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

**CIVIL DIVISION**

**CLAIM NO. SU2023CV01895**

**IN THE MATTER** of all that parcel of land part of **BARBICAN now known as BARBICAN HEIGHTS** (also known as Lot 4 Millsborough Crescent now known as No. 8B Millsborough Crescent) in the parish of **SAINT ANDREW** being the **Lot numbered FOUR** on the plan of Lot 417A Barbican Heights aforesaid deposited in the Office of Titles on the 20th day of September 1977 of the shape and dimensions and butting as appears by the plan thereof and being all the land comprised in Certificate of Title registered at **Volume 1144 Folio 36** of the Register Book of Titles.

**AND**

**IN THE MATTER** of restrictions (relating to the erection of buildings) affecting the said land;

**AND**

**IN THE MATTER** of Restrictive Covenants (Discharge and Modification) Act.

| | | |
|---|---|---|
| **BETWEEN** | **MAILEY FARMS LIMITED** | **APPLICANT** |
| **AND** | **COURTENAY GARRICK** | **RESPONDENT** |

IN CHAMBERS

Mr Alfred McPherson instructed by Alfred Mc Pherson & Co for the applicant.

Mrs Simone Morris Rattray and Mrs Chevanese Billings-Reid instructed by Simone Morris Rattray & Associates for the respondent

Heard; June 30, July 7 and July 16, and 17, 2025

**Application to set aside orders made on a Fixed Date Claim Form - Application for Inunction – Factors to consider.**

**Pettigrew Collins, J**

## INTRODUCTION

**[1]** This judgment is concerned with two applications filed by the applicant, Mailey Farms Limited. The first is a Notice of Application for Court Orders filed April 11, 2025. The second is a Notice of Application filed on June 12, 2025.

**[2]** In the application filed April 11, 2025, the applicant sought the following orders:

> *(1) The Order made by the Master, Miss S. Reid on the 17th day of September, 2024, be set aside.*
>
> *(2) Costs of this Application to the Applicant to be taxed, if not agreed.*
>
> *(3) That the parties be allowed to inspect the aforesaid documents within seven (7) days of the date of this hearing.*
>
> ….

The grounds on which the orders were sought are:

> 1. *The Applicant, who is the owner of property registered at Volume 1144 Folio 35 of the Register Book of Titles received no notification prior to the hearing of the Claimant's application for the modification of Restrictive Covenants numbered 1,2 and 3, in respect of which the Applicant is a beneficiary.*
>
> 2. *The Applicant would have objected to the Claimant's application if it had been aware of same.*

**[3]** In the application filed June 12, 2025, the applicant sought:

*(1) An injunction restraining the Claimant from continuing to execute or carrying out all or any further construction and/or building works or any ancillary works whatsoever on the land owned and/or occupied by the Claimant, the subject matter of the Application for Court Orders, effective from the date of hearing this Application for injunctive relief until a Final Judgment has been obtained in the substantive Application for Court Orders or such other dates as the Court deems appropriate.*

*(2) An injunction be granted immediately restraining the Claimant whether by himself, his servant and/or agent from any dealings with ALL THAT parcel of land part of land part of BARBICAN now known as BARBICAN HEIGHTS (also known as Lot 4 Millsborough Crescent now known as No. 8B Millsborough Crescent) in the parish of SAINT ANDREW being the Lot numbered FOUR on the plan of Lot 417A Barbican Heights aforesaid deposited in the Office of Titles on the 20th day of September 1977 of the shape and dimensions and butting as appears by the plan thereof and being the land comprised in Certificate of Title registered at Volume 1144 Folio 36 of the Register Book of Titles.*

*(3) An injunction restraining the Claimant, whether by himself, his servant and/or agent from disposing of the property whether by way of transfer, sale, mortgage or by will.*

*(4) An injunction restraining the Claimant from continuing to execute or carrying out all or any further construction and/or building works or any ancillary works whatsoever on the land owned and/or occupied by the Claimant, the subject matter of the Application for Court Orders, effective from the date of hearing this Application for injunctive relief until a Final Judgment has been obtained in the substantive Application for Court Orders or such other dates as the Court deems appropriate.*

