He also attached photographs in respect of the construction work at Lots R35 and R36 which he stated showed the breaches committed.

Summary of the Applicant's Submissions

[32] In written submissions filed on behalf of the Applicant it was argued that Starfish Bay had acted in contravention of the laws of Jamaica as well as the rules and regulations imposed on them as members by the Society. The Applicant submitted that the fundamental issues to be determined were whether the Respondent had breached an incumbrance endorsed on the Duplicate Certificate of Title and what measures should be taken to protect the interest of the Applicant who directly affected by the breach.

[33] It was submitted that in order to determine these issues, the Court should consider the following questions;

1. Whether an interim injunction should be granted to the Applicant in light of all the circumstances?
2. Whether there is a serious issue to be tried?
3. Whether the balance of convenience favours the granting of the injunction?
    i. Whether damages are an adequate remedy?
    ii. Whether there has been an undertaking of damages on the part of the Applicant?
    iii. Whether the preservation of the status quo favours the granting of the injunction

[34] The Applicant acknowledged that the Court is empowered by section 49 (h) of the Judicature (Supreme Court) Act with the jurisdiction to make orders for injunctions where it is just and convenient to do so. The exercise of this power was also noted to exist per Rule 17.1(1) (a) of the Civil Procedure Rules which empowers the

Court to grant interim remedies including interim injunctions. Reference was also made to Rule 17.2 of the Civil Procedure Rules which provides;

> (1) *An order for an interim remedy may be made at any time, including -*
>
> a. *before a claim has been made; and*
>
> b. *after judgment has been given.*
>
> (2) *However -*
>
> a. *paragraph (1) is subject to any rule which provides otherwise;*
>
> a *the court may grant an interim remedy before a claim has been made only if— i. the matter is urgent; or ii. it is otherwise desirable to do so in the interests of justice;*
>
> b *unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1(1) before filing an acknowledgment of service in accordance with Part 9.*

[35] The Applicant also submitted that the matter is an urgent one in which the injunction should be granted in the interest of justice. The Court was invited to consider the Privy Council decision of ***National Commercial Bank Jamaica Limited v Olint Corporation Limited reported at [20091 UKPC 16*** which expounded on the test as established by the House of Lords in ***American Cyanamid Co. v Ethicon Limited (19751 A.C. 396***. Specific reference was made to the judgment of Lord Hoffman at paragraph 16 where he stated:

> *[16] It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. 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.*

Serious issue to be tried

[36] On the question of whether there is a serious issue to be tried, the Applicant highlighted the test enunciated by Lord Diplock in ***American Cyanamid Co. v Ethicon Limited*** [supra] when he stated;

> *"The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, 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. ',

[37] The Applicant also cited the Australian case ***Australian Broadcasting Corporation v O'Neill [2006] HCA 46; 229 ALR 457*** and the local decision ***Arleen McBean v Sheldon Gordon. Patrae Rowe and the Police Federation (2019) JMSC Civ. 38 para. 34*** as providing useful guidance in respect of this question. It was submitted that the issue to be determined is whether there is an obligation imposed on Starfish Bay to be bound by the rules and regulations imposed by the Society and the Applicant contended that they were bound for the following reasons;

a. the imposition of the rules and regulations is endorsed as Miscellaneous No. 977583 on the Duplicate Certificate of Title, as exhibited JE-5 of the Affidavit of Urgency of Johann Epstein in Support of the Urgent Notice of Application for Court Orders, is an incumbrance.

b. the said miscellaneous has registered an agreement under seal which is subject to the application of the Registration of Titles Act.

c. the Respondent, through the acts and/or omissions of its agents and/or servants, is a member of the Applicant which is an industrial and provident society governed by the Industrial and Provident Societies Act and regulated by the Department of Co-operatives and Friendly Societies.

d. the Respondent's agent and servants as signatories of the Lagoons
Management Maintenance Agreement which is exhibited to in the affidavit of Johann Epstein as JE- 3 were notified of, presented with and to date, have acted in a manner (to the exclusion of the issue at hand) which is compliant, with the said Maintenance Agreement, thereby subjecting the Respondent to the jurisdiction of the Applicant.

e. the Respondent's development may create an accretion in land which essentially belongs to the crown and thereby denying the Applicant in its representational

capacity from bringing an action for damages in the event of any 'breach' damage, or injury.

Incumbrance

[38] The Applicant submitted that Starfish Bay holds its fee simple interest in the property subject to such incumbrances as may be specified in the certificate of title. For guidance on this submission, the Court was invited to consider sections 70 and 71 of the Registration of Titles Act which state:

> 70. *Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever...*
>
> 71. *Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer, from the proprietor of any registered land, lease, mortgage or charge, shall be required or in any manner concerned to enquire or ascertain the circumstances under, or the consideration for, which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

[39] Section 3 of the Registration of Titles Act was highlighted and it was noted to define an incumbrance as including "all estates, interests, rights, claims and demands, which can or may be had, made or set up, in, to, upon or in respect of the land adversely and preferentially to the title of the proprietor;". Section 26 of the Registration of Titles Act was also cited which states:

> *26. A person registered under this Act as proprietor of any land with an absolute title shall be entitled to hold such land in fee simple, together with all rights, privileges and appurtenances, belonging or appurtenant thereto, subject as follows-*
>
> (a) *to the incumbrances (if any) entered on the certificate of title; and*
>
> (b) *to such liabilities, rights and interests, as may under the provisions of this Act subsist over land brought under the operation of this Act without being entered on the*

certificate of title as incumbrances, but free from all other estates and interests whatsoever including estates and interests of Her Majesty, her heirs and successors, save only quit rents, property tax or other impost, charged generally on lands in this Island, that have accrued due since the land was brought under the operation of this Act.

[40] The Applicant submitted that the endorsement on the Respondent's Duplicate Certificate of Title could be deemed an 'incumbrance' as defined by the Registration of Titles Act and argued that on the face of the endorsement itself, it is clear that the Applicant is empowered to take all necessary steps to ensure that the subject property is kept in conformity with the rules and regulations implemented for the good of the development.

Contract - the Conveyancing Act

[41] The Applicant likened the relationship between the Society and Starfish Bay to a contractual situation and relied on the Conveyancing Act, specifically Section 63 which states;

[63] (1) A covenant, and a contract under seal, and a covenant with two or bond or obligation under seal, made with two or more jointly, to pay money, or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall by virtue of this Act imply, an obligation to do the act to or for the benefit of the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond or obligation, devolves.

(2) *This section extends to a covenant implied by virtue of this Act.*

(3) *This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and shall have effect subject to the covenant, contract, bond or obligation, and to the provisions therein contained.*

(4) *This section applies only to a covenant, contract, bond or obligation, made or implied after the commencement of this Act.*

[42] It was submitted that applying this provision the agreement should be regarded as a contract which would impose an obligation on the Society to do any act for the benefit of the registered proprietors of the development and in particular Starfish Bay. The Applicant argued that this section makes it clear that this bond is not only for the benefit of the registered proprietors but also their successors or any other person vested with the right to sue on the bond or obligation.

Industrial and Provident Society

[43] The Court was asked to note that the Society is registered as an Industrial and Provident Society. Reference was also made to Sections 3 and 21 of the Industrial and Provident Society Act which govern these societies and state as follows;

> (3) *A society which may be registered under this Act (herein called an Industrial and Provident Society) is a society for carrying on any industries, businesses, or trades specified in or authorized by its rules, whether wholesale or retail, and including dealings of any description in land.*
>
> *(21) The rules of a registered society under this Act shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules covenant on the part of such member, his heirs, executors, administrators, and assigns to conform thereto.*

[44] The Applicant submitted that applying these provisions to the circumstances herein, it is clear that Starfish Bay, which is a member of the Applicant and all persons claiming through it, would be bound by the rules and regulations imposed by the Society as if it had affixed its seal to same and should have sought the approval of the Board.

