



[2023] JMSC Civ.139

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION**

**CLAIM NO. SU2023CV01594**

<b>BETWEEN</b>	<b>CAPITAL HOLDINGS LIMITED</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>A N D</b>	<b>GEORGE PLUMMER</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>A N D</b>	<b>SHARON PLUMMER</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>A N D</b>	<b>NATIONAL HOUSING TRUST</b>	<b>DEFENDANT</b>

**IN CHAMBERS (VIA VIDEOCONFERENCE – ZOOM PLATFORM)**

**Mr. Mikael Lorne Attorney-at-Law for the Claimants**

**Mr. Jonathon Morgan Attorney-at-Law instructed by DunnCox for the Defendant**

**HEARD: July 14, 2023**

**Application for Injunction – Breach of Contract – Whether or not Interim Injunction should be granted – Whether There is a Serious Issue to be Tried**

**STAPLE J (Ag)**

**BACKGROUND**

[1] The Claimants are building developers. They are the developers of a housing project on historic Victoria Avenue in the capital, Kingston. The development is known as Victoria Court Apartments and it would be located at 14-18 Victoria Avenue [the agreement says 14-16 Victoria Avenue]. The development was comprised in several splinter titles.

- [2] The 1<sup>st</sup> Claimant and the Defendant entered into multiple agreements for the Defendant to finance the project. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimant come to find themselves as litigants in this matter as they would have given personal undertakings as per the supplemental agreement and they are directors of the 1<sup>st</sup> Claimant.
- [3] This arrangement was entered into from around 2006 and the first loan agreement was made On September 1, 2009<sup>1</sup>.
- [4] Along the way, other loans and agreements were entered into between the 1<sup>st</sup> Claimant and the Defendant for further financing as the project went along. The Defendants secured mortgages on the several splinter titles that comprised the development. Monies were duly disbursed to the 1<sup>st</sup> Claimant by the Defendant and the project was off and running.
- [5] However, on the Defendant's case, many things went awry during the long process of this project and the Defendant indicated to the 1<sup>st</sup> Claimant that there was a default on the terms of the loan agreements and called in the debt on the mortgages that were secured on the several titles for the properties that comprised the development.
- [6] These were significant debts amounting to over \$23m. A formal demand notice was issued to the Claimants by the Defendant dated March 23, 2016. The default was challenged by the 1<sup>st</sup> Claimant through their then Attorneys-at-Law. Years of negotiations then began between the parties. In fact, it is fair to say that negotiations had been ongoing between the Claimants and their various lawyers and the Defendant for some time before and after the demand notice was issued.
- [7] The amount of the debt kept increasing over the years and by May 17, 2021, the debt was said to be \$29,670,575.15. No payments had been recorded on the debt.

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<sup>1</sup> Paragraph 7 Affidavit 1 of George Plummer filed May 17, 2023.

**[8]** It seems now that those negotiations have not borne any real fruit and the Claimants assert that the Defendant is now going to enforce the default and they are now asking the Court to grant the following relief (among other things):

- (1) An Injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever be restrained until the end of trial from enforcing against the Claimants a rescission of its notice to end its contracts with the 1<sup>st</sup> Claimant for the construction of housing units at the Development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered at Volume 1430 Folio 77 in the Register Book of Titles.**
- (2) A Mandatory Injunction that the Defendant, through its directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever ordering the Defendant to pay to the 1<sup>st</sup> Claimant the remaining sums in the amount of \$5,116,465.00 to complete the construction of housing units at the Development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered at Volume 1430 Folio 77 in the Register Book of Titles and/or to repay its creditors and as compensation for services rendered on some of the said housing units.**
- (3) A mandatory injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever ordering the Defendant to immediately pay all balances outstanding under its Agreement with the 1<sup>st</sup> Claimant as loan proceeds of the supplemental loan agreement dated January 25, 2013.**
- (4) An injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever ordering that the Defendant pay over to the 1<sup>st</sup> Claimant all the sums required to complete the sale of 28 housing units at the Development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered at Volume 1430 Folio 77 in the Register Book of Titles**
- (5) An interim declaration that the 1<sup>st</sup> Claimant has not defaulted on the terms of the said agreements with the Defendant for the construction**

of housing units at the development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered Volume 1430 Folio 77 in the register book of titles.

