



[2025] JMSC CIV 51

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2025CV00748

IN THE MATTER of ALL THAT parcel of land part of Drax Hall Estate in the parish of St. Ann being Lots Numbered One to Eight (1-8) Part of Lot Number 390 and being the lands comprised on Certificates of Titles registered at Volume 1477 Folios 153, 535, 536, 651 and 653 of the Register Book of Titles and known as Lot Number 390 Drax Hall Estate in the parish of St. Ann.

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|----------------|-------------------------------------|---------------------------------|
| BETWEEN | NEW ERA DEVELOPMENTS LIMITED | 1ST CLAIMANT |
| AND | LEO TADDEO | 2ND CLAIMANT |
| AND | LLEWELYN WATSON | 3RD CLAIMANT |
| AND | ALBAN WILSON | 4TH CLAIMANT |
| AND | NEW ERA PROPERTIES LIMITED | 1ST DEFENDANT |
| AND | BENEDETTO PERSICHILLI | 2ND DEFENDANT |

Mr. Kemar Robinson instructed by Robinson & Partners for and on behalf of the Claimants

Ms. Nerine Small instructed by Chambers LexForte for and on behalf of the Defendants

Ms. Laleta Davis Mattis observing proceedings on behalf of the 1st Defendant

Ms. Courtni Ann Allen, Judicial Counsel

Heard: April 17, 2025 and May 9, 2025

Civil Practice & Procedure – Application for interim injunction – Requirements for the grant of an interim injunction – American Cyanamid Co. v Ethicon Ltd. – Whether there is a serious issue to be tried – Whether damages is an adequate remedy – Balance of convenience – Section 4 of the Restrictive Covenants (Discharge and Modification) Act – Whether stay of proceedings is appropriate given the fact that the Defendants have applied to remedy the breach

PALMER HAMILTON, J.

BACKGROUND

[1] By way of a Fixed Date Claim Form filed on the 10th day of March, 2025 the Claimants sought several Orders against the Defendants which all touch and concern some of the restrictive covenants found on the Certificates of Title registered at Volume 1477 Folios 153, 535, 536, 651, 652 and 653. The Claimants are alleging that the said restrictive covenants have not been modified and the Defendants are therefore in breach by constructing buildings contrary to the terms of the said covenants. The Claimants are also alleging that if the breach is allowed to continue, it is likely to result in irreparable loss and damage being suffered by them.

[2] The claim concerns Lot 390 part of Drax Hall Estate (hereinafter referred to as ‘the Property’ or ‘the said Property’) which was subdivided into eight (8) lots. The Claimants are the registered proprietors of several strata units located on Lot 1, while the Defendants are the registered proprietors of Lots 2-7. Lot 8 is the common property for Lots 1-7 and each Lot has a 1/7th interest in the said Lot 8.

THE CLAIMANTS’ APPLICATION

[3] The Claimants also filed an Urgent Notice of Application for Interim Injunction on the 10th day of March, 2025 seeking the following Orders:

1. *An interim order that the Defendants/Respondents and its servants or agents immediately cease and desist from*

continuing the construction of any further buildings on the remainder of Lot 390 (Lots 1-7) Drax Hall Estate in the parish of St. Ann.

2. *An interim order that the Defendants/Respondents and its servants or agents immediately cease and desist from continuing the construction of any further buildings on the remainder of Lot 390 (Lots 1-7) Drax Hall Estate in the parish of St. Ann, which are in breach of the restrictive covenants which governs Lots 2-7.*
3. *A mandatory injunction compelling the Defendants to demolish and/or remove any and all structures erected in breach of the restrictive covenants, including but not limited to buildings constructed on lands designated as common areas.*
4. *An interim injunction to compel the Respondents to return the playground to the common area where it was previously located.*
5. *An interim order restraining the Defendants/Respondents from carrying on any physical interference with the land which does not conform to the Restrictive Covenants.*
6. *An interim injunction compelling the Defendants to provide all notices for application for modification of Restrictive Covenants, all Permits and all Approvals which have been granted in relation to said lands.*
7. *An interim injunction prohibiting the Registrar of Titles from registering any dealings or transferring any interest in the lands comprised in the Certificate of Titles registered for Lots 2-7, the remainder of Lot 390 Drax Hall Estate until the claim is determined.*
8. *Costs to the Applicant to be taxed if not agreed.*
9. *Such further and other relief as this Honourable Court may deem just in the circumstances.*

[4] The grounds on which the Claimants are seeking the Orders are as follows:

- a. *Pursuant to Section 49 (h) of the Judicature (Supreme Court) Act and Part 17 of the Civil Procedure Rules, the Court has the power to grant an interlocutory order in all cases in which it appears to the Court to be just and convenient that such order be made to prevent the Defendants from continuing to breach the Restrictive Covenants.*