*(5) An order declaring that the Registrar of Titles be served with the Formal Order for injunctive relief, if the same is granted by this Honourable Court.*

*(6) Costs*

*….*

The grounds upon which the orders were sought, inter alia, are:

…

*c… That the continuance of any further construction and/or building works or any ancillary works whatsoever on the land owned and/or occupied by the Claimant could severely prejudice the Applicant's legitimate rights in law*

*to have the construction works aborted as a consequence of the advanced nature of construction should Final Judgment be entered on behalf of the Applicant, this being so irrespective of the failure and or negligence and or deliberate act on the part of the Claimant to comply with the Interim Order of the Court to serve the Applicant with a Legal Notice of the Application for Modification of Restrictive Covenants as required by law and which is the basis of the substantive claim for Court Orders.*

*d. That the Applicant and or the occupiers of the Applicant's and its servants or agents have suffered substantial hardship and inconvenience due to the continuance of construction by the Claimant and the seemingly rapid pace of construction works even in light of the uncertainty presented by the Applicant's Application for Court Orders in the substantive matter before this Honourable Court.*

*e. It is in the best interest of justice and fairness to grant these orders as prayed.*

**BACKGROUND**

**[4]** The applicant, Mailey Farms Limited, is a limited liability company, incorporated under the laws of Jamaica with registered address at 8A Millsborough Crescent, Kingston 6. Mr Overton Carlisle Hutchinson who deponed on behalf of the applicant, described himself as the director and major shareholder of the applicant company. The respondent is a businessman who, by virtue of a power of attorney, is the representative of the registered proprietor of the parcel of land that is the subject of the application for modification of restrictive covenants. The applicant is the registered proprietor of land part of Barbican Heights with civic address number 8A Millsborough Crescent, Kingston 6 in the parish of Saint Andrew. The property bears lot number 3 on the plan of part of Lot 417A Barbican Heights. That property is registered at Volume 1144 Folio 35 of the Register Book of Titles.

**[5]** The parcel of land subject of the application for modification of restrictive covenants is land part of Barbican Heights with civic address numbered 8B Millsborough Crescent, Kingston 6 in the parish of Saint Andrew. The property bears lot number 4 on the plan of part of Lot 417A Barbican Heights and is registered at Volume 1144 Folio 36 of the Register Book of Titles.

**[6]** The respondent filed a Fixed Date Claim Form on June 13, 2023 bearing claim number SU2023CV01895. An Amended Fixed Date Claim Form was filed on January 15, 2024. On the occasion of the final hearing September 17, 2024, Master Reid granted the orders sought in that Amended Fixed Date Claim Form. By virtue of the orders granted, development on the property is no longer restricted to the construction of single family residences. Multi-family dwellings can now be constructed.

**[7]** The covenants which pre-existed the modification were to the following effect:

1. *There shall be no subdivision of the said land.*

2. *No building of any kind other than a private dwelling house with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such private dwelling house and outbuildings shall in the aggregate not be less than Two Thousand Eight Hundred Dollars.*

3. *The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than Sixty Feet to any road boundary which the same may face nor less than Ten Feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all outbuildings shall be erected to the rear of the main building.*

**[8]** The modifications granted were that:

1. *There shall be no subdivision of the said land SAVE AND EXCEPT into Town House lots/Strata lots with the approval of the relevant planning authorities.*

2. *No building of any kind other than private dwelling houses, townhouses and/or apartments with appropriate outbuildings appurtenant thereto and to be occupied therewith shall be erected on the said land and the value of such*

*private dwelling house and outbuildings shall in the aggregate not be less than Two Thousand Eight Hundred Dollars*

3. *The main building to be erected on the said land shall face the roadway or one of the roadways bounding the said land and no building or structure shall be erected on the said land nearer than twenty feet to any road boundary which the same may face nor less than Ten Feet from any other boundary thereof and all gates and doors in or upon any fence or opening upon any road shall open inwards and all outbuildings shall be erected to the rear of the main building. For the purpose of this covenant the guardhouse, garbage receptacle, water meter house, electrical meter house and swimming pool shall not be considered as a breach of this covenant.*

**[9]** It is against that background that the applicant filed the applications now being considered. I do not propose to set out all the evidence filed in support of, and in opposition to the applications because of the several affidavits that were filed, some of which are quite voluminous. I will make reference to the evidence only in so far as it is necessary in order to arrive at a decision in this matter.