- (6) A mandatory injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen assignees and successors or otherwise howsoever ordering that the Defendant shall immediately grant a rebate of the interest it applied to the 1<sup>st</sup> Claimant's account with the Defendant by one hundred percent (100%) as there was no default in payment by any of the Claimants under the loan agreements with the Defendant for the construction of housing units at the Development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered at Volume 1430 Folio 77 in the Register Book of Titles.
- (7) A mandatory injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen, assignees and successors or otherwise howsoever ordering that the Defendant shall immediately remove all charges, penalties and interest applied to the 1<sup>st</sup> Claimant's account with the Defendant as there was no default in payment by any of the Claimants under the loan agreement with the Defendant.
- (8) A Mandatory injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen assignees and successors or otherwise howsoever ordering that the Defendant shall immediately release to the 1<sup>st</sup> Claimant the duplicate certificate of titles for the housing units at the development known as Victoria Court Apartments located at 14-18 Victoria Avenue Kingston and registered at Volume 1430 Folio 77 in the Register Book of Titles incomplete sales namely units 9, 34-36, 37-40, 42-43 and 52-53.
- (9) An Injunction that the Defendant whether by its directors, officers, representatives, servants and/or agents and/or workmen assignees and successors or otherwise howsoever be restrained until the end of trial from recalculation of the balance claimed in your [sic] most recent statement of account in light of (a) and (b) above.

[9] Importantly, this application was filed on the 17<sup>th</sup> May 2023. It was ordered by Justice Mott Tulloch-Reid on the 30<sup>th</sup> June 2023 that the Claimants were so to do by July 7, 2023. She made no unless order, but the fact that a judge has made

such an order is indicative of the tenuous position of the Claimants' application. The Claimants have filed the pleadings as ordered.

- [10] The Defendants have stoutly resisted this application and have filed an affidavit in response to same. The Claimants have not filed any affidavit in response to the affidavit of the Defendant.

## **THE UNDISPUTED FACTS**

- [11] The agreed facts are essentially that the parties entered into the 1<sup>st</sup> agreement in September 2009. The Defendant and the 1<sup>st</sup> Claimant executed the 1<sup>st</sup> instrument of mortgage and it was registered on the titles for 53 units.
- [12] On the 27<sup>th</sup> July 2010, the 17<sup>th</sup> May 2011 and the 25<sup>th</sup> January 2013 the parties entered into the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Supplemental Loan Agreements respectively.
- [13] On the 25<sup>th</sup> January 2013, the 2<sup>nd</sup> Mortgage was entered into to secure all four loans. This mortgage was registered on the titles for 53 units.
- [14] The essential terms of the 1<sup>st</sup> agreement, as far as I understand them, were that the 1<sup>st</sup> Claimant was responsible for executing the "completion and renovation works in respect of fifty-three (53) apartments at a housing development situate at 14-16 Victoria Avenue in the City and Parish of Kingston known as Victoria Palace Apartments..." and the Defendant was to provide financing for said works.
- [15] There were also terms under which the loan amounts would be disbursed and the terms of repayment. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Supplemental agreements modified some of the terms of the principal or the 1<sup>st</sup> agreement. However, in my view, the 1<sup>st</sup> agreement was the principal agreement, subject to whatever unique modifications were made to it by the other subsequent agreements.
- [16] What the supplemental agreements reveal is that by the time of the 4<sup>th</sup> Supplemental Agreement in January of 2013, there was still quite a bit of work outstanding and that loans were now being requested and approved for things

outside of the scope originally contemplated by the 1<sup>st</sup> Agreement. One could conclude that some of these items were necessarily incidental (e.g. connection of utilities, payment of legal fees related to the development etc) to the main purpose of the loan.

- [17] The 1<sup>st</sup> agreement expressly provides at paragraph 7(d) that work was to commence within 7 days of the first disbursement and proceed **with due diligence and expedition** (emphasis mine).
- [18] By the time the 4<sup>th</sup> Agreement was entered into, there were units where works were still outstanding. Indeed, much work was still to be done on much of the units, it would appear. What is also clear is that over \$37m was disbursed to the Claimants.
- [19] The terms of default were clearly set out in the 1<sup>st</sup> Agreement as well. These terms were not in conflict with any of the terms of any of the supplemental agreement and would therefore still be binding on the Claimants as borrowers.

## **DISPUTED FACTS**

- [20] There is heavy factual dispute between the parties as to whether or not there was default on the part of the Claimants. The Claimants said they had not defaulted on the terms of the loan and that it was the Defendant that defaulted in failing to pay out an additional sum of money to them.
- [21] The Defendant, on the other hand, has filed an undisputed affidavit outlining (from paragraphs 28-44) the breaches of the loan agreement on the part of the Claimants.
- [22] These defaults included:
- a. **Exhaustion of the loan sums repeatedly without submitting certificates of practical completion for the designated units;**
  - b. **Failing to allow for inspection of the units upon request by the NHT;**
  - c. **Failing to carry out works with due diligence and expedition as there were substantial delays in the execution of the works resulting in cancellation of several agreements for sale by purchasers.**

- d. Failure to submit monthly reports on the status of the works.
- e. Units being in a dire state of disrepair when they were eventually allowed to inspect same.
- f. The 1<sup>st</sup> Claimant's operations being potentially halted as they were liable to being struck from the Register of registered companies.