- b. *The Respondents are constructing buildings on property which currently forms the common area for properties which the Claimants have a vested interest as benefits derives from this common area.*
- c. *The Respondents are building multiple houses on the land contrary to the Restrictive Covenants which provides that no building other than one residential (multi-family) unit shall be erected on the said land.*
- d. *The Respondents have not served any Notices on the Applicants indicating any intention to modify the Restrictive Covenants which they are currently breaching.*
- e. *The Applicants are at the risk of losing the benefits of their shared interests in the common area as a result of the Respondents' actions.*
- f. *It is just and convenient to grant the above orders to prevent the continued trespass on Lot 8 by the Respondents and prevent the Respondents from continuing to breach the restrictive covenants.*
- g. *There is a serious issue to be tried insofar as the permanent injunctions and the damages which the Applicants seek against the Respondents.*
- h. *The actions by the Respondents are permanent in nature and as such damages would not be an adequate remedy if the Respondents continue with the construction of houses on the subject properties.*
- i. *The Applicants are prepared to extend the usual undertakings as to damages to cover any loss and damage suffered by the Respondents in the event the Court finds that the interim injunction is incorrectly granted.*
- j. *The balance of convenience lies in favour of granting the injunction to the Applicants insofar as the Applicants will suffer irredeemable harm unless the injunction is granted.*
- k. *In any event, the orders sought herein are necessary to preserve the status quo of the parties at the commencement of the claim.*
- l. *Pursuant to Rule 17.1.C(i) [sic] of the CPR, the Court may grant an interim injunction for the preservation of relevant property.*
- m. *It is in the interest of the overriding objective that the orders sought herein be granted.*

[5] The Claimants' Application is supported by three Affidavits of Mr. Elia Leo Taddeo filed on the 10th day of March, 2025, the 8th day of April, 2025 and the 11th day of April, 2025. The Application was also supported by an Affidavit of Mr. Llewelyn Watson filed on the 11th day of April, 2025. Three Affidavits were filed by Mr. Benedetto Persichilli on the 3rd day of April, 2025, the 7th day of April, 2025 and the 14th day of April, 2025.

THE DEFENDANTS' APPLICATION

[6] On the 16th day of April, 2025 the Defendants filed a Notice of Application for Court Orders seeking the following Orders:

1. *The Proceedings in Claim No. SU2025CV00748 be stayed pending the hearing of the application filed in Claim No. 2025CV01515 for the modification and/or discharge of restrictive covenants affecting Lots 2-8 of Lot 390, Drax Hall Estates, in the parish of Saint Ann.*
2. *Such further or other relief as this Honourable Court deems just.*
3. *Costs to be costs in the claim.*

[7] The grounds on which the Defendants are seeking the Orders are as follows:

- a. *The Court has the power to stay these proceeds [sic] pursuant to section 4 of the Restrictive Covenants (Discharge and Modification) Act in order to allow for an application to be made to a Judge in Chambers under section 3 of the said Act for the discharge or modification of restrictive covenants affecting registered titles.*
- b. *The Defendants have filed an application in Claim No. 2025 CV 01515 under section 3 of the Restrictive Covenants (Discharge and Modification) Act for the modification and/or discharge of restrictive covenants affecting Lots 2-8 of Lot 390, Drax Hall Estates, Saint Ann.*
- c. *There are questions to be determined in Restrictive Covenants (Discharge and Modification) Act as to the persons entitled to the benefit of the restrictive covenants affecting Lots 2-8 of Lot 390, Drax Hall Estates, Saint Ann, arising in circumstances of a failed scheme of development, which are part of the determination usually made by a court dealing with a restrictive covenant discharge and modification applications.*

- d. *Where there are issues of compensation persons entitled to the benefit of restrictive covenants in the event there is a loss or harm as the Judge in Chambers is empowered to make such orders pursuant to section 3 of the Restrictive Covenants (Discharge and Modification) Act.*
- e. *The delay in filing the application to discharge or modify the restrictive covenants was unintentional and is regretted.*
- f. *Granting this application for a stay in the circumstances is in keeping with the overriding objective.*

[8] The Defendants are relying on the three Affidavits filed by them and mentioned in paragraph 5 of this judgment. The Defendants are also relying on another Affidavit filed by Mr. Benedetto Persichilli filed on the 16th day of April, 2025.

SUBMISSIONS

[9] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance in deciding the issues. However, I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings. I wish to reassure Counsel that their submissions were thoroughly considered even if not directly referenced.

SUBMISSIONS BEHALF OF THE CLAIMANTS

[10] By way of background, Learned Counsel for the Claimants stated that the basis of their Application is that the Defendants have commenced construction on land which are protected by restrictive covenants which have not been modified or discharged, namely covenants number 8, 9, 37 and 41. It was further stated that the Defendants commenced the construction of single family houses on Lots 2-7 and commenced the building of houses on Lot 8 ignoring the restrictive covenants and the fact that other persons have an interest in Lot 8. Further, the Defendants have removed amenities previously enjoyed by the Claimants on Lot 8. Learned Counsel for the Claimants contended that the Defendants were warned about their actions or intended actions since June of 2024 and despite the warning they have proceeded to commit the acts described above without regard for the rights of

others. Learned Counsel for the Claimants further contended that his clients have provided evidence that the Defendants have commenced the constructions of buildings on the remainder of the Property, being Lots 2-8.

[11] Learned Counsel for the Claimants submitted that the issues to be determined are:

- i. Whether the Defendants have breached the aforementioned restrictive covenants and how the Court should treat with this issue.*
- ii. Whether the Defendant should be permitted to build on common land.*
- iii. Whether the Court should grant the injunction.*
- iv. Has the Defendant trespassed on the common property, Lot 8?*

[12] In respect of the first issue, the Learned Counsel for the Claimants submitted that the Defendants have not denied that they have commenced construction of the buildings in breach of certain restrictive covenants and that at the time this claim was filed no application to discharge or modify the covenant was made. It was further submitted that this is a flagrant disregard of the said covenants and it is a practice which case law, both locally and within the wider Commonwealth has not supported. Learned Counsel relied on the cases of **Martin Lyn and Others v Sarah Shin-Jen Hsia and Others** [2023] JMCA Civ 16, **Re Roseberry Drive** [2021] JMCA Civ 187 and **Alexander Devine Children's Cancer Trust v Housing Solutions Ltd** [2020] UKSC 45. Learned Counsel concluded that the conduct of the Defendants warrants the Court's intervention for the granting of an injunction to prevent continued breach of the law.

