

IN THE HIGH COURT OF BELIZE A.D. 2026

IN THE HIGH COURT OF JUSTICE

Claim No. 585 of 2026

BETWEEN

MICHAEL FEINSTEIN

APPLICANT

A N D

STAKE BANK ENTERPRISE LIMITED
(in Receivership)

RESPONDENT

Appearances:

Mr. E Andrew Marshalleck SC, along with him Mr. Jaraad Ysaguirre
for the Applicant

Rt. Hon. Dean O. Barrow, S.C. along with him Ms. Agassi Finnegan
for the Respondent

2026: 9th September
14th September

**Interlocutory relief — Ex Parte Injunction — Test to be Satisfied Interlocutory
Injunction — Inter Partes Proceedings — General Rule — Duty of Full
Disclosure - Damages an Adequate Remedy Serious Issue to be Tried – Balance
of Convenience**

JUDGMENT

[1] **SYLVESTER J:** The Applicant filed an application for an urgent injunction *ex parte*, against the Respondent, *ex abundanti cautela* seeking the following reliefs:

- (1) The Respondent is restrained, whether by itself, its receiver, its site management, security personnel, servants, or agents howsoever, from blocking or obstructing the roadway located on Block 79 used to access Block 78A until the conclusion of the trial of this matter and/ or further order of the Court.
- (2) The Respondent is restrained whether by itself, its Receiver, servants, or agents from disconnecting, destroying, or in any way interfering with the utility poles and electrical lines situated on the utility reserve on Block 79 that service Block 78A.
- (3) The Respondent's Notice of Revocation of Access dated 1st September 2026, is stayed pending the trial of this claim.

Ex Parte Application

- [2] On the 1st day of September 2026¹, the Respondent *via* its Receiver issued a formal notice of revocation to the Applicant effective **3rd September 2026 at midday**, denying the sole means of land access to the Applicant's Marina, and demanding the removal of all vessels, equipment, chattels and other items from the Respondent's property.
- [3] Further, on the 1st September 2026², the Applicant via email received a notice from Mark Anthony Flowers on behalf of the Receiver giving notice that Blackbird Lodge Equipment, boats, materials and scraps will be removed from the property by **midday 3rd September 2026**. There was also a demand for unpaid electricity from March 2026 to the present, and a notice that the services shall be disconnected and will not be reconnected.

¹ Affidavit of Michael Feinstein par. 14 [Exhibit MF1-4]

² Affidavit of Michael Feinstein par. 15 [Exhibit MF1-5]

- [4] On the 1st day of September 2026³, the Applicant through his Attorney responded to the Respondent stating inter alia that an easement existed for many years prior, and all the lots being 78 A, 79 and 81 were all originally owned by the Applicant. That lots 79 and 81 were transferred to the Respondent Company in receivership, State Bank Enterprise Limited [SBEL], for use as a staging area in the development of State Bank Island. The Applicant also requested immediate confirmation that there will be no interference with the right of access to the property, and if no response is given by midday tomorrow, an injunction application shall be instituted in the High Court.
- [5] The Respondent did not respond to the above letter from the Applicant.
- [6] On the 3rd September 2026, at 11:05 a.m., the Applicant filed its Certificate of Urgency, Notice of Application and affidavit in support of the injunction and also filed its statement of case which includes the Fixed Date Claim, Affidavit in support and other prescribed documents.
- [7] The Court examined the matter in the round, being aware of the principle in ***National Commercial Bank Jamaica Ltd v. Olint Corp Ltd***⁴ and exercised its discretion to hear the matter ex parte on the 3rd September 2026. The deadline for blocking access was looming, which was the same day when the application was filed. Further, the Respondent did not respond to the Applicant's letter 'M-F 6' and had notice in that letter that an injunction would be applied for in the High Court. The

³ Affidavit of Michael Feinstein par. 16 [Exhibit MF1-6]

⁴ 2009 [UKPC] 16 par. 13⁴ ".....Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule 17.4(4) of the Civil Procedure Rules 2002. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none.

Court therefore proceeded to hear the matter on the same day the Respondent indicated in writing that it would revoke access to the road.