**APPLICATION TO SET ASIDE COURT ORDERS**

**[10]** As far as the application to set aside the court order is concerned, the main issue which arises is whether the orders granted in the Amended Fixed Date Claim Form should be set aside. This decision will turn largely on whether the applicant in these proceedings was served with the legal notices as directed by the Master.

**[11]** In his ‘affidavit filed May 27, 2025, in response to the notice of application to set aside the orders made in the Amended Fixed Date Claim Form, Mr Courtenay Garrick deponed that he fully complied with the first hearing orders made on July 4, 2023. He pointed out that he caused legal notices dated February 9, 2024 to be dispatched to the applicant at two separate addresses; namely No. 2 Melmac Avenue Kingston 5 which is the address of the applicant reflected on the duplicate certificate of title for land registered at Volume 1144 Folio 35. The second letter was directed to Lot 3 Barbican Heights, 8 Millsborough Crescent Kingston, which

he says is the location of the subject property as endorsed on the certificate of title. It is to be noted that that property is adjoining to the property in respect of which the modification of the restrictive covenants was sought and granted.

**[12]** Mr Hutchinson in his affidavit filed April 11, 2025 stated that on July 10, 2021, a change of address of registered company was effected in accordance with the provisions of the Companies Act of Jamaica in respect of the claimant. At paragraph 16 of his affidavit, he said that the Millsborough address to which the respondent directed the letter was incorrect. He said the proper mailing address is 8A Millsborough Crescent, Kingston 6. He stated that the applicant was never in receipt of any of those notices said to have been dispatched via registered mail.

**[13]** Mr Hutchinson deponed that the letter addressed to Melmac Avenue was returned to the respondent's attorney-at-law on March 27, 2024 via one Mr Arnold Madourie. See exhibit OCH6 attached to the affidavit of Mr Hutchinson filed June 19, 2025. There is evidence from the respondent that Mr Arnold Madourie is an authorised representative of the respondent's attorney-at-law.

**[14]** This means that non-delivery of the legal notice sent to Melmac Avenue was at least within the constructive knowledge of the attorney-at-law for the respondent, given the date on which the mail is said to have been returned. The respondent acknowledged by way of affidavit of Jamila Williams filed June 23, 2025 that the letter was returned.

**[15]** The applicant provided proof by way of exhibit indicating that the letter directed to Melmac Avenue was in fact returned. Mr Garrick said in his affidavit that that the registered mail directed to Melmac Ave had not been returned. Ms Williams deponed that when she was in the process of preparing the affidavit in response to this application, presumably Mr Garrick's affidavit, she was not then aware of the return mail, but that it was upon being advised by the Postmaster General of the fact of the return, that she undertook a more extensive search and realised that the mail had in fact been returned.

**[16]** Mr Hutchinson further deponed that he was informed by his attorney that a letter was received from Post and Telecommunications Department dated June 18, 2025, which confirmed that the letter sent to the Millsborough address was returned to sender. That letter from the Post and Telecommunications Department is exhibited at OCH7 to the affidavit of Mr Hutchinson filed June 19, 2025. In that letter, it was said that the Post and Telecommunications Department had issued a formal notice of arrival to the sender Simone Morris-Rattray and Associates on April 10, 2024, and that that notice advised that the registered item, which was endorsed with the stamp 'unclaimed', remained at the post office and was available for pickup.