[13] This leads to the second and fourth issue, Learned Counsel for the Claimants contended that the Defendants have no right to construct buildings on Lot 8 and no defence known to law was presented to support their conduct. It was further contended that this amounted to trespass on Lot 8, in which the Claimants have an interest. Reliance was placed on section 10 of the Registration of (Strata Titles) Act to show that the registered proprietors of Lots 1-7 have respective shares in

Lot 8, which is for their use and benefit. Learned Counsel also relied on the cases of **Melody Cammock-Gayle v Heather Urquhart and Glendon B. Spence** [2015] JMSC Civ. 213 and **Proprietors Strata Plan 253 v Annmarie Logan** [2024] JMSC Civ 33.

[14] Learned Counsel for the Claimants submitted, in dealing with the third issue that the jurisdiction to grant an interlocutory injunction is well established under Rule 17.1 of the **Civil Procedure Rules (CPR)** and section 49 (h) of the **Judicature (Supreme Court) Act**. Learned Counsel outlined the applicable tests for the granting of an interlocutory injunction that the Court should consider as derived from **American Cyanamid Co. v Ethicon Ltd** [1975] AC 396. It was contended that the facts of the case support the granting of an injunction against the Defendants. The first limb is whether there is a serious issue to be tried and it was submitted that this must be answered in the affirmative. Learned Counsel outlined the following reasons in support:

- i. The land on which the Defendant is building is protected by restrictive covenants which are being breached by the Defendants.*
- ii. Land on which the Defendant has commenced construction is common property, jointly owned by all unit proprietors and prohibited by restrictive covenants.*
- iii. Construction is being done without approval in violation of both statutory provisions and registered restrictive covenants.*
- iv. This case raises serious legal questions regarding property rights, unauthorized use, trespass, damages and enforceability of covenants.*

[15] The second limb considers whether damages would be an adequate remedy and Learned Counsel for the Claimants has contended that it would not be in this instance as:

- i. The value of the common property will be diminished.*
- ii. The Claimants' rights to shared amenities and enjoyment of the common property will be permanently altered.*

- iii. *The Defendants' construction, once completed, would be difficult and expensive to remove.*
- iv. *Damages are not always an adequate remedy where rights to land are at stake. (see **Kevin Sudeall and Joyce Ramdeen-Sudeall v Garfield Sinclair and Lynsetta Sinclair** [2023] JMCA Civ 32)*
- v. *The public's interest is to be protected from persons who disregard the law. (see **Kingston and Saint Andrew Corporation v Diana Cooke, Deborah Ezzo, Colin Cooke and C.C.L. Limited** (unreported) Claim No. HCV02584/2006 delivered on the 31st of January, 2007)*

[16] Learned Counsel for the Claimants submitted that the third limb, being where does the balance of convenience lie, is also in favour of the Claimants. The following reasons were given:

- i. *The balance of convenience lies in preserving the status quo.*
- ii. *The Claimants stand to suffer irreparable harm.*
- iii. *The Defendants cannot be said to be prejudiced by halting construction and demolishing the buildings in circumstances where they have broken the law.*
- iv. *The Claimants' collective interest must be preserved over unilateral and unlawful actions.*
- v. *The Court should not support unlawful conduct which would prejudice the Claimants' rights despite the fact that the Defendants have expended sums on construction.*

[17] Learned Counsel for the Claimants concluded that the Orders being sought ought to be granted to prohibit the Defendants from continued flouting of the law by breaching the restrictive covenants, and to remedy the breach by an order to demolish the structures which have already been built on the Property.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[18] Learned Counsel for the Defendants summarized what she considered to be the material facts as follows:

- i. *The 2nd Claimant and 2nd Defendant are the sole equal owners and directors in a construction business known as New Era Homes 2000 Limited.*
- ii. *The relationship between them became acrimonious and the parties agreed to separate.*
- iii. *The parties executed a Separation Agreement and Scheme of Reconstruction on January 1, 2021. Under this agreement the parties stipulated how the assets of New Era Homes should be equally shared between two (2) companies formed for that purpose:
- New Era Properties Limited, with ownership of 70% by the 2nd Defendant and 30% by the 2nd Claimant; and New Era Development with 70% ownership by the 2nd Claimant and 30% by the 2nd Defendant.*
- iv. *The land which is the subject matter of this dispute is Lot 390 Drax Hall Estate. In the separation the remaining interest in Lots 2-7 and Lot 8 were transferred to the 1st Defendant.*
- v. *Lot 1 houses a condo building of multi-family units built in compliance with building approval from the St. Ann Municipal Corporation. In 2013/2014 when this strata block was constructed, the plan was to build out similar blocks on Lots 2-7 on a phased basis. This never materialized because it was not financially feasible to do so. The building approval*
- vi. *The 2nd Defendant commenced an oppression action against the 2nd Claimant in the Supreme Court Commercial Division in Claim No. SU 2021CD00037 – Benedetto Persichilli v Leo Taddeo and New Era Homes 2000 Limited. In that action, the 2nd Defendant made various claims concerning being locked out of the business of New Era Homes. It was widely agreed and accepted that the 2nd Claimant was responsible for finance and administration and the 2nd Defendant was responsible for construction. Additionally, the parties had verbally agreed to engage in the construction of their own projects: the 2nd Claimant at Goshen Pen in St. Catherine and the 2nd Defendant at Lot 390 Drax Hall Estate, Saint Ann. However, while the 2nd Claimant was using the resources of New Era Homes to further this project, he refused to allow the 2nd Defendant to do the same. Notwithstanding the 2nd Defendant's claim in respect of oppression, the Court did not agree, however, it required the 2nd Claimant to honour the Separation Agreement.*
- vii. *In order to do so the parties jointly engaged a Valuer, Allison Pitter & Company to value the properties owned by New Era Homes. The 2nd Claimant disagreed with the valuation for Lot 390, something he has done several times before, even when he engaged the valuer's himself. The valuation done by Allison Pitter & Company in respect of Lot 390, concluded that the highest and best use of Lots 2-7 are*

