[2024] JMSC. Civ. 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2023 CV03593

BETWEEN MONIQUE IFEOMA ELIZABETH ANIKWUE CLAIMANT

AND DCR HARDWARE AND CONSTRUCTION LTD DEFENDANT

IN CHAMBERS

Tamiko Smith, instructed by Smith, Afflick, Robinson & Partners, for the Claimant.

Seyon Hanson, instructed by Beecher-Bravo Hanson for the Defendant.

Application for interlocutory injunction - Whether there is a serious issue to be tried – Whether damages are adequate – Whether the application is in the nature of a permanent injunction- Whether an injunction can be granted at the interlocutory stage where there is no claim for permanent injunction in the Claim- Whether it is necessary to make a distinction between mandatory and prohibitory injunction- (Rule 17 of the Supreme Court Civil Procedure Rules, 2006.)

Heard: the 9th and the 26th of January 2024

THOMAS, J.

INTRODUCTION

Factual Background

[1] The following facts have not been disputed:

(i) On or about November 16, 2021, the parties Monique Ifeoma Elizabeth Anikwue, (the Claimant) and DCR Hardware and Construction Limited (the

Defendant) entered into an agreement for the sale of a two-bedroom dwelling house situated at Lot 35 Ocho Rios, Country Club, St Ann and registered at Volume 1569 Folio 109 of the Register Book of Titles.

(ii) The Claimant has paid the full purchase price for the sale.

(iii) The agreement provided that the Defendant would be responsible for remedying at its own cost any structural defect as a result of material or workmanship relating to floors, foundations, plumbing, or electrical appearing within 180 days of the Claimant being in possession, where written notice is given to the Defendant within such period.

(iv) On or about January 21, 2022, the parties entered into an agreement for the construction of a Pergola at the rear of the said Lot 35.

(v) The Claimant paid the full cost of Fifteen Thousand Dollars ($15,000.00) USD for the Pergola.

(vi) Practical Completion took place on January 11, 2023, and the Claimant was given possession on April 17, 2023.

The Application

[2] The Claimant, alleges that having been put in possession of Lot 35, she engaged the services of Allied Real Estate for the purpose of inspection and the preparation of reports. She contends that the Defendant has failed to perform under the contract in that the constructions, to include the Pergola, are poorly done. They are incomplete, defective, and unfit for human habitation. She further states that the Pergola cannot be repaired as it is leaning, thereby, causing a construction hazard.

[3] She further avers that between April 29, 2023, and August 12, 2023, she wrote to the Defendant regarding multiple defects that she had identified. She further alleges that while the Defendant has addressed minor defects they have failed and or refused to make good the majority of the defects. Arising from the failure of the

Defendant to make good the defects she engaged the services of a company, namely, Hygienely, to treat with the Mold infestation, and the services of independent contractors to carry out remedial work.

[4] She says that Defendant has obstructed her efforts to remedy the defects, by denying her contractors access to the compound and has disconnected the common water supply from Lot 35. She states that she is under obligation to pay mortgage instalments for the property and as a result of the actions of the Defendant she is unable to mitigate her damages.

[5] The Claimant by Notice of Application for Interim Remedies filed November 15, 2023, seeks the following orders:

i. *An order requiring the Defendant to permit ingress and egress of the subdivision development known as Ocho Rios Country Club, to property situated at Lot 35 Ocho Rios, Country Club, St Ann Registered at Volume 1569 Folio 109 of Registration Book of Titles by the Claimant and her servants or agents hired by the Claimant and authorized to enter Lot 35.*

ii. *An order permitting the Claimant to install an AC unit and carry out remedial work with respect to defects appearing in the said Lot 35 Ocho Rios Country Club, St Ann Registered at Volume 1569 Folio 109 of Registration Book of Titles, which appeared during the Default Liability Period, as referred to in the Agreement for Sale of Property between the parties, dated November 16, 2021.*

iii. *An order that the Defendant cease and desist any interference with the Claimant and her servants or agents accessing the Common water supply to Lot 35 Ocho Rios Country Club and to restore the same within 24 hours.*

iv. *An order that the Defendant cease and desist any interference to the Claimant and her agent from completing any and all services related to mold infestation, including the replacement of the defectively installed exterior backdoor within Lot 35 Ocho Rios Country Club.*

v. *An order that the Defendant cease and desist any interference to the Claimant and her servant or agent from tearing down the Pergola at Lot 35 Ocho Rios Country Club.*

vi. *An injunction restraining the Defendant and its servants or agents from taking any further action against the Claimant's access and the access of her servants and or agents to the property and water supply in any way whatsoever without order from court.*