[23] One of the most serious alleged breaches highlighted was that contained in paragraph 41. Here the Defendant highlighted that the 1<sup>st</sup> Claimant was threatened by the Companies Office of Jamaica with deregistration. This fact of threatened deregistration was never disclosed to the Court in the affidavit of the Claimants.

### THE GENERAL LAW ON INJUNCTIONS

[24] As this is an application for an interim injunction, the Court had regard to the well-established guidelines from the celebrated cases of ***American Cyanamid Co v Ethicon Limited***<sup>2</sup> and the judgment of Lord Diplock. This was further affirmed in the local Privy Council decision of ***NCB Limited v Olint Corporation***<sup>3</sup> (hereinafter *Olint*). These considerations are:

- (i) *Is the Claimant's case frivolous or vexatious? Meaning, is there a serious issue to be tried?*
- (ii) *If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider whether or not damages would be an adequate remedy.*
- (iii) *If there is no clear answer to the question of whether or not damages would be an adequate remedy to compensate either the Plaintiff or the Defendant, then I will go on to examine the balance of convenience generally;*
- (iv) *If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain.*

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<sup>2</sup> [1975] 1 All ER 504

<sup>3</sup> Privy Council Appeal No. 61/2008, April 28, 2009.

[25] In the case of *Tapper v Watkis-Porter*<sup>4</sup> Phillips JA stated that, “An analysis of the balance of convenience entails an examination of the actual or perceived risk of injustice to each party by the grant or refusal of the injunction”

[26] Earlier in the said judgment at paragraph 36, she adumbrated and distilled the principles on the concept of the balance of convenience from the *American Cyanamid* and the *Olint* cases. I can do no better than to quote from the eminent jurist:

*In considering where the balance of convenience lies, the court must have regard to the following:*

- (i) *Whether damages would be an adequate remedy for either party. If damages would be an adequate remedy for the appellant and the defendant can fulfil an undertaking as to damages, then an interim injunction should not be granted. However, if damages would be an adequate remedy for the respondent and the appellant could satisfy an undertaking as to damages, then an interim injunction should be granted.*
- (ii) *If damages would not be an adequate remedy for either party, then the court should go on to examine a number of other factors to include the risk of prejudice to each party that would be occasioned by the grant or refusal of the injunction; the likelihood of such prejudice occurring; and the relative strength of each party’s case.*

[27] At the end of the day though, the Court should try to take the course that will result in the least irremediable prejudice to either party<sup>5</sup>.

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<sup>4</sup> [2016] JMCA Civ 11 at para 37

<sup>5</sup> Id



## ISSUES

[28] In keeping with the principles as set out in the cases above, the Court considers the following to be the issues involved in deciding whether or not to grant the relief sought:

- (i) *Is the Claimants' case frivolous or vexatious? Meaning, is there a serious issue to be tried?*
- (ii) *If the answer to the above is no, then the injunction ought not to be granted. If the answer is yes, then I must next consider the balance of convenience generally;*
- (iii) *If, after considering the balance of convenience generally, the Court is still unable to come to a definitive conclusion, and there are no special factors, it is advisable to have the status quo remain?*

### **ISSUE 1 – IS THE CLAIMANT’S CLAIM FRIVOLOUS OR VEXATIOUS?**

[29] At this stage it is difficult to say that there is a serious issue to be tried.

[30] There is no affidavit of the Claimants in response to the affidavit of the Defendant. This is the case even after the first hearing of this application on the 30<sup>th</sup> June 2023 before Tulloch-Reid J.

[31] In the circumstances, the Court’s only conclusion is that the Claimants do not take issue with any of the assertions made by the Defendant in response to the Claimants’ Affidavit.

[32] These assertions are certainly damning and raise the prospect that the Claimants were in breach of the 1<sup>st</sup> agreement as well as the other agreements as outlined in paragraphs 28-44.

[33] This being the case, how then can the Claimants assert, as they do in their pleadings, that there is any basis for challenge to the issuing of the notice by the Defendant to them of their default? In the absence of any evidence from the Claimants to challenge the incidents of default pointed out by the Defendant, then

the Claimants cannot pass the first limb test for an injunction as to whether or not there is a serious issue to be tried.