single family residential properties. The 2nd Claimant's obsession with the valuations extended in a material way only to properties assigned to the 2nd Defendant in the separation. Consequently, he raised issues with the valuation of Lot 390, then Lot 389, then Lot 392, all properties assigned to the 1st Defendant in the separation.

- viii. The 2nd Claimant brought an application to overturn the valuations prepared by Allison Pitter & Company. Batts J ruled on the matter and determined that the parties were bound by the valuations. The 2nd Claimant appealed the decision. The Court of Appeal heard the matter on paper during the last week of January 2025. We are awaiting that decision.*
- ix. In the meantime, the 1st Defendant commenced construction on Lot 390, on or about November 2024, having sought and obtained the requisite approvals including building approval from the Municipal Corporation to construct single family residential units.*
- x. Lot 390 is zoned resort/residential and this allows for the construction of multi-family or single-family residences on the property. the titles for Lots 2-7 carry restrictive covenants which required multi-family units to be constructed on them. The 1st Defendant obtained sub-division approval to construct single family units on them consistent with the zoning of the property.*
- xi. Restrictive covenants in relation to this issue and to the use of Lot 8 are registered on the titles to Lots 2-7. The 1st Defendant is obliged to seek the modification and discharge of the relevant covenants. An application has been filed under section 3 of the **Restrictive Covenant (Discharge and Modification) Act** to discharge and/or modify the covenants.*

[19] Learned Counsel for the Defendants submitted that it is necessary for the Court to determine whether the Claimants are entitled to the benefit of the restrictions on the titles of the 1st Defendant, those restrictions not appearing on the face of the titles of the Claimants, in the context of a failed strata development. It was further submitted that Lot 1, on which the Claimants have their units, is only entitled to a 1/7th interest in the common area being Lot 8. Learned Counsel contended that these are matters which should be fully ventilated in the restrictive covenant discharge or modification matter. Learned Counsel for the Defendants directed the Court to section 4 of the **Restrictive Covenants (Discharge and Modification) Act** which deals with a stay of proceedings pending the hearing of the application to modify or discharge the restrictive covenants. Learned Counsel asked the Court

to consider granting a stay in this matter so the application under the **Restrictive Covenants (Discharge and Modification) Act** can be addressed.

[20] In dealing with the principles arising from American Cyanamid, Learned Counsel submitted that it is a matter for the Court whether the said principles apply to cases involving breaches of valid restrictive covenants. It was further submitted that if they are applicable then it is the Defendants' position that there is no serious issue to be tried. It was contended that it is likely that should the relief sought at this interlocutory stage be granted, it would have the effect of finally disposing of the matter in favour of the Claimants as nothing of any practical value would be left for the Claimants to obtain. It was further contended that no room would remain for a defence on the part of the Defendants in this matter to be heard at trial, which would result in an injustice to the Defendants. Learned Counsel for the Defendants argued that they are seeking to have the restrictive covenants on the titles to Lots 2-7 discharged or modified consistent with the sub-division approved by the Saint Ann Parish Council and the pre-checked plan approved by the National Land Agency. Learned Counsel further argued that the sub-division which was approved is consistent with the existing zoning of the property. It was also contended that if an Order to demolish what the Defendants has already constructed then it would effectively put an end to other matters before the Court namely, the effect of the Defendants entitlement under the Separation Agreement.

[21] Learned Counsel for the Defendants contended that damages would be an adequate remedy and the Claimants have not established that it would not be an adequate remedy. Learned Counsel for the Defendants further contended that the circumstances of this case are exceptional, as what the Claimants are complaining about is that her clients have not complied with the requirements to have the restrictive covenants modified or discharged, and instead of granting the injunctive relief being sought the Court should stay the matter. Learned Counsel further submitted that matters of compensation can be addressed by the Court dealing with the restrictive covenant matter. Learned Counsel also submitted that the Claimants have not established any loss or material loss in relation to the restrictive

covenants to be modified or discharged. Learned Counsel for the Defendants argued that the Claimants have not established that they are able to provide any proper undertaking as to damages and they would not be able to pay should the Defendants succeed at trial. On the other hand, it was argued that damages would not be an adequate remedy if the Defendants succeed at trial as the losses that they would have sustained, including reputational damage, could not be compensated for in damages by the Claimants.

[22] Learned Counsel for the Defendants asked the Court to have regard to the fact that the Claimants did not act in an expeditious manner being fully aware of the fact that the 1st Defendant intended to build and did in fact commence construction. It was contended that it would be an injustice to the Defendants if the Court exercises its discretion to grant interlocutory injunctions in favour of the Claimants, which would effectively bring an end to the substance of the matter. (see **Cayne v Global National Resources plc** [1984] 1 All E.R 225 at 233 referred to in **Miller v Cruickshank** (1986) 44 WIR 319, Court of Appeal Jamaica and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16). The Claimants would have received the substance of what they require at trial at the interlocutory stage and the injunctive relief sought ought not to be granted. Learned Counsel submitted that that as an alternative the Court is at liberty to stay these proceedings pending the hearing of the application for modification and discharge of the relevant restrictive covenants.