The Defendants Response

[6] In response, the Defendant company relies primarily on the Affidavit evidence of the Assistant Manager of the company, Nicolette Kameka ,which was filed on the 27th of December 2023. Ms Kameka admits that a written Notice of Defects was given to the Defendant within the Defects Liability Period (Clause 4 in the Sales Agreement is referred to as the "Defect Liability Clause"). She avers that the Defendant agreed to make good the defects at its own cost but contends that the Claimant has omitted the role of the Quantity Surveyor in confirming and certifying the defects.

[7] Despite not denying that the company has an obligation under the Defects Liability Clause of the Sales Agreement to correct the defects at its own cost, the Defendant contends that there are conditions precedent, and particular sequence that the parties must adhere to. That, subsequent to the written notice being provided by the purchaser, the defects should be first confirmed by the Quantity Surveyor. Then within reasonable time, after the receipt of the written notice, make good the defects at their at own cost, unless the Quantity Surveyor directs otherwise. After they have corrected the defect and obtained from the Quantity Surveyor a certificate of final completion of structural defects, certifying that the structural defects complained of have been made good, their liability to the Complainant will cease. It is the Defendant's contention that none of the alleged defects have been confirmed by the Quantity Surveyor. The Defendant also takes the position that some of the complaints cannot be classified as defects but as breach of contract.

These are highlighted as; the failure to install the water tank, water heater, and closet shelving.

[8] The Defendant's main challenge to this application is that the Claimant's attempt to introduce workmen on the property should not be allowed as this would be in breach of Special Condition 4 of the Sales Agreement. The Company disputes the Claim on the basis that, it was making efforts to do corrective works to the defects as identified by Claimant, but neither of them had referred the matter to a Quantity Surveyor. The Defendant maintains that the Claim is premature in that the Claimant has denied access to the Defendant's workmen since June 15, 2023. The Defendant further argues that the Agreement for Sale does not allow the purchaser, to bypass the appointment of the Quantity Surveyor, to engage independent contractors, as such engagement would be a cost to her and irrecoverable from the Vendor, who is under a duty to remedy the defect as provided for in Special Condition 4 of the Agreement.

[9] In response to the Claimant's assertions concerning the common water supply, the Defendant company does not deny disconnecting the supply. The Defendant however says that, when the Claimant was given letters of possession, she was also given a letter to the National Water Commission (NWC). She was expected to make arrangements for services to be connected to her unit by way of a metered connection as she was using water from the main meter for doing landscaping. The Defendant company also mentions that purchasers are generally given fourteen (14) days to formalize connection with the National Water Commission (NWC).

[10] Regarding the Pergola the Defendant is maintaining that:

> "*It is constructed in accordance with the agreement. The Claimant was supposed to provide covering of her choice to allow for compliance to her exact specification, which she failed to do. Notwithstanding, the said Pergola was completed. The defects as alleged by the Claimant are denied, The Agreement for Sale does not allow the Claimant to bypass the appointment of the Quantity Surveyor. The Defendant wishes to assess the state of the Pergola for recommendation of the Quantity Surveyor prior to*

any decision being made. The claimant is denying access to allow for same."

The Agreement of Sale

[11] The clause surrounding the controversy is clause 4 of the Agreement for Sale. It reads:

> ***"Notwithstanding anything to the contrary herein contained the Vendor shall be relieved from any liability of any nature whatsoever, whether arising under the agreement or by common law or statute in respect of the Dwelling House unless structural defects due to the materials or workmanship not in accordance with the Plan and Specification thereof in floors or foundation, plumbing or electrical shall appear or arise within One Hundred and Eighty (180) days of the purchaser being granted possession of the Dwelling House (herein called "the Defects Liability Period") and written notice thereof shall have been given by the Purchaser to the Vendor within such period and such defects confirmed by the Quantity Surveyor. The Vendor shall within reasonable time after the receipt of the written notice in that regard make good such defects at its own cost (unless the Quantity Surveyor otherwise direct in writing) Upon making good such defects confirmed by the Quantity Surveyor the Vendor shall obtain from the Quantity Surveyor a Certificate of Final Completion of Structural Defects certifying that the Structural Defects complained of have been made good and such certificate shall be final and binding on the parties hereto and all liability of the Vendor hereunder whether expressed or implied, shall thenceforth cease and determine. The said certificate shall be conclusive evidence in any proceedings arising out of this Agreement that construction of the said unit has been properly carried out and completed in accordance with the provisions of this agreement"***