Development of an Accretion in Land

[45] It was submitted in this regard, that the approved development of the foreshore of the subject property, would place the property in the realms of the common law doctrine of accretion. This doctrine of accretion conferring an exclusive title on a landowner to lands which has been slowly, gradually and imperceptibly added to his property by nature. Counsel contended that with this development essentially creating an accretion on Crown land, if same were to be permitted it would be detrimental to the interest of the Applicant and its members who would then be forced to seek ameliorative relief in the likely event of negligence and/or nuisance.

Balance of Convenience

[46] The Applicant submitted that useful guidance on this issue is found in the dicta of Lord Diplock at page 408 of his judgment in ***American Cynamid Co v Ethicon Ltd*** where he stated:

> *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. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": Wakefield v. Duke of Buccleugh (1865) 12 L. T. 628, 629. So 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.*

[47] They argued that in order to determine the balance of convenience, the Court should have regard to the irremediable prejudice that the Society and the other registered proprietors of the development may face. Counsel argued that if Starfish Bay is permitted to continue with its development, the Society and other registered owners could face an increased risk of disenfranchisement. It was also asserted that a consequence of the injunction being denied would be the creation of a precedent where continued indifference to the rules and regulation of an Industrial and Provident Society would ultimately lead to a breakdown in the proper governance of the development as well as breaches of contracts which impose binding obligations.

Inadequacy of Damages and the Undertaking of Damages

[48] In submissions under this heading, the Applicant made reference to paragraph 16 of Lord Hoffman's judgment in ***National Commercial Bank Jamaica Limited v Olint Corporation Limited reported at (20091 UKPC 16*** where he stated:

> *As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975]1 All ER 504, ... 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*.

[49] They submitted that in this instance, an award of damages would be inappropriate not only because of the impending prejudices and its far-reaching effects but also because of the novelty of the issues, the peculiarity of the interest of the Applicant and the authority on which same was vested, as such any damages to be considered would be are incalculable. The Applicant noted however that notwithstanding this position, the Society is in a financial position to pay Starfish Bay damages if the Court so orders.

Maintaining the Status Quo

[50] In respect of this issue, reference was made to the ***America Cyanamid*** case with specific reference to the dicta of Lord Diplock at page 511 where he stated:

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

[51] The Applicant submitted that this is not a case in which the factors are evenly balanced and asserted that the injunction should be granted in order to safeguard the legal interests of the Applicant against what they described as a threatened breach of the incumbrance on the title of the subject property as well as indifference to the rules and regulations.

Novation

[52] The Applicant also sought to rely on the doctrine of novation in establishing the rights and obligations of Starfish Bay under the Maintenance Agreement as well as the Rules and Regulations of the development. They acknowledged that a company has a distinct personality from it servants and/or agents, and is capable of entering into its own agreements. They contended however that the Muppuri's in their capacity as shareholders/directors of the Respondent, acknowledged, accepted and acted in accordance with the said agreements on Starfish Bay's behalf with the view of ensuring its compliance. It is these actions the Applicant

submitted which are capable of evidencing a novation of the rights and obligations of the Muppuri's to Starfish Bay.

[53] In support of this position the Applicant made reference to the decision of **Re Head [1894] 2 Ch. 236)** as providing guidance on the definition of novation as 'a situation which creates a new contract and terminates the old, thereby terminating the liabilities of the outgoing contractor without the need for an assignment of the contract'. Reference was also made to the definition provided in **Halsbury's Laws of England/Contract, Volume 22 (2012)/8 at paragraph 598** as follows:

> "Novation occurs where one contract is substituted with another, either between the same parties or different parties, the consideration usually being the discharge of the old contract. However, where the 'new' contract modifies the old contract between the same parties, this has come to be termed a variation; and the expression 'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are to be performed by different parties. Hence, novation requires a subsequent binding contract and the consent of all parties. Where the new party takes over liabilities formerly resting on one of the original parties, it is a question of construction whether he takes them over with or without the benefit of time which has run under the statutory rules of limitation."

[54] A number of other authorities were cited by the Applicant to include ***Scarf v Jardine [1881-85] All ER Rep 651***, ***Wilson v Lloyd*** **(1873) LR 16 Eq 60 at 74** and ***Linden Gardens Trust Limited v Lenesta Studge Disposals Limited [1993] UKL 4 (22 July 1993)*** in which Lord Browne-Wilkinson stated:

> *"It is trite law that it is, in any event, impossible to assign 'the contract' as a whole, i.e. including both the burden and the benefit. The burden of a contract can never be assigned without the consent of the other party to the contract in which event such consent will give rise to a novation*."

[55] On the question of consent, the Applicant submitted that this may be evidenced by consideration and/or conduct and relied on **Paragraph 19–087 of *Chitty on Contracts* (30th edn, 2008)** as making it clear that acceptance, which is the essence of novation, 'may be inferred from acts and conduct but ordinarily, it is not to be inferred from conduct without some distinct request'.

[56] The Applicant also relied on what was described as a settled principle of contract law that interpreting contracts involve ascertaining the party's objective intention, rather than their subjective intention and they adopted the words of Lord Hoffman in ***Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 All ER 98*** where he stated:

> *"is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

[57] In support of their position that novation had in fact occurred the Applicant's submitted that they were relying on facts which include but were not limited to the following:

a. Dr. Guna Muppuri and Mrs. Vishnu Muppuri acting in their capacity as servants and/or agents of Starfish Bay, maintained/continued their dealings with the Society and for years abided by and/or respected, the Rules and Regulations which were implemented eg. the payment of maintenance.

[58] The case of ***Re Head (supra)*** was again cited and the Court was asked to note that in that decision sufficient evidence of novation by conduct was found where the third party made payment in respect of a liability of one of the original contracting parties.

b. The Lagoons Rules and Regulations for Development and Architectural Control were drafted, tabled and ratified to govern property design within the community and all landowners, including Starfish Bay through its agents and/or servants acknowledged the subsistence of and has subjected itself to the terms of the said regulations. This was evidence by the fact that in response, to the Society's request to Dr. Guna Muppuri and Mrs. Vishnu Muppuri for copies of the application, plans, building permits and approvals issued by the respective bodies these were provided and on the 29th of January 2018 the board issued its approval.

[59] The Applicant contended that these actions, were never refuted by Starfish Bay and were all completed through the Muppuri's on its behalf and as the sole shareholders and directors of the company, they would have exercised the requisite authority to bind Starfish Bay to this contract.

Authority

[60] On the issue of the Muppuris' ability to bind Starfish Bay, it was submitted that the authority to manage the affairs of a company is vested in its board of directors which sometimes delegates authority for particular matters to specific directors or officers. The Applicant asserted that this delegation of authority can be express or implied and the authority can be implied in appropriate cases from a person's position as a director.

[61] They relied on the case of ***Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal), Ltd and Another [1964] 1 All ER 630*** in support of this proposition with specific reference to page 645 where Diplock, LJ stated:

> "…*The commonest form of representation by a principal creating an "apparent" authority of an agent is by conduct, viz., by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have "actual" authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter contracts on behalf of the corporation into contacts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do normally enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business."*

[62] The Applicant submitted that having regard to the Muppuris capacity and authority coupled with their conduct, there is sufficient evidence from which the inference can be drawn of there being consent to novation on behalf of Starfish Bay and the Muppuris in light of the latter's intention to act from 2017 to date on behalf of the Company.