ISSUES

[23] The issues that arise for my determination are:

A. Whether the Claimants' application for interim injunction ought to be granted. In considering this issue, the following sub issues arise:

(i) Whether there is a serious issue to be tried;

(ii) Whether damages would be an adequate remedy for the Claimants.
If damages are not an adequate remedy for the Claimants, is the Claimants' undertaking in damages adequate for the Defendants?
and

(iii) Whether the balance of convenience lies in favour of the granting of the injunction.

B. Whether the proceedings in this claim ought to be stayed pending the outcome of Claim No. SU2025CV01515.

LAW & ANALYSIS

A. *Whether the Claimants' application for interim injunction ought to be granted*

[24] Pursuant to Rule 17.1 of the **Civil Procedure Rules 2020**, as amended (hereinafter referred to as '**the CPR**'), the Court is empowered to grant an interim injunction. The Claimants are seeking injunctive relief against the Defendants who have commenced construction on Lots 2-8, which is a breach of some of the restrictive covenants on the titles for the Property. The Defendants have not denied that they are in breach, in fact they have admitted that they are in breach and an application was made to have the restrictive covenants modified or discharged in an attempt to rectify the breach. I am guided by the *locus classicus* case of **American Cyanamid Co. v Ethicon Ltd.** [1975] 1 All ER 504, where Lord Diplock identified the list of principles as guidance for factors to be considered in determining whether or not to grant an interim injunction. These principles have been adopted in our jurisdiction and summarized by Mangatal J in **Michelle Smellie & Ors. v National Commercial Bank Jamaica Limited** [2013] JMCC Comm. 1. In paragraph 5 of her judgment, Mangatal J outlined the following considerations which arose in the cases of **American Cyanamid** and **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)**:

(a) *Is there a serious issue to be tried? If there is a serious question to be tried, and the claim is neither frivolous nor vexatious, the court*

should then go on to consider the balance of convenience generally.

- (b) As part of that consideration, the court will contemplate whether damages are an adequate remedy for the Claimants, and if so, whether the Defendants are in a position to pay those damages.*
- (c) If on the other hand, damages would not provide an adequate remedy for the Claimants, the court should then consider whether, if the injunction were to be granted, the Defendants would be adequately compensated by the Claimants' cross-undertaking in damages.*
- (d) If there is doubt as to the adequacy of the respective remedies in damages, then other aspects of the balance of convenience should be considered.*
- (e) Where other factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are designed to preserve the status quo.*
- (f) If the extent of the uncompensatable damages does not differ greatly, it may become appropriate to take into account the relative strength of each party's case. However, this should only be done where on the facts upon which there can be no reasonable or credible dispute, the strength of one party's case markedly outweighs that of the other party.*
- (g) Further, where the case largely involves construction of legal documents or points of law, depending on their degree of difficulty or need for further exploration, the court may take into account the relative strength of the parties' case and their respective prospects of success. This is so even if all the court can form is a provisional view (see **NCB v. Olint**, and the well-known case of **Fellowes v. Fisher** [1975] 2 All E.R. 829). This is of course completely different from a case involving mainly issues of fact, or from deciding difficult points of law, since, as Lord Diplock points out at page 407 G-H of **American Cyanamid**, "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 points of law which call for detailed argument and mature considerations".*
- (h) There may also be other special factors to be taken into account, depending on the particular facts and circumstances of the case.*

[25] I am also guided by Lord Hoffman's dicta in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** where he stated, in reiterating the principles in *American Cyanamid*, that:

"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."

[26] I wish to note here that I am of the view that the principles arising from **American Cyanamid** are applicable to cases involving breaches of valid restrictive covenants and I see no merit in Leaned Counsel for the Defendants' submission on this point. No substantive submissions were put forward. The restrictive covenants are put in place for a reason and until those covenants are modified or discharged, then no one should be in breach as there is a responsibility for a property owner to be in compliance of same. By the Defendants' own admission, the application to modify or discharge the restrictive covenants was filed after this claim was brought by the Claimants. As McDonald-Bishop J in **Martin Lyn and Others v Sarah Chih-Jen Hsia and Others** (*supra*) stated, the practice by land developers to commence construction on lands encumbered by restrictive covenants before obtaining an order from the Court for modification or discharge is disturbing and unacceptable.

(1) Whether there is a serious issue to be tried

[27] The test for 'serious question' was characterized in the case of **Australian Broadcasting Corporation v O'Neill** [2006] HCA 46; 229 ALR 457 as:

"whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief".