**[17]** In his affidavit filed May 27, 2025, in response to the notice of application, at paragraph 4 (it is noted that there are 2 paragraphs numbered 4), Mr Garrick stated as follows:

> *4.That on February 12, 2024 the [sic] my process server, Mr Arnold Madurie caused the legal notice dated February 9, 2024 to be dispatched via registered post to Mailey Farms Limited at the following addresses*
>
> *i. 2 Melmac Avenue Kingston 5 being the address registered on the certificate of title for Lot 3 Volume 1144 Folio 35; and*
>
> *ii. Lot 3 Barbican Heights 8 Millsborough Crescent Kingston 8 being the location of the subject property and as endorsed on the title.*
>
> *4. That while the information contained in paragraph 15 of the applicant's affidavit correctly confirms the posting of the legal notice by registered mail on February 12, 2024, I wish to further clarify that a return of mail indicating non-delivery was only received in respect of the address listed at paragraph 4(ii) above, namely Lot 3 Barbican Heights 8 Millsbourogh Crescent Kingston. No such return of mail was received in relation to the registered office address at 2 Melmac Avenue. A copy of the return envelope is attached hereto and marked exhibit CG1 for identification.*

**[18]** From the evidence, there is proof that the letter directed to No. 2 Melmac Avenue was returned some six (6) months prior to the final hearing on September 17, 2024.

**[19]** It is of interest to note that Mr Garrick did not state when it is that the mail addressed to Millsborough Crescent was returned. Based on the evidence in totality, this court accepts that the legal notices directed specifically to the applicant in this case, were not served.

## RESPONDENT'S SUBMISSIONS

**[20]** Counsel for the respondent contends that a central tenet of the statutory framework governing service is a wide discretion conferred on the court in determining the method of service. She cited the provisions of the Act and the Practise Direction.

**[21]** Counsel contends that the language used by the Master did not mandate personal service, nor did it elevate either method of service above the other. Further, that the language did not even require that both forms of service be successful in delivery, only that they be attempted and recorded. I entirely disagree with this position.

**[22]** Counsel submitted further, that the reasoning in **Hopefield Corners Ltd v Fabric De Younis Ltd** Supreme Court Civil Appeal No 7/06 delivered October 24, 2008, supports the view that where at least one form of service has been carried out properly, and where there is no evidence of deliberate evasion or material prejudice, the process is still legally sufficient. She asks the court to distinguish the case of **Hopefield Corners**. She urged that in Hopefield Corners there was material non-compliance with the court orders because there was a failure to clearly identify the property in the legal notice, and that failure meant a fundamental violation of the purpose of the Practice Direction, In other words there was a total failure to comply with a core statutory requirement. By contrast, she urged, the applicant must be deemed to have been properly notified by the advertisement, therefore, in this case, there was not a total failure to comply with a core statutory requirement.

**[23]** It was Mrs Billings-Reid's submission that the provisions of paragraph 14 of the Practice Direction must be read in conjunction with Rule 39.6 of the Civil Procedure Rules. Therefore, she urged, the applicant is required to satisfy both limbs of the rule. She contends that the technical irregularity which occurred in this case would not be sufficient to merit a setting aside of the orders of the Master. The applicant would also be required to show that had he been given the opportunity to participate in the proceedings, it is likely that a different outcome would have resulted. She proffered that the applicant has not placed before the court any credible evidence capable of satisfying the conjunctive threshold required by CPR 39.6. Specifically, there has been no demonstration of any evidence that had the applicant been heard, a materially different outcome was likely.

**LAW AND ANALYSIS**

**[24]** **The Restrictive Covenants (Discharge and Modification) Act,** the **Restrictive Covenants (Discharge and Modification) Rules 1960** and **Practice Direction No. SC 2003/1** govern the statutory framework of the modification of restrictive covenants.