Clean Hands

[63] It was argued by the Applicant that the doctrine of clean hands is not engaged simply by alleging any misconduct on the part of the Claimant. They submitted that this point was best enunciated by ***Lord Scott in Grobbelaar v News Group Newspapers Ltd [2002] 4 All ER 732 at para 90*** where he stated:

> *"…it is long established practice that an equitable remedy should not be granted to an applicant who does not come with "clean hands". The grime on the hands must, of course, be sufficiently closely connected with the equitable remedy which is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled. And whether there is or is not a sufficiently close connection must depend on the facts of each case."*

[64] They contended that the authorities on the point would suggest that the doctrine should only apply once the following have been satisfied:

a. The applicant is seeking an equitable remedy.

b. The applicant has previously acted in such a manner that is improper, dishonest, fraudulent or iniquitous;

c. The misconduct alleged must bear an immediate and necessary relation to the equity that is sued being for.

d. The Applicant, for its own benefit, is seeking to derive an advantage from its dishonest conduct in such a manner that it would be unjust to grant him the relief sought.

<u>Whether the Applicant is seeking an equitable remedy?</u>

[65] In determining this issue, the Court was asked to note that the Urgent Notice of Application for Court Orders filed February 20, 2020 seeking an interim injunction was grounded first, in ***section 49 (h) of the Judicature (Supreme Court) Act*** and secondly in ***Rule 17 (1)(a) of the Supreme Court Civil Procedure Rules***. The Applicant submitted that the procedure adopted, did not mount its application on the laws of equity as it was expressly grounded and supported in both primary and subsidiary legislation.

<u>Whether the applicant has previously acted in such a manner that is improper, dishonest, fraudulent or iniquitous?</u>

[66] In unpacking this issue, the Applicant submitted that the Court must first appreciate that the conduct alleged, should have been exercised at some time in the past. Secondly, it must seek to identify the alleged misconduct. In doing so, the misconduct must be looked at cumulatively, not just individually, to determine whether they are sufficiently serious and connected with the equity invoked to bring the doctrine into play.

[67] In respect of the breaches which were alleged to have been committed by Mr Epstein, the Applicant argued that there is no proof before the Court that he had constructed or is constructing any permanent structure within eight (8) meters of the high-water mark without the approval of NEPA. It was also submitted that Dr Muppuri had failed to establish that Mr. Epstein has acted contrary to the Rules and Regulations of the community and without NEPA approval and the photos provided in support failed to show what was being contended.

[68] In respect of the other breaches alleged against the Society it was submitted by the Applicant that the Society and its Board denied being aware or complicit in several of these examples they also pointed to decisive taken to address these situations once they were discovered. Counsel argued that in light of the foregoing, it is clear that the Applicant has not previously acted in such a manner that can rightly be deemed as improper, dishonest, fraudulent or iniquitous.

Whether the misconduct alleged bears an immediate and necessary relation to the equity that is sued for?

[69] The Applicant cited a number of authorities in respect of this question, of particular note was the decision ***In Royal Bank of Scotland Plc v Highland Financial Partners LP [2013] EWCA Civ 328*** where the relevant principle and how it should be applied were outlined in the judgment of Aikens LJ as follows:

> '[159] It was common ground that the scope of the application of the "unclean hands" doctrine is limited. To paraphrase the words of Lord Chief Baron Eyre in Dering v Earl of Winchelsea [(1787) 1 Cox Eq. Cas 318 at 319, [1775–1802] All ER Rep 140 at 142] the misconduct or impropriety of the claimant must have "an immediate and necessary relation to the equity sued for". That limitation has been expressed in different ways over the years in cases and textbooks. Recently in Fiona Trust & Holding Corp v Privalov [2008] EWHC 1748 (Comm), [2008] 2 P

> & CR D52 Andrew Smith J noted that there are some authorities in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief.

[70] In light of this explanation, the Applicant submitted that on the evidence before the Court, this test cannot be satisfied and even in the event that the Court is content that the Society has acted with unfairly, it's the alleged misconduct does not bear an immediate and necessary relation to the equitable remedy that is sued for.

Whether the Applicant, for its own benefit, is seeking to derive an advantage from its dishonest conduct in such a manner that it would be unjust to grant the relief sought?

[71] The Court was asked to note the discussion on this issue in ***Royal Bank of Scotland Plc v Highland Financial Partners LP*** [supra] where Aikens LJ stated:

> *"Spry: Principles of Equitable Remedies suggests that it must be shown that the claimant is seeking 'to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief'. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought".*

[72] The Applicant argued that it must be made out that the Society, is seeking to benefit from its own misconduct or dishonesty. They asked the Court to note that the Society has maintained throughout the application that the cause is not on their own accord or for its own benefit but in an effort to protect the rights of all the homeowners in the community being the only body that could actively exercise this right. They submitted that in considering these submissions the Court should weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing same.

[73] In concluding the Applicant submitted that the matter is neither vexatious or frivolous but raises serious questions to be tried. They argued that the issues raised are novel and have the ability to add to the development of the Jamaican

jurisprudence. It was also contended that from the discussion of the law and the application of the overriding issues to the circumstances, a prima facie case has been made out. It was also asserted that the injunction sought is necessary to improve the Court's chances to do justice after a determination of the merits at trial.

Summary of Respondent's submissions

Whether there is a serious issue to be tried

[74] It was submitted by the Respondent that there is no serious question to be tried as the Society has no locus standi to seek an injunction or make any claim in relation to the Respondent's use of the foreshore as authorized by NEPA. In addition to the authorities of ***American Cynamid Co*** and ***Olint,*** the Court was also asked to consider the decision of ***Mothercare v Robson [1979] FSR 466*** where Megarry VC clarified the issue as follows;

> '*the prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospects of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails; for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real.'*

[75] The Respondent asserted that the Applicant's claim lacks substance as it has no proprietary or other right in the foreshore adjoining Starfish Bay's property and as a result of this had no real prospect of success. They argued that Restrictive Covenants 1, 2, 17 and 23 on Starfish Bay's title imposes covenants and obligations which would assume primacy in any consideration of its actions in the planned development of the building or foreshore. The Respondent submitted that having complied with these covenants by obtaining the approval required the Applicant cannot legitimately seek to usurp the jurisdiction of NEPA in respect of the works underway on the foreshore.

[76] The Court was asked to consider the Court of Appeal decision of ***Patrick Woolcock etal v David Sykes etal [2014] JMCA Civ 52*** and the findings outlined between paragraphs 126 and 131 of the Judgment in which the appeal court

overruled the decision of the lower court to award damages for public nuisance to the Respondent against the Appellant on the basis that the land which the latter had built upon belonged to the NRCA and there was no evidence that the public to include the Respondent had acquired rights over same. The Court concluded that in those circumstances, the construction by the Appellant could not have resulted in a loss being suffered by the Respondent and the award of damages was unwarranted.

[77] The provisions of Section 3(1), (2), (4) and 9 of the Beach Act were also relied on and the Respondent submitted that these reserved exclusively to the NRCA/NEPA the right to determine all matters concerning the construction of groynes and jetties along the foreshore of Jamaica. They refuted the concern that the constructions would obstruct the view of Starfish Bay's neighbour and submitted that in any event one's view is not protected by any restrictive covenant and it has long been established that there is no such thing as a legal right to a view. The authority ***Aldred's Case (1610) 77 ER 816 [1558 – 1774] All ER Rep 622*** was cited wherein it was noted that to qualify as an easement a right must be sufficiently definite whereas a right to view is far too general. The Respondent also submitted that there was in fact no such concern as the neighbours had indicated in a letter that they had no objection to the construction.