- [8] The Court granted the order staying the revocation of access until the inter partes hearing, with the usual undertakings as to damages. The Court further, abridged time and adjourned for service on the Respondent and the Attorney on record for the Respondent, which service included substituted service via email.
- [9] The inter partes hearing of the matter was listed for 9th September 2026, at 9:00 am.
- [10] On the 8th day of September 2026, the Respondent filed a notice of application seeking the discharge of the interim injunction, wherein technical and substantive grounds of objections were raised. On the 9th day of September 2026, the Court proceeded to hear the Applicant's application *de novo*, together with the Respondent's application to discharge the injunction.
- [11] The Respondent was at liberty to file an urgent application to discharge the injunction if there existed any cogent reasons to justify the discharge of the ex parte order prior to the date set for the inter partes hearing.

INTER PARTES APPLICATION

- [12] The Applicant's application for a prohibitive injunction was premised on the affidavit filed by Michael Feinstein, and alleged the following:

Ownership Block 78 A

- (1) The Applicant is the owner of Block 78A measuring 3.287 acres of land situate on the Eastern Side of the Western Highway, near Mile 5, Belize District, under and by virtue of Minister's Fiat Grant No. 526 of 2005.

Blocks 79 and 81

- (2) The Applicant was once the owner of Blocks 79 and 81, by virtue of Minister's Fiat Grants No. 609 of 2006, and No. 669 of 2004 respectively.
- (3) By virtue of an arrangement between the Applicant and Respondent, the Applicant transferred title to Blocks 79 and 81 to the Respondent for use as a staging area for the development of Stake Bank Island. It was agreed between the Applicant and the Respondent that Block 78A would be developed as a marina to service Blackbird Caye Company Limited and other business interests relating to the Feinstein Group of Companies, wherein the Applicant has an interest.
- (4) The Respondent Company by its Directors, being the Applicant and his wife Melita Feinstein, both orally and by conduct, assured the Applicant that he would have the use of the roadway and utility reserve built by the Applicant on Block 79 for access to and egress from Block 78A.

Substantial Reliance

- (5) The Applicant relied on the Respondent's assurance that it would have access to the marina and constructed the Feinstein Group Marina on Block 78A to service his business interests.

Sole Road Access- Years of usage

- (6) The Applicant submitted that the marina's sole road access is via the designated roadway located on Block 79, which the Applicant, and his licensees, have to the knowledge of the Respondent used without interference for many years including the years intervening since the Receiver was appointed for the Respondent company.

Necessity

- (7) The Applicant has relied on the explicitly mapped 'Boats Water Berthing Area' shared between the Respondent and the Feinstein Group Marina to dock his boats and conduct necessary maintenance and repairs thereon. The Respondent, even after the commencement of the receivership, had full knowledge of the Applicant's long-standing, uninterrupted use of the roadway and the utility reserve and of the arrangements that were in place for meeting utility charges.

Threatened withdrawal of Road Access/Utility

- (8) By letter dated 1st September 2026, the Receiver unilaterally purported to withdraw the Applicant's use of the roadway and utility reserve, demanding the removal of vessels, equipment and demanded outstanding utility charges and threatened to cut electricity and water services by midday 3rd September 2026.

Serious Issue to be tried

- (9) There is a serious issue to be tried as the Applicant has a strong case that he is entitled to an easement by estoppel over roadway on Block 79 to access his property and the Respondent assured the Applicant use of the roadway and utility reserve. The Applicant relied on these assurances to his detriment by constructing the Feinstein Group Marina on Block 78A. Block 78A, inclusive of the marina, is inaccessible by road except via the designated roadway on Block 79.

Effect of not granting the injunction

- (10) The Applicant's business will be immediately and severely paralysed if the injunction is not granted and the Respondent is allowed to deny the Applicant access and sever electricity.

Balance of convenience

(11) The balance of convenience favours the grant of the injunction. The Applicant and his licensees have utilized the designated roadway and utility reserve without interference for many years. As such, maintaining the status quo preserves the Applicant's established operations until a full hearing, whereas a refusal of the injunction allows the Respondent to force the immediate removal of vessels and restricts the Applicant's only access.