**[25]** **Section 3(2) of the Act states in part that:**

> *(2) The Judge shall, before making any order under this section, direct such enquiries as he may think fit to be made of the Town and Country Planning Authority and any local authority, and such notices as he may think fit, whether by way of advertisement or otherwise, to be given to the Town and Country Planning Authority and any persons who appear to be entitled to the benefit of the restriction sought to be discharged, modified, or dealt with.*

**[26]** Rule 2 of the **Restrictive Covenants (Discharge and Modification) Rules 1960** mirrors the provisions of section 3(2) of the Act.

**[27]** Practice Direction No. SC 2003/1 paragraphs 5, 6 and 7 state as follows:

*5. At the first hearing, the Judge in Chamber or the master will direct what notices, if any, are to be given and to whom, and what advertisements should be placed and may direct the claimant to furnish the Registrar…*

*6. On being directed as above, the claimant shall give such notices as directed, to persons who appear to be entitled to the benefit of the restrictions. The persons who appear to be so entitled may be decided by the Judge or Master from his perusal of the affidavit in support and any other documents such as title deeds supplied to the registrar.*

*7. The notices served and or advertised by the claimant shall give persons entitled to object to the discharge or modification of the restrictions at least 14 days from the giving of the notice, an opportunity to object if they so desire.*

*…*

**[28]** Paragraphs 12 and 18 of the Practice Direction address the consequence of noncompliance with the requirements for the giving of notices. Paragraph 12 states that:

*12. Where a notice (including one used in an advertisement) does not comply with the above requirements the court may regard the notice as being insufficient.*

*18. A final hearing conducted in breach of this Practice Direction or of Rule 8 of the Rules, is an irregularity and is liable to be set aside on application by anyone entitled to be heard.*

**[29]** Rule 8 speaks to what the Registrar is required to do after the expiration of the time for filing objections. Rule 8 is inapplicable to the present proceedings.

**[30]** However, rule 10 invests in a judge, the discretion whether to declare the proceedings invalid as a consequence of the noncompliance. I believe that that discretion should be exercised bearing in mind the provisions of Rule 39.6 of the CPR.

**[31]** It was made clear in **Hopefield Corners** that notwithstanding the provisions of section 3 (3) of the Act to the effect that orders for modification are binding on all persons whether they were parties to the proceedings, or whether or not they were served with notices, that is so only if the order was a valid one.

**[32]** The matter came before Master Miss S Reid for first hearing on January 15, 2024, where orders were made by the Master. Among those orders were that:

> *(1) Legal notices of this application are to be directed to persons affected as in paragraph 6 of the affidavit filed on January 15, 2024.*
>
> *(2) Affidavit of Service regarding the above legal notices is to be filed.*
>
> *(3) Legal Notices are to be published twice in a daily newspaper, seven (7) days apart and an affidavit exhibiting the publications is to be filed."*

**[33]** An applicant is required to comply with the orders of the court. He must give notices as the judge or master directs. The Master in this instance directed that notice be given by two separate methods. One method required that the specific property owners whose properties are affected by the covenant were each to be notified. She also directed that publications were to be placed in the Newspaper. That could not mean as Mrs Billings Reid submitted, that it was sufficient that an attempt be made to effect service by the method which would ensure that direct notification to be given to the persons whose properties are directly affected by the covenants, as long as the notification by publication was properly made.

**[34]** It is observed in passing that the applicant made extensive submissions and cited a number of authorities on the matter of deemed service and the circumstances in which service by post is rebutted. The respondent did not in any meaningful way take issue with the question of whether service by mail via the notices addressed directly to the applicant was deemed to have been made in circumstances where both pieces of mail were returned to the offices of the respondent's attorney at law. Suffice it to say that I find that the presumption of service was rebutted based on the evidence.

**[35]** In **Hopefield Corners**, the appellants appealed an order by Beckford J setting aside a court order for modification of restrictive covenants that was made by Cole-Smith J. Beckford J held that the notice sent to the respondent and that published by the appellants were insufficient as they did not comply with the Practice

Directions. The order made by Cole-Smith J was therefore an irregular order and was liable to be set aside.