Incumbrance:

[78] It was submitted by the Respondent that in order for Miscellaneous No. 977583 endorsed on the Duplicate Certificate of Title to be deemed an "incumbrance"/restrictive covenant and thereby run with the land, the appropriate words of annexation must be used in order to bind all future proprietors. Otherwise it would be a mere personal covenant between the original covenantors, 'the Reids' and the Applicant. They contended that whether a particular covenant is annexed to the land benefited depends upon 'the intention of the parties to be inferred from the language, which they used in the deed in creating the covenant. Guidance as to the appropriate formula of words of annexation was noted as being found in the locus classicus ***Rogers v Hosegood [1900] 2 Ch 388*** where it was stated as words which would have been said:

> *'with intent that the covenants might so far as possible bind the premises thereby conveyed and every part thereof and might enure to the benefit of the vendors ... their heirs and successors and others claiming under them to all or any of their lands adjoining or near to the said premises'.*

[79] The Respondent argued that the land to be benefited must be clearly identified and if it is expressed to be made between two persons simply for the benefit of the covenantee, it is for the benefit of the covenantee as against the covenantor only and does not burden the land of the covenantor. It was highlighted that in ***Lamb v Midac Equipment Ltd [1999] UKPC 4*** Mr Lamb sought to enforce a covenant entered into by the Respondent's predecessor in title which read;

> "*and the said Mary Connolly Christie covenants with the said Frank Merrick Watson, his heirs, executors, administrators, transferees and assigns to observe the restrictive covenants set out in the schedule hereto*,,

[80] The Respondent noted that before the Board the Appellant contended that he was the beneficiary of the covenant in question and was entitled to enforce it. Their Lordships found that on a proper construction of the covenant it was not expressed to be for the benefit of any land identified by the covenant itself and that the wording of the covenant was consistent with the covenant being personal to the original covenantor Mary Connolly Christie for the benefit of the original covenantee, Frank Merrick Watson.

[81] The Respondent submitted that Miscellaneous No. 977583 provides as follows:

Agreement dated the 28th of May 1997 whereby the registered proprietor of the lands comprised in this Certificate of Title hereby grants to Lagoons Management Limited its servants, agents and invitees for a period of Ninety-nine years from the date hereof the Licence, Authority, full and free right and liberty at such times as is deemed necessary to enter upon the lands comprised in this Certificate of Title to landscape, layout the grounds, maintain, tend, trim, remove plants, trees and shrubs, cut, prime lawns, hedges, verges, plants and trees and to take all necessary steps to ensure that the said lands are kept in accordance with the rules and

regulations imposed from time to time and further for the purposes, upon the terms and subject to the covenants and conditions further particulars of which are set out in the said Miscellaneous Instrument.

[82] They submitted that like the covenant in ***Lamb v Midac*** (supra) this agreement was personal to the then registered proprietor only as it is expressed to be an agreement between the registered proprietor as at 28th May 1997 who was Lagoons Development Ltd. The Respondent argued that like the situation in ***Lamb v Midac*** the fact that the rules and regulations referred to in Miscellaneous No. 977583 were personal in nature, and were not expressed to be for the benefit of other property, and was not expressed to burden the subject land so as to run with it and create a reciprocity of obligation, same cannot apply to the current registered proprietor, Star Fish Bay Holding Ltd as no appropriate words were used to create that reciprocity within a scheme of development.

[83] The Respondent also submitted that the said "incumbrance" applies only to the land identified as comprised in the Certificate of Title. They noted that in the instant case the Applicant seeks to prevent Starfish Bay from constructing structures over the foreshore and sea floor, which is not part of the land comprised in the Certificate of Title as it is property owned by the Crown.

Application of section 63 of the Conveyancing Act

[84] It was submitted by the Respondent that the agreement is not binding on Starfish Bay as there was no privity of contract between them and the Society. They asserted that the language of the agreement contained in Miscellaneous No. 977583 isn't negative in their terms and therefore do not amount to restrictive covenants. The decision of ***Tulk v Moxhay (1848) 41 ER 1 1 43*** was cited in support of this position.

Application of the Industrial Provident Society Act

[85] In response to the Applicant's assertion that Starfish Bay was bound to comply with the rules and regulations as a member of this Industrial Provident Society the

Respondent submitted that by the very language of Section 21 of the Act, only persons who are members or claiming through members are bound by those rules. It was argued that Starfish Bay is not a member of the Society neither is it claiming through another entity.

[86] They asserted that although the previous proprietors were members of the Society this position would have ceased after the property was transferred to Starfish Bay, a separate legal entity with separate legal personality. Accordingly, membership of the previous owners in the Applicant Society, although they are directors and shareholders of Starfish Bay could not be transferred to the Company.

[87] They submitted that this principle is most aptly illustrated by ***Macaura v Northern Assurance Co Ltd [1925] AC 619,*** wherein the owner of a timber estate sold all the timber to a company which was owned almost solely by him. He was the company's largest creditor. He insured the timber against fire, but in his own name. After the timber was destroyed by fire the insurance company refused the claim. The House of Lords held that in order to have an insurable interest in property a person must have a legal or equitable interest in that property. The claim failed as "the corporator even if he holds all the shares is not the corporation... neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation." (per Lord Wrenbury, at pg 633).

Accretion

[88] The Respondent submitted that the issue of accretion does not arise in the present case as there is no claim by Starfish Bay that the boundaries of its land has increased to include the foreshore. They argued that it was recognised by Starfish Bay that the foreshore is not part of their property but belongs to the Crown and it was in light of this that they sought and obtained the requisite approvals from NEPA to complete the proposed activities on the same.

[89] It was also submitted that the Applicant cannot claim that there was artificial interference by the Respondent of the natural processes such as the changing of the sea level or boundary, or a sudden deposit of material or other additions. The

Respondent also asserted that in any event if the property owned by Starfish Bay had been subject to accretion a claim against them would be solely within the purview of the Crown acting through the Attorney General.

Balance of Convenience

[90] It was submitted by the Respondent that if the injunction was to be granted against Starfish Bay they would experience severe disruption and dislocation in their approved construction operations without any evidence of the Applicant's ability to meet damages likely to be sustained within a reasonable time. They argued that the Applicant was seeking to ascribe to itself rights without any basis in law and had suffered no loss to justify an action. It was also contended that the Society had acquiesced or not objected to similar structures built by other proprietors in the Lagoons and as such the balance of convenience should lie with Starfish Bay.

Damages

[91] It was the Respondent's position that damages are an adequate remedy for the Applicant if it is successful at a trial as any loss it may suffer would be pecuniary in nature and easily quantifiable. They argued that taking into account the fact that they are in possession of assets valued in excess of US$1.2 million and their only liability is JMD $20 million they would be in a position to satisfy the damages that could be awarded. They submitted that in contrast the Applicant had failed to give an adequate undertaking as to damages as apart from the bank account stated, there was no evidence as to the nature of its assets and liabilities. The Court was also asked to note that the Titles proffered are not in the name of the Applicant and should be disregarded.

Novation

[92] It was submitted by the Respondent that the fact that the Directors of Starfish Bay had previously owned Lot R34 before transferring same to them, did not by itself provide a basis for saying that the maintenance agreement has been novated given that the Respondent is a separate legal person. They argued that there is no evidence on which the Applicant can rely to support such a contention as even if the company is in fact a holding company this would not by itself inexorably lead to a conclusion that the maintenance agreement had been novated. They insisted that

the evidence relied on amounts to nothing more than the fact that the invoices are sent in the name of Dr Muppuri personally and he has continued to pay the maintenance.

[93] The Respondent contended that the issue to be determined is whether the alleged actions relied on amount to a novation of the right and obligations of Dr and Muppuri under the Maintenance Agreement and by extension the relevant Rules and Regulations. They submitted that the decision **In re Head [1894] 2 CH 236** does not assist the Applicant as the facts are wholly different and inapplicable to the present case. The Court was asked to note that on comparing this decision to the facts of the present case there are important elements of novation missing. ***In re Head*** there was an entirely new contract with the surviving partner of the bank but in the instant matter, the Maintenance Agreement was with the Muppuris only and at no point did Starfish Bay sign any agreement or make payments in respect of same.