Duty of Full Disclosure

(12) The Applicant has disclosed via its duty of candour to make full disclosure, that there was currently no formal, registered Deed of Easement in existence for Block 79. The Applicant's right to an easement is premised on the equitable doctrine of proprietary estoppel based on oral assurances, conduct and detrimental reliance.

[13] The Applicant further maintained that damages would not be an adequate remedy, since the degree of loss, paralysis to business and denial of sole access that they once enjoyed and relied upon to their detriment cannot be adequately compensated in damages, if at all.

Respondent's Application to Discharge the Injunction

[14] The Respondent's application to discharge the injunction was premised on Technical and Substantial grounds of objection. The technical grounds had mostly dealt with a challenge to the grant of the hearing of the *ex parte* injunction and the subsequent order which was granted. The technical grounds were mostly explained and resolved during the hearing of this matter.

Technical grounds of objection

No apparent reason for lack of notice

- [15] For completeness the Court will expound on the issues raised, albeit succinctly. The first is the issue as to a breach of CPR 17.3(4) wherein no apparent reasons were provided to the Court for the lack of notice. The Court examined the affidavit of the Applicant in the round, in that notice was given of an impending injunction application that would be filed via exhibit M-F 6. There was no response to said letter and the certificate of urgency and injunction application were filed on an urgent basis at 11:04 and 11:05 a.m. respectively, which was approximately fifty-five [55] minutes from the midday deadline given by the Receiver for blocking the access, *inter alia*.

Interim Order

- [16] The second ground of objection is in relation to the breach of Rule 17.4(6) and 5.7 which mandates the Applicant to serve the Respondent “*not less than seven*” clear days before the return date. The Rule requires the Respondent to be served personally with a copy of the application, and when there ought to be service on a Company, its registered office. This was resolved by the Court ordering substituted service via email, as stated in the order. The Applicant’s Attorney undertook to provide a copy of the filed order to the Respondent’s Attorney.
- [17] In relation to the issue concerning the shortened time for the hearing of the matter, the Court abridged the time for the inter partes hearing, due to the urgent nature of the proceedings.

Factual Background

- [18] The Receiver sent communication to the Applicant regarding the continued use of the Respondent’s roadway reserve and utility poles existent on property [Block 79] located at mile 5 on the George Price Highway. He also requested the removal of the Applicant’s vessels, goods and other assets on the property.

- [19] The notice to end the road access was triggered by imminent works on the Respondent's property.

Substantive grounds of objection- non-disclosure

- [20] The Respondent submitted that the injunction ought to be discharged since the Applicant has failed to disclose four material elements which are necessary and integral to the application.
- [21] Firstly, that the lots of land have all been registered and form part of the Land Registry System and that Blocks 79 and 81 were transferred to the Respondent to be used as a staging area for the development of Stake Bank Island. That since mid-2018 both those parcels of land were subject to first registration and thus have been assigned individual registers. That Blocks 79 and 81 are reclassified as Block 45 parcel 2145 and 2146 respectively, with no registered easement. Both blocks were transferred to the Respondent in 2021, without a registered easement.
- [22] Secondly, the Applicant failed to disclose the historical and material facts surrounding the development of the marina on Block 78A, which facts were material to the detrimental reliance prayed by the Applicant. The Applicant claims to have received assurances from the Respondent for the use of the roadway and utility reserve, which he alleged to have relied on to his detriment. However, he failed to disclose that development to Block 78A commenced in early 2015, whilst construction of the marina commenced in 2018 and concluded in 2019. At that time, he was the sole proprietor of Blocks 78A, 79, and 81.
- [23] Thirdly, the Applicant failed to disclose that there are three alternative routes of access to the property, by land and water. The Applicant's property is bounded on the north by Block 45 Parcel 2144 (owned by Western Dairies Ltd), and on the east by parcel 77. There is also an inlet from the sea to the Applicant's property.