[28] In **American Cyanamid** Lord Diplock in addressing the Court's consideration of whether there is a triable issue in the matter stated that:

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

*It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial... **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.**"* [emphasis added]

[29] George J in addressing this consideration stated at paragraphs 14 and 15 in the case of **Pamela Reidy v Joni Young-Torres (Administrator Estate Karl Young)** [2017] JMSC Civ. 189 stated that:

[14] Lord Diplock in the Privy Council decision of ***ENG Mee YONG and Others v Letuchasan***, 1979 UKPC 13 (4th April 1979), made it clear that:

*"The guiding principle in granting an interlocutory injunction is the balance of convenience. There is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a 'probability,' a 'prima facie case' or 'a strong prima facie case' that if the action goes to trial, he will succeed; but before any question of a balance of convenience can arise, the party seeking the injunction must satisfy the court that his claim is neither frivolous or vexatious; in other words that the evidence before the court discloses there is a serious question to be tried, **American Cyanamid v Ethicon Ltd.** (1975) AC396."*

[15] *This principle has been somewhat refined or qualified by later cases such as **Olint**, where the Court uses expressions such as the Claimant 'must show a prospect of success' and in some cases, a real prospect of success. (See: paragraph 23 of **Olint**). This of course should not be strange concepts, as in considering a serious issue to be tried, this must necessarily involve an assessment of any prospect of success."*

- [30] The crux of the matter surrounds the Defendants' flagrant breach of the restrictive covenants that concern Lots 2-8 of the Property. The Defendants' position is that there is no serious issue to be tried. However, I do not share that view. The mere fact that the Defendants have commenced construction knowing that they are in breach of the restrictive covenants is in my opinion a serious issue that the Court ought to consider. In fact, the owners of Lot 1 also have a beneficial interest in Lot 8, which I must note is the common area for Lots 1-7. I am satisfied that the Claimants' claim is not frivolous or vexatious nor can it be described as one which fails to disclose any real prospect of success.
- [31] I see no need to delve into a discussion of the Affidavit evidence that is before me as the Defendants are not denying the Claimants' claim that they commenced construction without first seeking an order of the Court to modify or discharge the restrictive covenants under the **Restrictive Covenants (Discharge and Modification) Act**. It is a practice which has been heavily frowned upon in previous years and yet it continues to happen. The Defendants have put before this Court evidence that they got approval from the St. Ann Municipal Corporation, however that is not the issue at hand. At this stage, there is no guarantee that the Defendants will get the relevant restrictive covenants modified or discharged.
- [32] In my view, the Claimants have made out a prima facie case, because if the evidence remains as it is there is a probability that at the trial of the action they may be successful. Therefore, it is my judgment that there is a serious issue to be tried. There are substantive submissions as to how the Court is to treat with the breach of the restrictive covenants. However, at this juncture, it is not my role to resolve the issues raised by the parties and in any event, I am of the view that these issues ought to be dealt with in the application made by the Defendants under the **Restrictive Covenants (Discharge and Modification) Act**. My role is simply to determine whether the said issues raised disclose sufficiently plausible grounds for granting final relief and I so do find.

- (2) Whether damages would be an adequate remedy for the Claimants. If damages are not an adequate remedy for the Claimants, is the Claimants' undertaking in damages adequate for the Defendants?

[33] Having found that there is a serious issue to be tried, it is for me to now determine whether damages would be an adequate remedy to compensate the Claimants for any harm suffered in the event that they are successful at trial but the injunction was not granted. The onus is on the applicant, in this case the Claimants, as a matter of probability, to prove that damages would be an inadequate remedy. (see **Sheridan v The Louis Fitzgerald Group Ltd.** [2006] and **Smith Cline Beacham PLC v. Genthon BV** (unreported) High Court, 28th February, 2003.)

[34] In the Privy Council decision of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)**, Lord Hoffman at paragraph 16 of his judgement stated:

*“At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction.”*

Lord Hoffman also stated at paragraph 16 that:

“...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.”

[35] However, there is a presumption that damages are not an adequate remedy in matters concerning real property. In the case of **Tewani Ltd. v KES Development Co. Ltd. and ARC Systems Ltd.** Claim No. 2008 HCV02729, unreported, delivered July 9, 2008 Brooks J stated that:

*“The second question to be analysed is whether damages would provide an adequate remedy for a claimant who succeeds at trial but was denied an interim injunction. Where damages will provide an adequate remedy then the injunction should not be granted. (Per Lord Diplock in **American Cyanamid** (cited above) at page 510g)”*

His Lordship went further to consider this principle in relation to the subject matter of real property. He stated that:

“The significance of the subject matter being real property, raises a presumption that damages are not an adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be “unique” and to have “a peculiar and special value”.

[36] I am also guided by the case of **Arleen McBean v Sheldon Gordon, Patrae Rowe and The Police Federation** [2019] JMSC Civ. 38 where Bertram Linton J stated:

*“On the authority of Brerton J in **Goyal v Chandra** 68 NSWLR 313, an application for an interlocutory injunction should not be granted where there is an adequate remedy in damages. However, if damages are available as a remedy but are inadequate, the onus is on court to use its discretion while considering among other things “the extent to which any damage to the plaintiffs can be cured by payment of damages rather than by the granting of an injunction”. The germane question should be “is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?”*

[37] Learned Counsel for the Claimants did not put forward any submissions or evidence to show that the land possesses any special or particular feature that defies monetary conversion, but was in fact relying on the above-mentioned presumption. (see **Kevin Sudeall and Joyce Ramdeen-Sudeall v Garfield Sinclair and Lynsetta Sinclair** (*supra*)). On the one hand, damages could be available as a remedy for the Claimants, as their interest in Lot 8 is only a 1/7th interest based on the Certificate of Title for Lot 1. However, it must be considered that even though damages could be available if it would also be adequate. On the other hand, damages might not be an adequate remedy for the Defendants who are alleging that they could suffer reputational damage if the injunctive relief is granted. However, I am cognizant of the fact that had it not been for the blatant violation of the Defendants, then the Claimants would have no claim. Learned Counsel for the Defendants submitted that the Claimants have not come before this Court with clean hands, but neither have her clients.