The Issues and the Relevant Law

[12] The issues that are to be determined in this Application are:

i. Whether there is a serious to be tried.

ii. Whether damages would be an adequate remedy for any harm likely to be suffered by the Claimant from a refusal to grant the injunction.

iii. If damages would not be an adequate remedy, whether the Claimant is able to give and satisfy an undertaking for damages for any harm suffered by the

Defendant if at the trial it is determined that the injunction was wrongly granted.

iv. If it is uncertain whether damages would be an adequate remedy to satisfy any harm to either party by the grant or refusal of the injunction, where does the balance of convenience lies. That is, which party is likely to suffer the more irremediable prejudice by the grant or refusal of the injunction.

[13] Counsel for the Claimant, Ms. Smith, asserts that the Claimant has satisfied all the necessary requirements for the grant of an injunction. In support of this position, she relies on the following authorities:

American Cyanamid Co. v Ethicon Ltd [1975] A.C 396; ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** [2009] UKPC 16; ***Zockoll Group Ltd v Mercury Communications Ltd*** [1998] FSR 354; ***Films Rover International Ltd. And Others V. Cannon Film Sales Ltd****.* [1987] 1 WLR 670*;* ***Cable and Wireless Jamaica Ltd v Digicel (Jamaica) Ltd*** 2009 HCV05568.

[14] Counsel for the Defendant, Mr. Hanson is contending that the Claimant has not satisfied the requirements for the grant of an injunction. He relies on the following authorities:

American Cyanamid v Ethicon Ltd **[**1975**]** A.C 396*;* ***National Commercial Bank Jamaica Ltd v Olint Corp Ltd*** [2009] UKPC; ***Heather Montague v GM and associates Ltd et al****;* ***Shepherd Homes Ltd v Sandham*** ([1971] Ch 340; ***Morris V Redland Bricks Ltd*** [1970]AC 652; ***TPL Limited V Thermo Plastic Jamaica LTD*** [2014] JMCA Civ. 56.

[15] I have carefully reviewed the cases relied on by both counsel, and their applicability to the issues which lie to be determined. In light of this review, I notice that in any case regarding the grant or refusal of an injunction the issues to be considered by the court are the same as the aforementioned. In deciding on these issues, the court should be mindful that the grant of an injunction is a discretionary remedy which should be exercised judicially and not arbitrarily. The leading authorities on

these issues are ***American Cyanamid Co v Ethicon Ltd (Supra)*** *and* ***National Commercial Bank Jamaica Ltd v Olint Corporation Ltd (Supra)****.*

Whether there is a serious issue to be tried.

Submissions

[16] Whereas Ms. Smith submits that there is a serious issue to be tried, Mr. Hanson submits that the Claimant has not demonstrated that there is a serious issue to be tried. He further submits that Special Condition 4 of the Agreement for Sale is binding on the Claimant and as such the relief being sought is premature. He insists that Defendant has not refused to remedy the defects and that the Defendant stands willing and able to do so. He takes the position that, in the circumstances, there would be no need for the attendance of the independent contractors on the property whose repair work would run afoul of Special condition 4. He suggests that the Claimant is seeking the court's approval to breach the contract, in that her application is for a permanent injunction. He also suggests that the fact that there is no mention of any remedy for a permanent injunction in the Claim, the application should be refused. As such, he submits, that there is no serious issue to be tried.

Analysis

[17] In the case of, ***American Cyanamid v Ethicon***, the court stated that:

> *"the court no doubt must be satisfied that the Claim is not frivolous nor vexatious in other words there is a serious question to be tried." (see page 407).*

[18] In the instant case there is no denial that there is a contract for sale of the dwelling house and pergola at Lot 35. There is no denial that the Claimant paid the full purchase price. It has also not been challenged that she was put in possession on

April 17, 2023. It has also been affirmed that the Claimant complained in writing about the structural defects within 180 days upon being granted possession.