- [24] Fourthly, the Applicant has also failed to disclose to the Court that there is no direct commercial activity conducted on Block 78A, and the use of Block 78A is only to facilitate a transfer station from which supplies and personnel are sent to Blackbird Caye. This can be done from any location and/or marina in Belize City. The Respondent's termination of the Applicant's use of its property does not make transfer services to Blackbird Caye impossible.
- [25] The Respondent also argued under its substantive ground that the test/requirements to be satisfied for the grant of an injunction namely, whether there is a serious issue to be tried, the balance of convenience and whether damages was an adequate remedy was not satisfied. Therefore, the injunction should be discharged.
- [26] On the contrary the Applicant submitted that the tri partite test for the grant of an injunction was satisfied and the injunction ought to be granted until the determination of the substantive matter.
- [27] The Court requested from the Respondent at the hearing whether the continued use of the road by the Claimant would prevent the construction project, and whether the Applicant's continued use of the utilities on the roadway can continue until the determination of the substantive matter. The Respondent filed a second Affidavit of Marlowe Neal [Receiver]. The Receiver answered the first question in the positive and the latter in the negative.

Law and Analysis

Duty of Full Disclosure- The Test

- [28] The duty of full disclosure, and the principles governing material non-disclosure in *ex parte* proceedings are well documented and was encapsulated in the *locus*

classicus of **Brink's Mat Ltd v Elcombe**⁵ per Ralph Gibson LJ, which was followed and applied in numerous cited decisions but more recently in **Moses Barrow v Tracey Panton**⁶, **Great Panorama International Limited v Qui Hui et al**⁷, **AO Alfa-Bank v Kipford Ventures Limited**⁸ and **Derma Med Ltd v Ally and Or's**⁹, the principle enunciated states as follows:

'(1) The duty of the applicant is to make 'a full and fair disclosure of all the material facts'.

(2) The material facts are those which [are] material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which the application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order. That is a reference to Columbia Picture Industries Inc v Robinson.⁹ And (c): 'The degree of legitimate urgency and the time available for the making of inquiries.'

(5) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure is deprived of any advantage he may have derived by that breach of duty.

⁵ [1988] 1 WLR 1350

⁶ CLAIM No. Civ 661 of 2024 (No. 1) per Hondora J at par. 59

⁷ BVIHC (COM) 2019/0180 (delivered 13th August 2020, unreported) Per Michel J

⁸ BVIHCMAP2021/0047 per Michel JA at par. 69

⁹ [2023] EWHC 2788 par. 29 et seq

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

Finally, it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure, which justifies or requires the immediate discharge of the ex parte order, nevertheless, to continue the order or to make a new order on terms. When the whole of the facts, including that of the original non-disclosure, are before [the court], it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.” However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief sought.”

- [29] The central issue on this point is whether the Respondent’s submission encapsulated in paragraphs 19-25 listed above and its pleading, were non-disclosures, and if so, were they material? The first issue raised, concerned the non-disclosure by the Applicant to state that the properties now formed part of the Land Registration System. Second, issue was that since 2018 the lots were subject to first registration. Third, issue were that Blocks 79 and 81 were transferred to the Respondent to be used as a staging area for the development of State Bank Limited. Additionally, the lots were now reclassified as # 2145 and # 2146 in Block 45, and finally, both lots were transferred to the Respondent in 2021, long after the period of first registration.

[30] However, par. 6 of the affidavit of the Applicant states at paragraph 6 thus:

“Pursuant to arrangements by the Defendant with the Claimant, the Claimant transferred title to Blocks 79 and 81 to the Defendant to use as a staging area in development of Stake Bank Island. It was clearly represented and understood and agreed between the Claimant and the Defendant from inception that Block 78A would remain titled to the Claimant and be developed as a marina to service Blackbird Caye Company Limited and other business interests relating to the Feinstein Group of Companies, which the Claimant has an interest in.”

[31] Evidently, the affidavit did not address every issue in detail, however, the omission on the first point was not material in the court’s view, as it related to determining the granting of the injunction. In other words, even if the above minor non-disclosures were known at the time of the hearing of the application, the order would still have been granted.

[32] On the first point the court concludes that the areas where there were non-disclosures, for example, registration pursuant to the Land Registry Act, the new designation of the two lots and other minor factual non-disclosures, were not material.