[94] They argued that the maintenance agreement between the Muppuris and the Applicant has not been replaced and there is no privity of contract between the Parties in order for the agreement to be enforced against Starfish Bay. The Respondent also submitted that there is no law that payment of maintenance fees by the Muppuris in their personal capacity creates the said privity of contract between the Applicant and the Company.

[95] The Respondent commended to the Court an extract from **Halsbury' s Laws of England's/ Contract, Volume 22 (2012)** which states:

> a. *Novation requires a subsequent binding contract and consent of all the parties; and*
> b. *In modern law, contractual rights, but not liabilities, may as a general rule be transferred by assignment without the consent of the parties. Novation, however, is an act whereby, with the consent of all parties a new contract is substituted for an existing contract and the latter is discharged.*

[96] They submitted that in light of the principles outlined above, for novation to exist in the instant case there had to be a separate agreement (maintenance agreement or otherwise) between all three parties whereby the rights and obligations of the Muppuris under the Maintenance Agreement are transferred to the Respondent and the Applicant accepts same and provides consideration under the new contract. The Respondent submitted that such a process is separate and distinct from an assignment (which involves an assignment of contractual rights and not obligations) of the maintenance agreement by the Muppuris to the Defendant.

[97] They relied on the decision in the matter of ***Jamaica Redevelopment Foundation (unreported) Jamaica Supreme Court, Claim No 2008 HCV 5029, delivered 8th April 2009*** where between paragraphs 21 and 23, the Judge indicated that a novation involves a tripartite agreement between all relevant parties (the original parties and the third party who is to acquire the new contractual rights and incur simultaneous obligations) and is different from an assignment of a contract which does not involve the transfer of obligations under the said contract.

[98] The Respondent highlighted that in the present case, there is no separate maintenance agreement or otherwise between all three parties and the only agreement which exists is between the Muppuris and the Applicant. The Respondent also submitted that if it were to be argued that the Muppuris by their continued payment of the maintenance fee after transferring legal title to Starfish Bay may have engaged in an assignment, this would only transfer the contractual rights under the agreement, and not the obligations which would include those under the Rules and Regulations.

[99] They submitted that **Scarf v Jardine [1881-85] All ER Rep 651** was unhelpful to the Applicant's case as while it did not provide an example of novation it exemplified why the present case is not one in which novation has taken place. The Court was asked to note the commentary of the House of Lords where they opined;

> *upon the dis-solution of a partnership [if]the persons who are going to continue in business agree and undertake, as between themselves and the*

> *retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the firm, to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration*

[100] They submitted that applying this dictum to the present case the payment of maintenance fees by Dr Muppuris in his name is insufficient to establish that Starfish Bay intended to be bound by the obligations under the Maintenance Agreement. In respect of **Wilson v Lloyd (1873) LR 16 Eq 60** the Respondent conceded that while useful guidance on novation is provided to the Court in this authority, the situation in that case is different from the instant claim where there was no tripartite agreement. The decision of **Linden Gardens Trust Limited v Lenesta Studge Disposals Limited [1993] UKL 4 (22 July 1993)** was also distinguished on the basis that it did not involve the issue of novation but an assignment. The Respondent also relied on an extract from **Chitty on Contract** where it states;

> *It should however be noted that the effect of a novation is not to assign or transfer liability, but rather to extinguish the original contract and replace it by another. It is therefore necessary that consideration should be provided for the new contract. Thus if A owes B money and both parties agree with C that A is pay the money to C instead of B, there will be no valid novation unless C has provided some contribution for A's promise.*

[101] They submitted that in light of the foregoing, novation could not be inferred from the conduct of the parties in the present case as there has been no distinct request for same. It was also asserted that there is no evidence of any consideration in respect of a new maintenance agreement between the Applicant and Respondent.

[102] The Respondent cited two authorities as to what would constitute sufficient conduct to establish novation. The first was ***Camillin Denny Architects Ltd v Adelaide Jones & Co Ltd [2009] EWHC 2110 (TCC);*** and the second was ***CEP Holdings Ltd and CEP Claddings Ltd v Steni AS [2009] EWHC 2447 (QB***). In the 2nd matter the Defendant purported to terminate a distribution agreement with the 1st Claimant and the Claimants sued for wrongful repudiation of the said agreement. As part of

its case the Claimants claimed that the distribution agreement was novated to the 2nd Claimant, as a crucial fact affecting the quantum damages which could be claimed, if any. The Claimants also alleged that there was an agreement to novate evidenced by conduct. It was said that the EDA was novated in favour of Claddings and a new agreement was entered into between Claddings and Steni. The Claimants contended that Steni was given notice of a transfer of business from CEP to Claddings by means of a letter and that Steni thereafter accepted orders from Claddings, invoiced Claddings and accepted payment from Claddings; and that, from this conduct the court could infer the necessary agreement to novate. Between paragraphs 28 – 33 of the Judgment the Court stated as follows:

> *28. Novation, which involves the extinguishing of the original contract and the creation of a new contract between different parties, requires the consent of all parties; see Chitty on Contracts (2008) paragraph 19-086. The evidence does not establish that there was any consensual agreement by Steni, Holdings and Claddings to such a course.*
>
> *29. As Mr. Charles Graham QC, on behalf of Steni, submitted, even if the June circular letter had been received:*
>
> *i) there was nothing in it that could conceivably amount to an offer, or construed as an offer, from Holdings and Claddings jointly to Steni to novate the EDA;*
>
> *ii) the EDA was not even mentioned; the letter was merely a circular from Claddings to all suppliers, asking them to redirect their invoices owing to an internal group re-organisation;*
>
> *iii) there was no express or obvious reference to Holdings at all;*
>
> *iv) the letter was not even addressed to Steni, but to Steni's then subsidiary Steni Norden AS;*
>
> *v) moreover, the letter was somewhat ambiguous as to whether what was being transferred to Claddings was*
>
> *a) the role of operating the Claddings Products business (i.e. the role which the letter indicated had previously been taken by "CEP Architectural Facades Limited"- Old Claddings); or*
>
> *b) ownership of that business (which was being transferred from some unidentified member of the CEP group referred to only as CEP).*

> *30. Prior to June 2001 Steni had become used to accepting orders under the umbrella of the EDA from CEP Architectural Façades Limited (i.e. Old Claddings). I accept Steni's submissions that, if the letter had been received and read by Steni, the letter was far more likely to have been read as notice that the role of operating the business had been transferred and not as a notice that Holdings had transferred ownership of that business, let alone that it had assigned the benefit of the EDA to Claddings. It certainly would not have been understood as an offer to novate the EDA to Claddings. I place no reliance on the oral evidence of Mr. Gundersen as to what the letter would have conveyed to him, in this respect, if he had received it. The evidence in his written statement, as I have said, was that he did not understand that the letter was informing him of an assignment of the EDA. At the time he gave his evidence by means of video link, he was no longer employed by Steni, and, when he gave his answers in cross-examination, in relation to this particular point he had become impatient and was clearly irritated by the whole cross-examination process. What, objectively, the letter would have conveyed to a recipient is a matter for the court.*
>
> *31. Given that, in my judgment, the letter did not constitute an offer to novate the EDA, Steni's subsequent conduct was not capable of giving rise to an acceptance of any such offer.*
>
> *32. In any event, in my judgment, Steni's subsequent conduct cannot be characterised as conduct amounting to any acceptance of a contractual offer to novate.*
>
> *33. First of all it was only in April 2002 that, for the first time, Steni Norden invoices went to Claddings. There is nothing in the evidence which suggests that this had anything to do with the purported notice of assignment of the EDA. Second, the contemporaneous documentary evidence shows that certainly Mr. Barton considered that, in his dealings with Steni in relation to the EDA, he was still acting on behalf of Holdings. For example, in his response to a default notice sent by the chairman of Steni to Holdings, he replied on Holdings' headed fax paper dated 28 May 2001, just 12 days after the company re-organisation of 16 May 2001. He did not mention that there had been a reorganisation of the CEP group, let alone that the benefit of the EDA had been assigned to Claddings…*

[103] The Respondent contended that the legal principles extracted from these cases show that the continuation of payment under the initial contract by a new third party (not the original party as occurred in the instant case) is insufficient to establish a novation of the subject contract. The parties must have mutually and consensually addressed their minds (established an intention) evidenced by their conduct to form a new contract whereby the new third party would take over the rights and obligations of one of the previous contracting parties. The actions must be attributable to a clear intention for novation.