[19] The settled law of contract is that, where one party is in breach, as an alternative to the remedy for specific performance, the innocent party has the option to treat the contract as an end and sue the offending party for damages. That is, the innocent party has no duty to wait indefinitely for the offending party to correct the breach (See **White and Carter (Council Ltd . V McGregor**, [1962] A .C. 413 please page 416; **Suisse Alantiquq Societe D'armement Martime S.A. v N.V. Rotterd am Sche Kolen Centrale** [1967] 1 A.C. 361 please see page 363*)*

[20] Bearing in mind these options that are available to parties to a contract, it is apparent from the conduct of the Claimant, whether rightly or wrongly so, that she has already treated the contract as at an end, arising from the alleged failure of the Defendant to remedy the defects. Consequently, the court cannot accede to the posture of the Defendant, that is to refuse the injunction and allow the Defendant at this stage to remedy the defects. This, in my view, would be tantamount to compelling the Claimant to accept the Defendant's unwanted services.

[21] In any event I hold a contrary view to that put forward by Mr. Hanson regarding whether or not the injunction should be refused on the basis that there is no claim for such remedy in the Claim. The law, as I understand it is this: The fact that the Claimant has not sought an injunctive relief in her substantive Claim does not bar her from seeking that relief where it becomes necessary at the interlocutory stage. **Rule 17 of the Supreme Court of Jamaica Civil Procedure Rules, 2002** empowers the Court to grant interim remedies of which injunctions are included. **Rule 17.1(1)** states:

> *The court may grant interim remedies including –*
>
> *"(a) an interim injunction;*
> *(b) an interim declaration;*
> *(c) an order*

(i) for the detention, custody or preservation of relevant property;
(ii) for the inspection of relevant property;
(iii) for the taking of a sample of relevant property;
(iv) for the carrying out of an experiment on or with relevant property;
(v) for the sale of relevant property (including land) which is of a perishable nature or which for any other good reason it is desirable to sell quickly;"

[22] Moreover, an accurate reading of ***Rule 17(4) of the Civil Procedure Rules*** indicates that the power of the Court to grant an interim injunction is not limited to circumstances where the Claimant seeks an injunction as one of the final remedies. It reads;

"(4) *The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind*."

[23] Nevertheless, I form the view that the injunctive remedies that are being sought would not result in the resolution of all the issues arising in the substantive claim. Essentially, they do not translate into a claim for a permanent injunction. As it relates to paragraphs i, ii, iv and v, the Claimant is seeking, access by her agents, to correct the alleged defects to her property and to install an Air Conditioning Unit. In my view, in spite of the Claimant embarking on her own remedial work, there still remains triable issues for the court to determine.

[24] These are:

a) The correct interpretation of Clause 4 of the Agreement for Sale.

b) Whether the responsibility to engage the Quantity Surveyor rest solely on the Defendant or whether this is an option open to either party.

c) What is a reasonable time within the meaning of the contract?

d) Whether the Defendant was given reasonable time by the Claimant to remedy the Defect.

e) Whether the Defendant has failed to act within a reasonable time.

f) Ultimately, whether the Claimant was correct in treating the Contract as at an end and suing for Damages, or whether in doing so she is the party in breach.

[25] Accordingly, the orders that the Claimant is seeking as indicated in the aforementioned paragraphs, are not orders to engender a complete resolution of the issues at this stage, but are orders to restrain the Defendant from interfering with her right of access and enjoyment of her property.

[26] Admittedly, as it relates to the injunctive remedies being sought in paragraphs (iii) and (vi), there appears to be no serious issue to be tried. The remedy for the injunction as framed by the Claimant requires the Defendant to continue to supply water, the cost for which they are responsible to the National Water Commission (NWC), to her premises against the Defendant's will. The Defendant is resisting this, on the basis that along with her Letter of Possession, the Claimant was given a letter to the National Water Commission. She was expected to make arrangements for the water supply to be connected to her unit by way of a metered connection. Included in the Defendant's protestations is an indication that the Claimant was making excessive use of that water for landscaping. The Defendant also indicated that generally purchasers are given 14 (fourteen) days to formalize connection with the National Water Commission (NWC).