[33] The second point related to the failure by the Applicant to disclose historical facts surrounding the marina that sits on Block 78A, which facts were material to the detrimental reliance prayed by the Applicant. He failed to disclose that the development Block 78 A commenced in early 2015 whilst construction of the marina commenced in 2018 and conclude din 2019. The Applicant was the owner of the three lots 78A, 79 and 81 and therefore did not need permission from himself to himself regarding the use of the roadway and utility service.

[34] The Applicant’s answer in part can be found at paragraphs 4-6 of the Applicant’s affidavit, where he stated, ‘he was the initial owner of the three lots and pursuant to an arrangement, he transferred lots 79 and 81 to the Respondent’. The detailed historical facts relating to the Block’s development was not stated, and in the courts, view was

and is not a material factor in deciding the application, neither was it relevant at the *ex parte* stage nor at the *inter partes* hearing. The non-disclosure may be more relevant for a detailed analysis and appreciation of the substantive matter, which can be dealt with at the Case Management Conference.

- [35] The third issue concerns the Respondents' submission that there are alternative accesses to the Applicant's lot, since there is a lot in boundary, owned by Western Dairies Ltd, wherein access would have to be negotiated, purchased or an agreement can be reached with the owner. The evidence indicated that there is no present available access, but one that may be able to be secured in the future, if the owners are amenable to it. The Applicant's access would therefore be at the mercy of the neighbouring landowners. The Respondent also submitted that there is an inlet from the sea, but which is limited to sea access.
- [36] The court has examined the exhibits attached to the Respondent's application to discharge the application namely, **Tab 4**¹⁰ giving an aerial view of the property and the likely alternative access and has concluded that there was no material non-disclosure. The Applicant's exhibits **MF1-1, 1-2, 1-3 and 1-4**, were pellucid in relation to the lots in boundary and the impediments as it relates to alternative routes to access the property. Exhibit **MF1-3**¹¹, highlighted the Applicant's sole means of land access.
- [37] Fourthly, the Respondent submitted that there was a material non-disclosure when the Applicant failed to state that there was no direct commercial activity taking place on the marina save and except it being used as a transfer station for supplies and personnel to Blackbird Caye. Again, the court finds that this is an issue that was not and is not material to a determination of the matter at hand. Whether the marina is being used commercially, or used for the Applicant's business, the issue is the denial of his sole means of land access to the marina, a marina that is in operation to the present day.

¹⁰ Page 107 to 112 of the record

¹¹ Page 59 of 68 of the record

[38] On the issue of non-disclosure, the Court concludes that there was no material non-disclosure within the Brink's Mat legal guidance, and the court therefore exercises its discretion to deal with the substantive matter.

Tri partite Test [Issues]

[39] The three issues which fall to be determined in the grant of an injunction emanates from the well-known authority of ***American Cyanamid v Ethicon Limited***¹² which was adopted by our Court of Appeal in ***Belize Telemedia Limited v Speednet Communications***¹³ and state as follows:

- (i) whether there is a serious issue to be tried;
- (ii) whether damages are an adequate remedy; and
- (iii) whether the balance of convenience or justice favour the granting of an injunction.

Serious Issue to be tried

[40] The court will determine whether there is a serious issue to be tried. The Applicant asserted there is a serious issue to be determined by this court, however, the Respondent forcefully submitted otherwise.

[41] The Respondent submitted that Blocks 79 and 81 are both registered land and so, had an easement existed, it had to be listed on the register in the incumbrances section, and there was no such record. The **Prescription Act of Belize** recognizes unwritten easements after undisturbed use of land in excess of twenty years; the Applicant does not satisfy the minimum period for recognition of an unregistered easement.