[38] Both the 2nd Claimant and the 2nd Defendant have put forward what they consider to be their ability to give an undertaking as to damages. However, I am not able to at this juncture determine whether damages would be an adequate remedy. Therefore, in light of the considerations outlined by Mangatal J in **Michelle Smellie** and Bertram Linton J in **Arleen McBean**, if there exists doubt as to the adequacy of the respective damages, then the Court should consider where the balance of convenience lies before making a determination as to the adequacy of damages as a remedy. The Court has a discretion, and I think the germane question is the same as it was in **Arleen McBean**, that is, “is it just, in all the circumstance, that a plaintiff should be confined to his remedy in damages?” I would be better able to answer this question after dealing with the balance of convenience.

(3) Whether the balance of convenience lies in favour of the granting of the injunction

[39] In dealing with this sub-issue, the Court must take into account the relative strengths of each party’s case. Brerton J in **Goyal v Chandra** (*supra*) guided the courts in assessing this factor by giving the key consideration of whether or not irreparable injury will occur if an injunction is not granted. The onus is therefore on the applicant to show as a precondition that there is a threat of irreparable injury, which if not prevented by injunction cannot be afterwards compensated for by damages.

[40] Bertram Linton J in the case of **Arleen McBean** referred to the text **Injunctions and Specific Performance** which defined what is meant by irreparable harm. Robert Sharpe, the author, on page 2 states that irreparable harm “*has not been given a definition of universal application: its meaning takes shape in the context of each particular case.*” The author went on to identify irreparable harm as a consideration made on a case by case basis. He theorizes that the courts have held that irreparable harm includes loss of goodwill or irrevocable damage to reputation, loss of market share (though not necessarily irreparable if the loss is recoverable) and permanent loss of natural resources.

[41] I am guided by the words of Lord Diplock in **American Cyanamid:**

*“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.”* **[emphasis added]**

[42] I find some merit with the submissions of Learned Counsel for the Claimants, that the Defendants cannot be said to be prejudiced by halting construction and demolishing the buildings in circumstances where they have broken law. I found the case of **Kingston and Saint Andrew Corporation v Diana Cooke, Deborah Ezzo, Colin Cooke and C.C.L. Limited** (*supra*) to be useful. In that case, the defendants made changes to the property which caused the area to no longer be a cul-de-sac but a public thoroughway. These changes required the approval of the claimant which was neither sought nor granted. The claimant applied for an injunction and Brooks J in considering whether damages is an adequate remedy found that the public’s interest is to be protected and damages would not be an adequate remedy for the breaches and a permanent injunction was granted.

[43] I have taken into account the strength of the parties’ case and their respective prospect of success. I remind myself that I am not to resolve any conflicts or decide difficult points of law, at this stage. With that being said, the balance of convenience in my view, lies in favour of the Claimants. The Defendants’ blatant violation of the restrictive covenants shows that they have no regard for the laws that are in place. While I accept that it is regretted that the application to modify or discharge the covenants was not made before construction started, I cannot turn a blind eye to the breach. I agree with the submission of Learned Counsel for the Claimants that even the very approvals that the Defendants seek to rely on from the relevant municipal corporation refers to an obligation to apply for modification or discharge of any restrictive covenants where the approval is not in conformity with the

covenants endorsed on the title. The Court does not and cannot endorse unlawful conduct that seeks to undermine the rights of a party, even where a defendant incurred expenses. I understand the Defendants' position that they could suffer reputational damage, but this should have been something that was considered before they commenced construction in breach of the restrictive covenants endorsed on the titles.

[44] I considered the time that has passed between when construction started and when the case at bar was filed before the Court. However, I do not agree with the submissions of Learned Counsel for the Defendant that there was acquiescence on the 1st and 2nd Claimants' part having been aware of the construction and the delay in filing the case at bar. Respectfully, I also do not agree that the granting of the injunction would effectively bring an end to the substance of the matter. In the case of **Cayne & Another vs Global Natural Resources** (1984) 1 AER 225 it was held that where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing an injustice to either party. The substance of the matter concerns the breach of the restrictive covenants and until that is dealt with then, granting an injunction would simply prevent the Defendants from doing something that they have not done before as this is not a case where they would be interrupted in the conduct of an established enterprise, having only started construction in or about June 2024. For these reasons, I have concluded that the balance of convenience is distinctly in favour of granting the interim injunction. In my view, that is the course that would cause the least prejudice.

[45] In light of that, then it is my judgment that even though damages could be available, it is not an adequate remedy for the Claimants. The Claimants stand to suffer greater prejudice if the injunction is not granted. I believe that this case is one instance in which injunctive relief is necessary to prevent any further disturbance of the status quo until the matter is determined. I do not think it just for the Claimants to be confined to a remedy in damages.

B. *Whether the proceedings in this claim ought to be stayed pending the outcome of Claim No. SU2025CV01515*

[46] Section 4 of the **Restrictive Covenants (Discharge and Modification) Act** states that:

Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken may in such proceedings apply to the court for an order giving leave to apply to a Judge in Chambers under section 3, and staying the proceedings in the meantime.

[47] The breach of the restrictive covenants on the Certificates of Title by the Defendants and the breach of the **Restrictive Covenants (Discharge and Modification) Act** requires that an injunction be granted to prevent their continuation. The parties in this matter, namely the 2nd Claimant and the 2nd Defendant, have a contentious legal history, one which is still ongoing. The matter of the modification or discharge of the restrictive covenants is currently before the Court and the first hearing has been set for July 1, 2025. The decision in that matter does impact the case at bar.