[27] I observe that paragraph 12 of the Sales Agreement indicates that the Vendor shall be responsible for payment of taxes, water rates, and sewage rates only up to the date of possession. Thereafter the responsibility passes to the purchaser "*for separate assessment with respect to these outgoings. Until separate assessments are made the Purchaser shall be liable for such outgoings assessed against the development as a whole, utilizing the ratio of the Lot as against the Total Lots comprises in the entire* …"

[28] The Application and Pleadings are bereft of any indication as to why the Defendant is obliged, whether contractually or otherwise, to continue to supply water to Lot 35 subsequent to the Claimant being put in possession. There is nothing from her to indicate why it was not her responsibility, having been put in possession to make her own arrangements with National Water Commission (NWC). Consequently, I find that she has put nothing before the court that can be considered as a triable issue regarding this remedy. Therefore, as regards to paragraph iii and vi of the Application, I find that the Claimant has failed to establish that there is a serious issue to be tried. Therefore, this aspect of the application is denied.

Whether Damages are Adequate

[29] In the event that it is established that there is a serious issue to be tried, the court is required to go on to consider the adequacy of Damage. This governing principle was explained by their Lordships in the case of **American Cyanamid Co v Ethicon Ltd.** In summary, if damages will be an adequate remedy for the Claimant, the court should not interfere with the Defendant's freedom. That is, an injunction should not be granted. On the other hand, if there is a likelihood of the Claimant being 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. (See page 47. See also the case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**).

Submissions

[30] Mr. Hanson submits that since the Claim is for general, special, and aggravated damages, the remedies sought are based on damages, so the grant of an injunction would run counter to the principle that an injunction would not be granted if damages is an adequate remedy.

[31] Ms. Smith submits that in the instant case, the court should not only be concerned with the compensation for the unremedied defects, but the loss of enjoyment of the property, which is continuing and which is not measurable at this stage. She further submits that the Defendant having not completed the correction of the defects within the time allowed in the Defects Liability Clause, there is no lawful or justifiable reason to prevent the Claimant from carrying out remedial work.

Analysis

[32] As I have already outlined, there is no dispute, as it relates to Lot 35, that the Claimant at this stage is not the purchaser in possession under the contract for sale but now the proprietor of the said property. Therefore, my approach to determining whether damages is an adequate remedy to satisfy any loss from a refusal to grant the injunction were the Claimant to be successful at the trial must be accessed with this in mind. As such the pronouncements of Mangatal J as she then was in the case of ***Cable and Wireless Jamaica Ltd v Digicel***, 2009 HCV05568 become quite relevant. At page 28, she expressed the view that, the issue is not simply whether the loss can be compensated by damages but "*whether it can be adequately compensated*".

[33] In the instant case, this application for injunction, no doubt arises out of allegations of breach of contract regarding the alleged failure of the Defendant to correct alleged defects relating to Lot 35. However, with the exception of paragraphs iii and vi, the remedies sought, and as framed in the Application for Interim Remedies, are more concerned at this stage with the Claimant's right to access and enjoyment of her property. This is a property in which the Defendant is not seeking to establish a claim of right whether legal or equitable.

[34] Therefore, in my view, denying the agents of the Claimant, access to the property is tantamount to interference with her rights to access and enjoyment of her own property. It has been revealed in the Pleadings, that the Claimant is under the obligation of to make repayments on a mortgage loan which she received for the

purchase of Lot 35 Additionally, it has been stated that it is her intention to rent the property for residential purposes. Accordingly, I am of the view that, while actual loss of rent is easily quantifiable and therefore can be adequately assessed and compensated in damages, the loss of potential tenants cannot be adequately assessed and compensated.

[35] Moreover, were the Claimant to lose the property due to her inability to fund the mortgage arising from her inability to rent, her loss in terms of the monies expended may be quantifiable in damages. However, her ability to retain this same property of her choice in the area of her choice, that is, her attachment to this property would not be easily quantifiable in damages. Consequently, I find that if the injunctive orders as requested in paragraphs i, ii, iv, and v are not granted the potential loss to the Claimant cannot be adequately compensated in Damages.

The Adequacy of the Claimant's Undertaking for Damages

[36] Mr. Hanson submits that the Claimant has not provided sufficient undertaking for Damages in that she has provided no title for the property. Neither has she shown that she has a mortgage endorsed on the title.

[37] Counsel for the Claimant submits that given the fact that the Claimant is an Attorney-at-law and the registered proprietor of Lot 35, she has sufficiently established her ability to honour the usual undertaking she has given for damages.

Analysis

[38] I find little or no merit in the points raised by Mr. Hanson. The Defendant has admitted to selling the property at Lot 35 to the Claimant. The Defendant has not denied that she still retains possession of the said property. So, their challenge as to whether or not she can satisfy the undertaking for damages, based on a lack of proof of ownership of the property is incomprehensible.