¹² [1975] 1 AER p.504

¹³ Civil Appeal No. 27 of 2009

- [42] The Respondent further submitted that the claim of proprietary estoppel by the Applicant is rubbished by the facts, as there could have been no detrimental reliance when the Applicant started building the marina in 2018, on assurances by the Respondent regarding use of the roadway and utility reserve. Since the Respondent only became proprietor of that roadway and utility reserve via ownership of blocks 79 and 81 in late 2021, no question of promises in 2018 arises. That at that material time, the Applicant owned all three properties and could do as he pleased with any of them.
- [43] Further, after the Respondent got registered transfer titles to Blocks 79 and 81, it could not enter into any agreement with the Applicant except on the written authority of its Board of Directors. The Applicant was a Director of the Respondent and any agreement he made with the company in the absence of disclosure to and written authorization/ratification by the Board fell afoul of the rule against self-dealing, violated the Applicant's fiduciary duties, and was void. That such an agreement could not stand after the company went into Receivership.
- [44] The Respondent's utility poles are not the only means through which the Applicant can access electricity. There are alternative means via the properties that exist to the north and east of the Applicant's parcel. The Applicant's failure to pay the bills for the utilities would result in the disconnection.
- [45] The Applicant submitted that the Respondent clearly misunderstood its case, that he relied on proprietary estoppel, which is an equitable doctrine invoked precisely because no formal easement was executed or registered. The Applicant is seeking the Court's order to satisfy the equity, and that it is the absence of a registered easement that is the factual premise supporting the equitable claim, not a defence against it.
- [46] In relation to detrimental reliance, the Applicant maintains that clear assurances were made from the inception of the arrangements between the parties, that the transfers were conditioned on the Applicant retaining the right to use the road to

access Block 78A. All three blocks were owned by the Applicant for well over ten years before transfer to the Respondent company and were factored into the Applicant's deliberations during that period to undertake the development of Stake Bank Island in the way that was subsequently executed. Those deliberations occurred long before the date of the actual transfers relied upon by the Respondent.

- [47] No formal resolution of the Respondent company or decision of its board is required to find an assurance grounding an easement by estoppel. The estoppel arose out of conduct.
- [48] The issue is whether the Applicant can establish its claim for the use of the easement in proprietary estoppel, and whether the Applicant relied on the promise thereby acting to his detriment. Therefore, can the court of equity intervene to remedy any likely injustice.
- [49] Evidently, these are serious issues to be tried between the parties. Both parties have submitted their own version and therefore it solidifies the court's view that there are serious issues to be tried.
- [50] The court therefore concludes that the first part of the test has been satisfied.

Whether damages are an adequate Remedy

- [51] The Applicant submits that damages is not an adequate remedy, that the Applicant and by extension the Feinstein Group Marina will be cut off from its only road access. In effect the land will be land locked, with its only access by sea. The abrupt restriction will force the shutdown of the marina operations and necessitate termination of its staff. The destruction of an active, ongoing business and loss of employee livelihood cannot be compensated adequately by a future award of damages.

- [52] The Receiver contended that maintaining the injunction will cause interference with development plans, expose the Respondent to penalties for breach of third-party contracts, and delay the project for which materials have already been delivered and for which sub-contractors are owed money.
- [53] The second affidavit of the Receiver has neither stated in a material way how the continued use of the road by the Applicant will materially affect the project nor were the plan submitted or any drawing to show that the road is needed as part of the project. The Applicant asserted that at present both parties utilise the road, even with the ongoing project of the Respondent. The concern raised by the Respondent that the continued use of the roadway will operate as a direct obstruction to the full-on development activity, can be averted, by an appropriate court order.
- [54] The Respondent also asserted that there is a risk relating to construction safety and insurance, however, there is no evidence of the insurance policy before the court or that the use of the road by the Applicant will void the policy. Even if this was the case, the Respondent would have embarked upon construction knowing that the Applicant was using the road for years prior to access the marina.
- [55] The Applicant's Attorney alluded to the Respondent's first affidavit and corresponding exhibit at pages 158 and 170 [Tab 11] which coincided with paragraph 48 of the first affidavit of Receiver, which shows the motorable road, coupled with other photos, showing trucks and what appears to be active construction. The court concludes that in the absence of construction plan to show that the road is needed by the Respondent as part of its holistic construction, it is left to conclude that the road was and is in active use by both the Applicant and the Respondent.
- [56] An examination of the matter in the round shows that the road was in existence for many years and was used by both the Applicant and Respondent and continues to date. The utilities that run on the road supports both the Applicant and Respondent. The immediate stoppage of the use of the road by the Applicant wherein he has

enjoyed for numerous years, and further the marina being built with that sole road access in mind, will lead to a deleterious financial effect on the Applicant's business, including, denial of road access to the marina, termination of its employees and a stoppage or delay to the further development of the Applicant's business. The Respondent had full knowledge that the road was used for the Applicant's business, and any developmental project should have either taken that into consideration or resolve the issue regarding the usage of the road at its earliest.