[104] They argued that in the present case there is no clear evidence establishing that the Muppuris, the Applicant and the Respondent Company consensually desired to novate the Maintenance agreement and the payment of the maintenance fees by

the Muppuris is insufficient. There was neither a clear offer or acceptance by any party or consideration. The Respondent also submitted that the authorities of **Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 ELL ER 98 and Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal), Ltd and Another [1964] 1 All ER 630** did not assist the Applicant's position. They maintained that in any event these arguments did not trump the fact that Applicant is not the proprietor of the land in question and cannot by agreement override the statutory provisions of the Beach Control Act.

Clean Hands

[105] The Respondents made reference to the third Affidavit of Guna Muppuri which they contended provides details of the Applicant's patent lack of even handedness in its application of the Lagoons Rules and Regulations for Development and Architectural Control 2017 (the 2017 Rules). They highlighted the fact that the Applicant had not submitted an affidavit in response to this affidavit and stated that this had the effect of rendering the evidence proffered unchallenged. They submitted that by the Applicant's discriminatory implementation and failure to implement the 2017 Rules against all its members, it comes to the court with unclean hands and is not entitled to the equitable relief of an interim injunction as the very rules which they seek to enforce have been violated by them and selectively enforced or wholly ignored in respect of some members.

[106] They commended to the Court an extract from **Modern Equity, Hanbury & Martin, 17th Edition**, at pages 27-28 paragraph 1-025 at roman numeral "iv" where it is outlined that:

> ***He who comes to equity must come with clean hands.***[53] *This principle is closely related to the last one, save that the latter looks to the claimant's future conduct**, while the "clean hands" principle looks to his previous conduct. Thus equity will not grant relief against forfeiture for breach of covenant where the breach in question was flagrant.*** [54] *Examples abound in the field of equitable remedies: a tenant cannot get specific performance of a contract for a lease if he is already in breach of his obligations*[55] *; nor could a purchaser if he had taken advantage of the illiteracy of the vendor who was not separately advised*[56] ***; so also in the case of injunctions,*** [57] ***but equitable relief will only be debarred on this ground if the claimant's blameworthy conduct has some connection with***

> ***the relief sought.*** *The court is not concerned with the claimant's general conduct. Thus in Argyll (Duchess) v Argyll (Duke),[58] the fact that the wife's adultery had led to the divorce proceedings was no ground for refusing her an injunction to restrain her husband from publishing confidential material. Nor will unclean hands debar a claim which does not involve reliance on one's own misconduct. [59] If both parties have "unclean hands," the court should consider only those of the applicant, and need not balance the misconduct of ONE against that of the other.[60]* **EMPHASIS ADDED**

[107] The Respondents made reference to and relied on the commentary on the unclean hands doctrine in **Halsbury's**;

> *A court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim 'He who has committed iniquity shall not have equity'; and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation [1], or where the plaintiff sought to enforce a security improperly obtained [2], or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money [3]. **Later it was said that the plaintiff in equity [4] must come with perfect propriety of conduct [5], or with clean hands [6] ….***

[108] They also relied on the case of ***MortgageBrokers.com v Mortgage Brokers City 2010 ONSC 1797,*** in which the applicant sought an interim injunction in order to prevent the defendants from using trademarks which they argued would likely be confused with their own trademarks. In response, the defendants argued that the plaintiff had not come to court with "clean hands" as it had breached the licensing agreement that it had entered into with the defendants by withholding certain commissions. The Court agreed that by withholding commissions, the plaintiff had resorted to self-help and, accordingly, could not expect the court to provide injunctive relief. For this reason alone, the Court dismissed the injunction.

[109] The Court of Appeal decision of ***Jamculture Limited V Black River Upper Morass Development Company Limited And Agricultural Development Corporation (1989) 26 JLR 258 (CA)*** was also cited, specifically the dicta of Gordon JA in which on upholding on appeal in respect of a refusal to grant an interim injunction, he stated;

> *On the facts, the appellant had agreed to purchase machinery from the respondents. In furtherance of this agreement the appellant in entering into possession took possession of the machinery. The appellant did not honour the obligations imposed under the contract and proceeded to sell a crane*

> *valued at $2,500,000.00 for $1,000,000.00 and in his statement of claim in suit C.L. 1988/J229 the appellant seeks to recover from the Respondents $1,500,000.00 as special damages for "loss of sale of crane." The appellant's act in selling the crane is suggestive of conversion.* ***A litigant seeking equitable relief must have clean hands.*** *The appellant claims $128,000,000.00 for 10 years prospective net profits yet the injunction he seeks is to allow him to remain on the land. Mr. Grant claimed the appellant was entitled to remain on the land and pay no rent until the dispute is settled.*
>
> *I find that there is a serious question to be tried, that the balance of convenience is in the respondent's favour and that damages would be an adequate remedy to plaintiff who has filed a suit claiming $136,540,000.00 in special damages and general damages. I find no merit in ground 11. Ground 111 was abandoned.* ***I think that Ellis, J., was eminently correct in deciding as he did in refusing to grant the injunction****.*

[110] The Respondent also relied on the guidance provided by the Court in ***Crown Motors Limited et al v First Trade International Bank & Trust Limited (in Liquidation) [2016] JMCA Civ 6.*** They asserted that in light of the contents of the third affidavit, the members of the Applicant had been shown to have failed to comply with the Act. They submitted that the Rules cannot confer on the Applicant the right to direct its members (or anyone else) in the use of the foreshore as there was clear statutory injunction against same as reflected in the Beach Control Act. The Court of Appeal decision of ***Kathleen Morrison et al v Herma Lemond (1989) 26 JLR 43 CA*** was cited in which the decision of the Master who had granted an interim injunction in favour of a party who was shown to have no legal or vested equitable interest in land was overturned. In handing down its decision, the Court noted;

> In such circumstances no interlocutory injunction could properly be ordered against the 1st appellant because there was no existing estate or interest, legal or equitable, vested in the respondent in support and protection of which the interlocutory order was being issued (emphasis supplied).
>
> For these reasons, the learned Master erred on the threshold principle on which an interlocutory order of injunction is granted. The appeal is accordingly allowed and the interlocutory order of injunction is set aside with costs in this court below in favour of the appellants to be taxed if not agreed.

[111] The Respondent argued that by the same token, the Applicant, which has neither a legal nor equitable interest in the foreshore is not entitled to override the decision of the authorized agent of the Crown and obtain an injunction restraining the use which the Crown has permitted.

Discussion/Analysis

[112] It is not in dispute between the Parties that Section 49(h) of the Judicature (Supreme Court) Act empowers the Court to grant the orders sought herein. It is also accepted that Part 17 of the CPR provides that the Court can grant an interim injunction pending the filing of a claim. The request as the Court understands it at this point would be for an interlocutory injunction which would remain in effect until the determination of this matter as a Claim Form and Particulars of Claim were filed on the 22nd of June 2020.