[39] I will now go on to consider, whether if the Defendant were to succeed at the trial in establishing the right to do that which is sought to be enjoined, the Defendant would be adequately compensated under the Claimant's undertaking for damages, for the loss he would have sustained, by being prevented from doing so, between the time of the application and the time of the trial. The authorities have declared that "*If the measure of damages recoverable under such an undertaking would be an adequate remedy and the Claimant would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction*". (**See *American Cyanamid v Ethicon*; *National Commercial Bank Jamaica Ltd v Olint Co Ltd*; *Cable and Wireless v Digicel (Jamaica) Ltd***; ***TPL Limited V Thermo Plastic Jamaica Ltd***.)

[40] Ms. Kameka in her affidavit filed on December 27, 2023, on behalf of the Defendant, states that the Defendant needs access to effect the repairs as the Claimant has denied them access. She maintains that the Defendant is willing and able to remedy the defects once the Quantity Surveyor certifies what should be rectified. The Defendant is insisting that the Claimant's workmen should not be allowed to repair the defect as they are now seeking to remedy the defects at their own cost. The Defendant, however, has not pointed to any serious damage it would suffer between the grant of the injunction and the conclusion of the trial if the Claimant were to be allowed to remedy the defects.

[41] Nonetheless, I find that the only identifiable effect to the Defendant in permitting the Claimant's workmen to access her property to correct the defects is this: If the Defendant were to succeed at the trial, the company would be permitted to pay only the value of remedying the defect as at the date of the alleged interruption by the Claimant. In essence, I perceive that there would be no additional cost to the Defendant except the cost of defending the claim. Clearly this cost would be less than the value of the property itself. On this basis, I am satisfied that if the Defendant were to succeed on the issue regarding the defects the Claimant would be able to satisfy any award for damages.

[42] However, I take note of the fact that a Quantity Surveyor has not yet assessed the extent of the defects. If the Claimant were allowed to remedy the defects prior to this being done, regardless of which party were successful at the trial, I form the view that this would affect the issue of the quantum of damages. That is, were the Claimant to succeed, the Defendant would not be able to successfully challenge the quantum of damages claimed by the Claimant, if the repairs were effected before the Quantity Surveyor assessed the extent of defects, so as to determine the cost for remedying such defects.

[43] Likewise, if the Defendant were to succeed at the trial, the extent of the defect and cost of remedying those effects as at the date of the alleged interruption by the Claimant would still be relevant. However, this observation does not prevent the injunction from being granted with the stipulation that the repairs on behalf of the Claimant should not commence until the Defendant, within a limited time, engages a Quantity Surveyor to assess the extent of the defects. This is in a bid to do justice between the parties.

[44] As it relates to the Claimant's request for an order permitting the installation of the air condition unit, I note the Defendant's response. That "the houses are constructed to allow the trunking to run through the pre-constructed section and the Claimant's workmen attempted to leave the trunking exposed, so they prevented them from doing so'. In this regard there is no indication that the Defendant is likely to suffer any damage from an injunction restraining them from preventing the Claimant from installing the air condition unit to her own property, that is Lot 35. Where it is found that the unit is improperly installed, that is with the trunking exposed, the only negative effect I envision is that it would affect the aesthetic of the building, that is Lot 35.

[45] There is no demonstration on the affidavit evidence that this will affect the aesthetic of the community as a whole, or any other house or section of the community. That is, there is nothing contained in the objections of the Defendant, as to which section of the building the exposed trunking was being installed. That is, whether to the

back, front or side of the premises, so as to be visible from any other vantage point than from the premises at Lot 35 itself.

[46] However, even if the Defendant were to succeed at the trial and it is found that the Air Condition Unit was improperly installed, in breach of some Home Owners Regulation, it is the Claimant that would suffer the most damage from and order to correct the defect in installation. As such, I find that the Claimant's undertaking for Damages as regards to this request is adequate.

[47] This is sufficient to dispose of the matter concerning the remedies sought in paragraphs i, ii, iv and v of the Application. This is on the basis that, it is only where there is doubt as to the adequacy of damages to satisfy the respective remedies, available to either party or to both, that the question of the balance of convenience arises. However, for completeness, I will address the issue of the balance of convenience.