[57] The principle which emanates from **National Commercial Bank Jamaica Limited v. Olint Corp. Limited**¹⁴ is instructive in that the basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. At par. 17 et seq. per Lord Hoffman, opined thus:

*17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. **The basic principle is that the court should take, whichever course, seems likely to cause the least irremediable prejudice to one party or the other.** This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396, 408:*

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

*18. **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***

¹⁴ PCA Appeal no. 61 of 2008.

*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.***

19. 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."

[58] The Respondent's three [3]-day notice to the Applicant to cease and desist the use of the road, if not restrained, would have led to the circumstances outlined in paragraph **56 above**.

[59] The court therefore concludes that damages would not be an adequate remedy and therefore the second test is satisfied for the grant of the injunction.

Balance of convenience

[60] The Respondent contended that the balance of convenience weighs in favour of the discharge of the injunction since the Respondent is proceeding with its development plans and has entered into contractual arrangements with third parties for the expansion of facilities and the further development of its properties. The Respondent requires the use of all the land space of both Blocks 79 and 81, the Applicant's continued use of the roadway and keeping its assets stored on the Respondent's property, will prohibit the progression of the projects and expose the Respondent to litigation and penalties for breach of contract.

- [61] The Applicant submitted that the roadway on Block 79 is the sole roadway connecting the highway to the waterfront that is used by both the Applicant and the Respondent. That photograph evidence of the Respondent shows presently there are equipment operating on the property. The Respondent and the contractors will have to use the same roadway for ingress and egress in doing the required works. That it has not been suggested that the roadway must be done away with as a part of the development or that the presence of the roadway prevents required works. The evidence shows that the activity of the Respondent continues notwithstanding the Applicant using the road so that the development and the Applicant's use of the roadway can continue in harmony, until the matter is finally determined.
- [62] The Applicant states that any assets of the Applicant on the Respondent's property can be removed, and that the right of way over the roadway to access the public road is a distinct issue, and permitting the Applicant's staff to commute to the marina does not require them to occupy areas where the Respondent is doing any works. The road will solely be used as and is the sole means of land access to the marina.
- [63] The issue raised by the Respondent relating to the incompatibility with the Applicant marina port security obligation under the International Ship and Port Facility Security Code (ISPS Code) cannot be addressed substantively via this forum. However, the court has taken its contents into consideration.
- [64] In sum, the balance of convenience favours the grant of the injunction as prayed. The parties have been using the road for years without any obstruction to each other for the smooth passage to and from their respective lots. The Applicant's means of ingress and egress is the sole road access to the marina that he has enjoyed for years and is claiming easement through the equitable doctrine of proprietary estoppel. The Respondent has asserted that the continued use of the road would lead to possible contract breaches and other losses, however, the Respondent was aware of the prior use of the road by the Applicant before entering into any such contract.

[65] Therefore, the Applicant is likely to suffer much more prejudice if the injunction is not granted and the balance of convenience favours the grant of the injunction as prayed by the Applicant.

Order

[66] The Court therefore orders that the **status quo be preserved** until trial of this matter and order as follows:

- (i) The Respondent is restrained, whether by itself, its receiver, its site management, security personnel, servants, or agents howsoever, from blocking or otherwise obstructing the roadway located on Block 79 used to access Block 78A until the conclusion of the trial of this matter and/ or further order of the Court.
- (ii) The Respondent is restrained whether by itself, its Receiver, servants, or agents from disconnecting, destroying, or in any way interfering with the utility poles and electrical lines situated on the utility reserve on Block 79 that service Block 78A.
- (iii) Both the Applicant and Respondent shall ensure there is unobstructed use of the roadway, and each party shall allow the other unimpeded access to the use of the said road.
- (iv) This order shall continue until the trial and delivery of the decision in the substantive action.
- (v) Liberty to apply

[67] Costs shall be in the cause.

Derick F. Sylvester

High Court Judge