[48] The case at bar and Claim No. SU2025CV01515 both arise from similar circumstances. It could be argued that the outcome of this matter is contingent on the outcome of Claim No. SU2025CV01515. There is also the possibility of inconsistent or irreconcilable judgments if both matters are allowed to proceed separately. In the light of that, it is my judgment that the case at bar ought to be stayed pending the hearing and determination of Claim No. SU2025CV01515.

COSTS

[49] The general rule relating to costs is contained in Part 64 of the **CPR**. Rule 64.6(1) states: *“If the Court decides to make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party”*. Pursuant to section 47 of the **Judicature (Supreme Court) Act**, *“In the absence of express provisions to the contrary, the costs of and incident to*

every proceeding in the Supreme Court shall be in the discretion of the Court,” and it is well recognized that the exercise of this discretion should be pursued in a judicial manner. Rule 64.6 (2) of the **CPR** goes on to say that the Court may order a successful party to pay all or part of the costs of an unsuccessful party. However, in doing so the court must have regard to all the circumstances which include:

- (a) the conduct of the parties both before and during the proceedings;*
- (b) whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;*
- (c) any payment into court or offer to settle made by a party which is drawn to the court’s attention (whether or not made in accordance with Parts 35 or 36;*
- (d) whether it was reasonable for a party:*
 - i. to pursue a particular allegation and/or*
 - ii. raise a particular issue*
- (e) the manner in which a party has pursued:*
 - i. that party’s case;*
 - ii. a particular allegation or*
 - iii. a particular issue*

[50] I will deal with each application separately. Firstly, in regard to the Claimants’ Urgent Notice of Application for Interim Injunction filed on the 10th day of March, 2025, they were not successful in their entire claim. I took into account whether it was reasonable for the Claimants to pursue and raise the issues they did. In my opinion, it was. I also took into account the manner in which the parties pursued the case. Even though I mentioned the contentious legal history between the parties, I did not take that into account when considering the issue of costs. However, what I took into account was the fact that had the Defendants done what they were supposed to do, that is, to get an Order from the Court to modify or discharge the restrictive covenants before commencing construction, then there would be no basis for the claim and by extension the application. I am also mindful

of the fact that there was no evidence of any unreasonable conduct of the Defendants throughout the proceedings before the Court. Since the Claimants were only successful on half of the Orders they were seeking, it is my judgment that costs ought to be apportioned between the parties.

- [51] In respect of the Defendants' Notice of Application for Court Orders filed on the 16th day of April, 2025, the application was not served and no submissions were advanced by the Claimants on this application. In fact, the application was brought to my attention on the day the matter came before me for hearing. Even though the Defendants were successful with this application, I do not think that it warrants an Order for costs.

CONCLUSION

- [52] Even though the principles established in American Cyanamid are a guide in determining whether to grant an interim injunction, these principles should not be regarded as a rigid checklist. (see Agatha Pettigrew v Colleen Theresa Danvers Channer [2010] JMSC Civil 16). Even though damages may be considered to be an adequate remedy, the actions by the Defendants, that is, carrying out construction in blatant violation of the restrictive covenants ought to be restrained.
- [53] I am of the view that Orders 3, 4, 6 and 7 of the Claimants' Urgent Notice of Application for Interim Injunction filed on the 10th day of March, 2025 ought to be refused. I do not think it is appropriate at this interlocutory stage to compel the Defendants to demolish all structures erected in breach especially given the fact that the Defendants have applied to modify or discharge the restrictive covenants. I am also of the view that, at this stage it is not appropriate to compel the Defendants to return the playground to where it previously was as this is an issue that ought to be resolved by a tribunal. In respect of Order number 6, that is an issue that is best dealt with in the determination of the restrictive covenant matter, which is currently before the Court. Lastly, based on the nature of this claim, I also do not find it appropriate to make an Order preventing the Defendants from

registering any dealings or transferring any interest for Lots 2-7 as there are no issues concerning ownership of the said Lots.

ORDERS & DISPOSITION

[54] Having regard to the forgoing these are my Orders:

- (1) The Claimants' Urgent Notice of Application for Interim Injunction filed on the 10th day of March, 2025 is partially granted.
- (2) The Defendants, New Era Properties Limited and Mr. Benedetto Persichilli, and/or its nominee/s, and/or its agent/s, and/or its servant/s are restrained from building on Lot 8, part of Lot 390 Drax Hall Estate in the parish of St. Ann until the claim is determined or further Orders of the Court.
- (3) The Defendants, New Era Properties Limited and Mr. Benedetto Persichilli, and/or its nominee/s, and/or its agent/s, and/or its servant/s are restrained from doing any acts which are in breach of the restrictive covenants associated with Lot 390 part of Drax Hall Estate in the parish of St. Ann until the claim is determined or further Orders of the Court.
- (4) Paragraphs 3, 4, 6 and 7 of the Claimants' Urgent Notice of Application for Interim Injunction filed on the 10th day of March, 2025 are refused.
- (5) Half costs of the Urgent Notice of Application for Interim Injunction filed on the 10th day of March, 2025 are awarded to the Claimants to be taxed if not agreed.
- (6) The Defendants' Notice of Application for Court Orders filed on the 16th day of April, 2025 is granted.
- (7) Claim No. SU2025CV00748 is stayed pending the hearing and determination of Claim No. SU2025CV01515.

(8) No award as to costs on the Defendants' Notice of Application for Court Orders filed on the 16th day of April, 2025.

(9) Claimants' Attorneys-at-Law to prepare, file and serve Orders made herein.