The Balance of Convenience

[48] The principle of Law governing this issue is that, if it cannot be conclusively determined by the court that an undertaking, or cross-undertaking for damages will be adequate for any loss suffered by the successful party at the trial, the court should go on to determine which party is more likely to suffer irremediable prejudice, from the grant or withholding of the injunction. The court should adopt a course that would cause the least prejudice. In considering the balance of convenience, I again take note of the submissions of Mr. Hanson that the injunction should be denied on the basis that the Claimant has not sought a permanent injunction in her substantive Claim.

[49] However, the Court in the case of ***American Cyanamid v Ethicon*** discarded the notion, that there was the existence of this "*supposed rule that the court is not entitled to take account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence that is before the court*

at the hearing of the application the (Claimant) would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought" (Page 407).

[50] Mr. Hanson also sought to highlight the distinction between prohibitory and mandatory injunctions. He is of the view that this Application is in the nature of a mandatory injunction. He asserts that the test that should be applied is not in every respect the same as that to be applied when considering a prohibitive injunction. He submits that the appropriate test is this; the court should have a high degree of assurance that the Claimant would succeed at the trial before it can conclude that the balance of convenience lies in her favour. In support of this position, he relies on the case of ***Shepherd Homes Ltd v Sandham and Morris V Redland Bricks Ltd*** **(Supra)**.

[51] Nonetheless, having reviewed the authorities relied on by counsel, and in light of the decisions in the more recent authorities, my appreciation of the principles is this: the approach of the court should not be as narrow as that posited by Counsel, Mr. Hanson. The earlier cases did seek to highlight the distinction between mandatory and prohibitive injunctions. Megarry. J in the case of ***Shepherd Homes Ltd v Sandham and Morris V Redland Bricks Ltd*** **(Supra)** did say that a high degree of assurance of the Claimant's success at a trial was a guide for determining the balance of convenience regarding mandatory injunctions.

[52] Nevertheless, in the case of **National Commercial Bank Jamaica Ltd v Olint Corp Ltd**. Lord Hoffman provided some clarity on the application of this principle of "high degree of assurance". In that case the court pointed out that whether the injunction was prohibitory or mandatory, the underlying principle was that the court should take whichever course seemed likely to cause the least irremediable prejudice. The practical consequences should be examined on the particular material before the court. At paragraphs 18 to 21 of his judgment Lord Hoffman said;

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

There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in ***R v Secretary of State for Transport, ex parte Factortame Ltd*** *(No 2) [1991] 1 AC 603, 682-683.*
What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see ***Films Rover International Ltd v Cannon Film Sales Ltd*** *[1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in* ***Shepherd Homes Ltd v Sandham*** *[1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.*

For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren. What matters is what the practical consequences of the actual injunction are likely to be".

[53] These pronouncements of Lord Hoffman provide a clear indication that the requirement for the high degree of assurance of the Claimant's success at the trial is more concerned with the effect of granting the injunction rather than the nature of the injunction. That is, where it is gleaned, that the effect of granting the injunction would cause irremediable prejudice to the Defendant, it is in those circumstances that the Court should be satisfied with a high degree of assurance

that it will turn out at the trial that the injunction was rightly granted. Megarry J's reference to mandatory injunctions in this context was due to the fact that, by their very nature, most mandatory injunctions are likely to cause irremediable prejudice as in most cases, the effect is to cause the Defendant to perform an act that is irreversible.

[54] Mangal J in the case of **Cable and Wireless v Digicel (Jamaica) Ltd**, in expressing her appreciation of this principle stated that:

> "*After recognizing that the application is for a mandatory interlocutory injunction and examining on the particular facts, the consequences of granting or withholding the injunction, the court takes the view that granting the injunction is not likely to cause irremediable prejudice or greater prejudice to the Defendant than the Claimant, or withholding the injunction is likely to carry a greater risk of withholding it than granting it, even though the court does not feel a high degree of assurance about the Claimant's chances of establishing his rights, the court subject to the other aspects of the discretion, if satisfied that there is a serious issue to be tried may grant the mandatory interlocutory injunction. In other words, not feeling that high degree of assurance would not be a ground for refusing to grant the injunction". (See page 25 and 26)*

[55] In the judgment of the Court in the case of **Nottingham Building Society v Eurodynamics Systems** [1993] FSR 468 at p. 474: Chadwick J stated;

> "*In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong' in the sense described by Hoffmann J. Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the*

> *greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted*."

[56] In any event, in my view, the effect of the orders being sought in paragraphs i, ii, iv and v, of the Application is not in the nature of a mandatory injunction. In essence, they are orders to prohibit the Defendant from interfering with the Claimant's access to her premises by her agent.