[113] The legal principles which guide the Court's examination of this matter have been considered in a number of decisions more particularly ***American Cynamid Co*** and ***Olint Ltd*** both of which have been quoted extensively by the respective parties in their submissions and I do not propose to restate these principles here. It is sufficient to acknowledge that any decision to be made would necessarily take into account the seminal questions which have been acknowledged as;

a. Is there a serious issue to be tried?

b. Does the balance of convenience favour the granting of the injunction or to state it differently would irreparable harm be caused by its refusal?

i. Would damages be a sufficient remedy and has there been an undertaking of damages on the part of the Applicant?

ii. Does the preservation of the status quo require that the injunction be granted?

Is there a serious issue to be tried?

[114] It is the Applicant's position that there is a serious issue to be tried as the Respondent is bound to comply with the Rules and Regulations in respect of Architectural Development made by the Society and have breached same. In support of this assertion they have made reference to the various gateways through which the Respondent would be bound in order to show that this 'breach' entitles them to be granted this injunction and these are considered individually below.

Incumbrance

[115] The Applicant contends that the Respondent would be bound by an incumbrance on the title which makes any action in respect of the property by the registered owner subject to any rules and regulations which may be made by the Management Company. The 'incumbrance' in question is an endorsement on the title which has been noted as Miscellaneous 977583 and the contents of this endorsement have been outlined above. It is clear from the provisions of Section 26, 70 and 71 of the Registration of Titles Act that if this provision is in fact an incumbrance, any registered proprietor would be bound by the provisions therein. The Respondents on the other hand have asserted that the language of the endorsement does not support the categorization which the Applicants have sought to argue.

[116] In considering this argument, particular note was taken of the Title itself. At page 1 of the document, the registered proprietor's estate in fee simple was stated as subject to the incumbrances which were listed below. Under the heading incumbrances above referred to it was stated that;

> the restrictive covenants set out hereunder shall run with the land above…and shall bind as well the registered proprietors, its successors,

> assigns and transferees…. and shall enure to the benefit of and be enforeceable by the registered proprietor…
>
> The covenants which number 31 in total are then outlined. It is clear from the language used herein that the subsequent owners of this property would be bound by these incumbrances as they specifically provide that they run with the land and are binding on all successors in title regardless of the manner in which they acquired ownership of same. The proprietor was entitled to the benefit of same but also bore the burden of the negative provisions.

[117] The authority of ***Rogers v Hosegood***, which was cited by the Respondent, makes it clear that the intention of the parties to have a particular covenant annexed to the land can be inferred from the language used. It also established that in order for the land to be bound by a covenant or agreement, the appropriate words of annexation must be used. The language which precedes the listing of the 31 restrictive covenants clearly complies with these legal principles as it binds the premises conveyed as well as all successors in title and provides that it enures for the benefit of the registered proprietor and is also enforceable. A comparison with Miscellaneous 977583 reveals that there is no such provision as it appears to specifically bind the existing registered owner in a contract with the Society for a stated period for the latter to perform specific actions on the property or make rules and regulations in respect of same.

[118] The language contained in this endorsement seems to more closely mirror that in ***Lamb v Midac*** which the Court found to be insufficient to bind successors in title of the Respondent's predecessor. This observation in respect of the instant case is founded in the fact that that the Agreement which was dated the 28th of May 1997 provides that it is an agreement between the registered proprietor and Lagoons Management Limited. While it may be argued that the 'registered proprietor' stated therein was intended to include all future registered owners and contained a right which could be exercised by the Society regardless of whomever this was; the

language used is not that expansive as it fails to bind the successors in title to the registered proprietor in the manner that the other incumbrances do. Neither does the agreement contain a provision that the term registered proprietor would include present or future owners.

[119] Section 3 of the Registration of Titles Act makes it clear that an incumbrance includes all estates, interests, rights, claims and demands which can or may be had, made or set up, in, to, upon or in respect of the land adversely and preferentially to the title of the proprietor. In order to qualify as an incumbrance the endorsement would have to create such a right/claim etc in respect of the subject property which would be adverse or preferential to the existing registered proprietor. It is clear from the words used that this endorsement does not satisfy the provisions of Section 3 as it is limited in its application. As such it would not create an incumbrance which would be binding on the Respondent.

Novation

[120] It was also asserted by the Applicant that the Respondent was bound to comply with the Rules and Regulations on Architectural Development as the Maintenance Agreement under which these regulations were created had been novated to the Company. While it is clear that the Respondents did not sign a new maintenance agreement on the transfer of the property to them, it is not in dispute that the shareholders/directors of the Company had signed a maintenance agreement at the time that they acquired possession of the subject property. It is also not in dispute that Dr Guna Muppuri continued to pay the maintenance and submitted the construction documents and approvals to the Society when these were requested.

[121] The issue to be determined then is whether the conduct of the Muppuri's and their positions in the Respondent company would have been sufficient to novate the Maintenance Agreement. While a number of authorities and extracts from legal texts have been cited by both Parties, I found that useful guidance on this issue was provided in an extract from ***Halsbury's Volume 22 paragraph 598*** where the following was made clear;

1. Novation occurs where one contract is substituted for another either between the same parties or different parties the consideration usually being the discharge of the old contract.

2. Novation requires a subsequent binding contract and the consent of all parties.

[122] Applying these legal principles to the circumstances before me, it is clear that for the Applicant's argument to be successful the evidence must meet the criteria outlined. In this regard, I found that the Applicant faced the following challenges;

a. The statement of account which has been presented does not reflect that the account had been amended to state the name of the Respondent but still contains the name of the previous owner Dr Guna Muppurit to whom it is specifically addressed.

b. They have failed to rebut the assertion by Dr Muppuri that he continued to pay the maintenance not in any capacity on behalf of the company but in his personal capacity on receipt of the invoices.

c. The authority of ***CEP Holdings*** makes it clear that the continuation of payment under an original agreement by a third party is not sufficient without more to prove novation.

d. There is no evidence of a subsequent binding contract or any consideration for same. Neither has evidence been presented of an agreement by all 3 Parties to have the contract novated.

e. The evidence of compliance with the rules and with the requests of the Building Committee is equally consistent with the Dr Mupppuri's indication that these actions were taken to ensure harmonious relations with the executive committee and their neighbours.

[123] The absence of consent to novation on the part of any of the Parties who would be involved in such a transaction is a significant factor and its importance was made clear by Sykes J, as he then was, in the ***Jamaica Redevelopment*** case at paragraph 22 where he stated;

> *If the obligations and rights under the contract are to be transferred, then what occurs is a novation and not an assignment. A novation requires that the parties to the initial contract both agree that a third party, who must himself also agree, shall perform the obligations of one or both parties under the initial contract. A novation, therefore, requires a tripartite agreement and that agreement is an entirely new contract, and becomes the source of all contractual rights and obligations of the parties. This stands in sharp contrast to an assignment which is an agreement between the assignor and the assignee. In the case of an assignment of debt, the debtor is not a party to the assignment. He derives no enforceable rights under the assignment since he is not privy to that contract.(emphasis supplied)*

While I accept that some authorities provide that conduct of the Parties can be considered in this regard, it is evident that this conduct has to be shown by clear and cogent evidence and not evidence which is equally consistent with another interpretation.

[124] Additionally, the Applicant has failed to show that the actions of Dr Muppuri were done in the course of his duties as Director of the Respondent company and the authorities which have been cited by them make it clear that there should be cogent evidence of this agency. In light of the relevant law and evidence which has been presented, I am unable to agree with the Applicant's contention that novation has in fact occurred. As such, I am not of the view that the Respondent would have been bound by the terms of the Maintenance Agreement under this principle.