***Would damages be an adequate remedy for the Claimant?***

- [34] If I am wrong on the question of whether there is a serious issue to be tried, I will examine the next issue on damages.
- [35] If damages would be an adequate remedy for the Claimant, then there is no need for injunctive relief once the court is satisfied that the Respondent is in a position to satisfy the Applicant's claim in damages.
- [36] I would not be minded to agree that damages would not be an adequate remedy for the Claimants as asserted by them in paragraph 27 of their Affidavit. The reason advanced by the Claimant as to why damages would not be adequate is that several of the units had already been sold and those purchasers are in possession and any exercise of mortgagee powers may disrupt or [sic] interfere with their rights as owners of neighbouring properties. I do not agree with this reason.
- [37] There is no evidence that the exercise of a power of sale would in any way affect the rights of those existing purchasers. I do not even know which rights it would potentially affect as the Claimant has just made a blanket statement about rights being affected without particularising which right and demonstrating how it would or could be affected.
- [38] Further, in my view, this was clearly a commercial venture and the Claimants were renovating these units with a view to selling them and realising a cash value. There is no evidence from them that they had intended to hold on to any of the apartments or commercial units within the development and utilise them for their own benefit.
- [39] Going a step further, we see an assertion at paragraph 28 that there was reputational damage to the Claimants. I see no evidence of this reputational damage from the Claimants. There are no letters, articles or such things which

would show how the Claimants' reputations have suffered as a consequence of the actions of the Defendant. Indeed, the evidence from the Defendant, which I accept, and is evident from the number and terms of the supplemental agreements and the letters showing negotiations up to 5 years post default, reveals a financier that was quite accommodating to them.

- [40]** The amount for which they have claimed, in the pleadings is just over \$1,000,000.00 as special damages. They have not identified in any document what the quantum of their other loss is likely to be.
- [41]** The Claimants have not clearly given an undertaking as to damages in their Affidavit. They have also palpably demonstrated, in their own affidavit, an inability to meet such an undertaking even if they had given one clearly. Further, the undisputed evidence from the Defendant is that the 1<sup>st</sup> Claimant was in jeopardy of deregistration from the Companies Office as recently as May 2022. It is not clear as to what triggered the threat of deregistration and if that situation has been remedied by the 1<sup>st</sup> Claimant as there is no affidavit in response from them. In those circumstances, the Court cannot countenance granting an injunction at all.
- [42]** The other major issue to consider is that the greater hardship lies with the Defendant. There is evidence of several registered mortgages that are now in jeopardy because of the tardiness of the 1<sup>st</sup> Claimant in completing the project despite receiving substantial sums of money so to do. The longer the units remain in that state of incompleteness, the more costly it is likely to get for the Defendant to recover their investment.
- [43]** It seems to this court that on the totality of the evidence, the greater hardship would likely arise in granting the injunction than in refusing it.
- [44]** So, in the circumstances, I am satisfied that the balance of convenience is in favour of the Defendant.

## **THE MANDATORY INJUNCTIONS**

- [45] The Court considers these to be relatively simple to dispose of. The granting of these mandatory injunctions would be tantamount to granting the Claimants the substantive relief in the Claim they have now filed.
- [46] I agree with the submissions of the Defendant and the authority from Batts J<sup>6</sup>.
- [47] I simply have no evidence that the Claimants would be highly likely to sustain their claim against the Defendant to give me the high degree of assurance that the Claimant will be able to establish any of the rights required to secure the relief claimed for the mandatory injunctions.

## **CONCLUSION**

- [48] In the circumstances, I am not satisfied that the Claimants are entitled to the interim and mandatory injunctions claimed. I find that there is no serious issue to be tried as between the parties as there is no dispute from the Claimants that they had breached their agreement with the Defendant in the manner outlined by the Defendant in their affidavit. This therefore means that, on the face of it, the Claimants are not challenging the Defendant's assertions that it is the Claimants that are in breach and so the notice of default was properly issued and is enforceable.
- [49] Even if I am wrong on the question that there is no serious issue to be tried, I am satisfied that the balance of convenience lies in the Defendant's favour and not in the Claimants. It is quite evident that damages is an adequate remedy for the Claimants in the circumstances of this case and I am satisfied that the Defendant has the means to satisfy the Claimant's claim in damages. I am also not satisfied

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<sup>6</sup> *Maurce Tomlinson v Mayor Homer Davis* [2019] JMSC Civ 202

that the Claimant has given any undertaking as to damages and even if it had given such an undertaking, there is more than sufficient evidence to show that it was not capable of meeting same.

## **DISPOSITION**

- 1 The Claimants' Application filed on the 17<sup>th</sup> May 2023 is refused in its entirety.**
- 2 Costs to the Defendant to be taxed if not agreed.**
- 3 Mr. Lorne undertakes to file and serve a Notice of Acting on or before the 17<sup>th</sup> July 2023 by 4:00 pm.**
- 4 A Case Management Conference is set for the 11<sup>th</sup> January 2024 at 2:00 pm for 1 hour.**
- 5 The parties shall proceed to mediation in the interim and conclude same within 90 days of the Defence being filed and served.**
- 6 Any applications to be made by either party shall be heard at the Case Management Conference and the said applications shall be filed and served within time to be heard at the Case Management Conference.**
- 7 Defendant's Attorneys-at-Law to prepare, file and serve this Order on or before July 21 2023 by 4:00 pm.**

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**Dale Staple**  
**Puisne Judge (Ag)**