[57] Mr Hanson also submits that the court should find that the parties are bound by Clause 4 of the Sales Agreement and such the balance of convenience lies in denying the injunction, thereby allowing the Defendant to correct the defects.

[58] Nonetheless, I find that if I were to make such a determination, as to the effect of Clause 4 on the actions of either party, I would essentially be usurping the role of the trial judge by making a final determination of the issues. It is not for me at this stage to say whether the alleged actions of the Claimant breached Clause 4. Either party is alleging that the other is in breach. It is for the trial court to make such a determination.

[59] In the case of **American Cyanamid v Ethicon** Lord Diplox gave the following caution;

> "*It is no part of the court's function at this stage of the litigation to try to resolve the conflict of evidence on affidavit as to the facts on which the claim of either party may ultimately depend or to decide difficult questions of law which call for detailed arguments and mature considerations. These are matters to be dealt with at the trial*' (see Page 407)

[60] Further at page 410, he said:

> "*In view of the fact that there are serious questions to be tried upon which the available evidence is incomplete, conflicting, and untested, to express an opinion now as to the prospects of success of either party would only be embarrassing to the judge who will have eventually to try the case. The likelihood of such embarrassment provides an additional reason for not adopting the course that both Graham J. and the Court of Appeal thought they were bound to follow, of dealing with the existing evidence in detail and giving reasoned assessments of their views as to the relative strengths of each party's cases".*

[61] He continued;

> "*The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case*".

[62] In the instant case, I find that If the restriction of access and enjoyment is prolonged damages would not be adequate to compensate the Claimant for loss of the enjoyment, in the event that she is successful at the trial for breach of contract. I find that there is nothing arising on the material before me that indicates that an injunction restraining the Defendant from denying the agents of the Claimant access to her house and Pergola will cause any irremediable prejudice to the Defendant, even if it turns out that Defendant is successful at the trial. This is in light of the fact that the Defendant is not claiming any proprietary or even equitable interest in the property at Lot 35.

[63] Granting the Claimant such an injunction would only preclude the Defendant from effecting the repairs at their cost. As previously indicated, this can be easily remedied at the end of the trial. That is by the Defendant being required to compensate the Claimant for the cost of remedying the defect, at a cost which would not be over and above the cost at the date when the Defendant was

prevented from effecting the repairs. A cost which the Defendant has already said the company ready and willing to meet.

[64] Conversely, I find that if the injunction is not granted allowing the Claimant's agents access to her premises, if she were to be successful at the trial, she is more likely to suffer irremediable prejudice. That is, the loss of use and enjoyment of her premises; the loss of potential tenants, and possible loss of the premises, where the loss of potential tenants result in a failure to meet her mortgage commitments.

Conclusion

[65] Despite the fact that the claim is for damages for breach of contract regarding defects in the construction of the dwelling house and Pergola, the interim remedies being sought by the Claimant in paragraphs i, ii, iv, and v of this Application concern the Claimant's right of access to her premises through her agents and her freedom to improve on its condition in a manner that is satisfactory to her.

[66] If the restriction by the Defendant of the Claimant's access and enjoyment of her property is allowed to continue, damages would not be adequate to compensate the Claimant for the loss of the enjoyment of her property, in the event that she were to be successful at the trial. The granting of the injunction, restraining the Defendant from denying the agents of the Claimant access to her house and Pergola will not cause any irremediable prejudice to the Defendant, even if it turns out that the Defendant is successful at the trial. That is, even if the trial judge determines that the Defendant was not the party in breach. In this regard, the balance of convenience lies in favour of the Claimant.

[67] In any event the cross undertaking in damages provided by the Claimant is adequate in the event that the Defendant is successful at the trial.

[68] Accordingly, I make the following orders:

ORDERS

i. Injunction granted in terms of paragraphs i, ii, iv and v of the Notice of Application filed on November 15, 2023. This injunction is granted under the condition that before commencing repairs to the defect the Claimant allows the Quantity Surveyor appointed by the Defendant to assess the extent of the defects within 7 days of the date hereof.

ii. Orders sought under paragraphs iii and vi are denied.

iii. Cost to the Claimant to be agreed or taxed.

iv. Leave to Appeal granted

v. Orders to be prepared filed and served by the Claimant's attorney-at – law.

……

Andrea Thomas
Puisne Judge