Contract – Conveyancing Act

[125] The substance of this assertion by the Applicant that Section 63 of the Conveyancing Act operates to bind the Respondent rests entirely on the premise that the Court accepts that the endorsement on the title is an incumbrance and/or a contract under seal which is binding on the Respondent and its successors in title. I have already concluded that this is not an incumbrance but the argument would

also fail as there is no privity of contract between the current registered owner and the Management Company in order to make the contract enforceable against Starfish Bay to the benefit of the Applicant.

Industrial and Provident Society

[126] The Applicant's submission in this regard appears to be grounded in Section 21 which makes it clear that such a society can create rules to bind the society, all members thereof and all persons claiming through them. The Respondents on the other hand have stated that these rules do not apply as while the previous owners had been members this position changed when they transferred ownership. In examining whether this provision would in fact to operate the Respondents, I noted that while the Management Company was clearly an Industrial and Provident Society which could exercise these powers membership in same seemed to depend on a party entering into an agreement with them to this end. In light of my conclusion that there was no new agreement created by the process of novation, I am unable to agree with this submission as the provision makes it clear that only members of the society can be bound by the rules.

Accretion

[127] Although the concern of accretion has been raised by the Applicant, they have not sought to rebut the assertion of the Respondent that no issues had been flagged by NEPA upon their inspection of the foreshore construction. Additionally, it has been stated by the Respondent that they seek to make no claim to this area but recognise that it remains the property of the Crown whose permission they have obtained before moving forward with the development.

[128] In any event, if there was in fact a future 'violation' as contended by the Applicant, they would have no locus standi to assert a right or bring a claim in that regard as that authority would rests with the Attorney General on behalf of NEPA/NRCA. Section 3 (1) of the Beach Act area states;

> *"3.(1) Subject to the provisions of this section, all rights in and over the foreshore of this Island and the floor of the sea are hereby declared to be vested in the Crown.*

This provision was considered in the decision of ***Patrick Woolcock etal v David Sykes etal*** and the Court recognised that the jurisdiction over the foreshore would rest in the NRCA/NEPA and no member of the public to include the Applicant would have or acquire rights over that area; save if same were granted in accordance with Section 14 which allows for members of the public, by way of a court order, to secure rights to use any beach or land adjoining any beach.

[129] In light of the foregoing discussion, it is evident that the Applicant would be unable to get pass the hurdle of proving that the Respondent Company was bound by the terms of the Regulations. The effect of this is that despite the alleged novelty of the argument, the Court has no other option but to conclude that with the evidence falling short of establishing a prima facie case, the Applicant has failed to show that there is a serious issue to be tried.

Balance of convenience

[130] At page 408 of the ***American Cynamid Co*** decision, Lord Diplock provided useful guidance in respect of this consideration, while this portion of his reasoning had previously been highlighted, I believe it is useful to revisit a part of his remarks, specifically where he stated;

> *So 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.*

[131] I have highlighted this pronouncement as in light of my finding that there is no serious case to be tried, I would be entitled at this juncture to conclude my consideration of this matter. However, in order to give careful and through consideration to all issues raised herein, I considered it prudent to determine where the balance of convenience actually lies.

[132] Although the Applicant has raised a concern as to the damage which may be done by the Respondent being allowed to have his way, nothing has been identified in respect of actual physical damage or a tangible loss to the Society or other residents. On the other hand, the Respondent has outlined that he had borrowed the sum of JMD$20 million dollars, which he is liable to repay, to cover the cost of the construction work which has a debt service cost exceeding JMD $ 2 million dollars annually and if the injunction is granted the possibility exists that the undertaking as to damages may be insufficient to meet his damages and legal cost.

[133] Having carefully considered the competing positions of the Parties, I am persuaded that the balance of convenience would favour the Respondent as an injunction in such circumstances would clearly result in a tangible loss for him. While it is appreciated that the Applicant would wish to avoid a situation in which other home owners may seek to flout the rules, the situation in respect of the Respondent has been shown to be distinguishable where the rules and regulations are concerned.

Undertaking as to Damages

[134] In respect of the undertaking as to damages, the Respondent has raised concerns in respect of the titles presented by Mr Epstein as they have noted that the registered proprietors named are not parties in this action, neither has there been evidence presented to show that they are prepared to have their titles used in this manner. In respect of the sums contained in the accounts presented the concern was also raised as to the sufficiency of this sum in light of the loan amount, debt payment rate and other expenses which would be occasioned.

[135] Having examined the Applicant's undertaking, I was persuaded that these concerns were well founded as I was left with questions as to whether the Applicant would actually be in a financial position to compensate the Respondent by way of damages if the application was granted and the matter later determined in the Respondents favour. As such, it is my conclusion that the undertaking is not sufficient for the foregoing reasons.

Maintaining the Status Quo

[136] In the ***American Cynamid*** decision it was made clear by Lord Diplock that where the other factors appear to be evenly balanced the prudent course in treating with an application such as this is to preserve the status quo. In this situation however, the factors cannot be said to be evenly balanced given the challenges to the Applicant's action which have been identified. Accordingly, the plea for the preservation of the status quo cannot be favourably considered.

Clean Hands

[137] In outlining their opposition to this application, the Respondents questioned whether the Applicant would be entitled to the relief sought on the basis that they had come before the Court with unclean hands. The basis of this contention lies in the allegation of breaches of the rules and restrictive covenants being committed by Mr Epstein himself and the failure of the Society to fairly enforce the rules against other residents who had also committed breaches. A number of authorities and extracts from legal texts were cited to establish that it is settled law that an injunction can and has been denied in circumstances where the Applicant has been shown to have 'unclean hands' and I took special note of the local Court of Appeal decision of ***Jamculture Limited v Black River Upper Morass Development Company etal*** in this regard.

[138] In submissions in response, the Applicant denied the allegations made by the Respondent and invited the Court to consider what it considered to be four important issues in order to determine whether this defence by the Respondent is a viable one. They also provided a number of useful authorities and other material as to the relevant law which could assist the Court in its consideration of this issue and these have been carefully reviewed. In respect of the evidence underpinning their position, it was observed that reference was made to the contents of an affidavit which had been sworn to on this issue by Mr. Epstein.

[139] At the time of the hearing of this matter, on the 13th of October 2020, there had been no affidavit filed in response to the third affidavit of Dr Muppuri filed on the 7th of August 2020 in which these allegations were raised. The hearing proceeded on the basis that this affidavit was unchallenged or certainly unanswered. It was recently discovered that although permission was neither requested nor granted for same, an affidavit was filed after the hearing had concluded and its contents appear to provide the foundation for much of the submissions made on this point.

[140] I have used the word 'appear' as I have not read this affidavit, neither have I read that which was provided electronically by the Respondent on the 28th of April 2021 with a filing date of April 15th, 2021, in response to same. These affidavits were never requested neither was permission granted for same to be filed and their submission subsequent to the hearing in circumstances where permission had only been granted for written submissions on the areas of novation and clean hands is most unusual. As such, they do not form a part of the material that was considered by the Court in arriving at this judgment.

[141] In respect of the allegations made against the Applicant, while Dr Muppuri provided photographs and emails which were said to show the breaches by Mr Epstein, I am of the view that the evidence being relied in respect of these alleged breaches and those involving other residents are in fact questions of fact which would have to be resolved by the appropriate tribunal. Additionally, the determination of this issue whether in favour of the Applicant or the Respondent would in no way change the outcome of this matter given my earlier conclusion that the injunctive relief sought cannot be granted as there is no serious issue to be tried.

[142] Accordingly, it is my ruling that the reliefs sought in the Notice of Application filed on the 20th of February 2020 are denied and costs of this application are awarded to the Respondent to be taxed if not agreed.