**[36]** The requirement that the notice should contain the civic address, as is required by paragraph 9 and emphasised in paragraph 10 of Practice Direction, were not complied with, and neither did the publications in the newspaper contain the civic address. Additionally, both letters containing the notice sent to the respondent were sent to the incorrect address and were subsequently returned to the appellant's attorneys-at-law. When the learned judge granted the modification application, she was unaware that the respondent had not been served with legal notice or the learned judge was wrongly advised that the legal notice had been properly served on the respondent by letter.

**[37]** The Court of Appeal therefore held that the learned judge who considered the application to set aside the court order was correct to find that the respondent was not served with the notice and is entitled to complain that he was not given a chance to object.

**[38]** Regarding whether Sameer Younis, as a director of the respondent company, had actual notice of the advertisement published in the newspaper, the Court of Appeal said that the fact that Mr Younis observed significant development which suggested an intention to construct buildings on the site, does not irrefutably convey the fact that the covenants had been or would have had to be modified.

**[39]** Further that in any event, any notice received by a director of a company, which is not in a transaction as a director, is not notice to the company: see **The Societé Générale De Paris and Another v The Tramways Union Company, Limited, and Others** [1884] 14 QBD 424. The court found that Mr Younis, although managing director of the company, was in law a mere occupier of the premises.

**[40]** The instant case bears some similarities to **Hopefield Corner**. Like in **Hopefield Corners**, the mail purportedly sent to the registered address was not directed to the current registered address of the applicant company. There are also

differences. In **Hopefield Corners**, there had been communication between principals of both the appellant and respondent and the appellant's representative from that communication would have been aware that the respondent had objections to the modification of the covenants.

**[41]** In the instant case, Mr Hutchinson the principal and majority shareholder of the applicant had made observations of signs posted at the property in respect of which the modifications were sought which signs evinced the intention of developers to carry out construction on the land.It is true that in this instance, Mr Hutchinson would have been aware that modifications to the covenants would have been required. In both cases, the principals discovered that there had been applications for modification of the covenants after the orders granting the modifications were made.

**[42]** The two decisive factors in **Hopefield Corners** were that the Court of Appeal did not accept that the respondent's chairman and managing director was presumed to have had notice of the newspaper advertisement and that he must have observed the construction on the premises in respect of which the modification was sought, because he lived next door and therefore the respondent had notice of the removal of the covenants. Secondly, the notice did not comply with the requirement of paragraph 9 of the Practice Direction which requires that the notice should clearly and prominently show the civic address of the premises which is the subject matter of the application. It is true this this second factor is not a feature of the instant case, because there is no complaint that the description of the civic address given in any notice was inadequate. It is also true that in this case Mr Hutchinson had knowledge of the fact that construction was about to take place. I will address that matter in short order.

**[43]** There is nothing in my view that was said in **Hopefield Corners** that would give the impression that the failure in the notice to clearly and prominently show the civic address of the premises which is the subject matter of the application is a weightier consideration than that of serving notice on the property owners whose

properties are affected by the covenant. I therefore reject the submission of Mrs Billings Reid in that regard.

**[44]** On the question of whether it was sufficient that the applicant had notice via the newspaper advertisement, again, there is nothing in **Hopefield Corners** which suggests that the Court of Appeal was saying that the notice by advertisement would by itself have been sufficient. That matter was not really addressed. On the facts of that case, the notice in the advertisement as well as the notice purportedly addressed to the civic address were defective. I accept that that is not the case in this instance. The Master gave directives that notice should be served by both methods, therefore there ought to have been full compliance with the orders given by the Master at the first hearing.

**[45]** This court is not in a position to say that the notices to the applicant were deliberately directed to incorrect addresses, although the applicant has insinuated as much. Neither Mr Garrick nor Ms Williams was cross examined. It is however odd that the registered mail addressed to the Melmac Ave address was collected by the authorized agent of the respondent and /or his attorney at law some six months prior to the making of the final order, and that directed to Millsborough Crescent some 5 months prior, yet the fact of the return was not discovered.

**[46]** I am mindful of Ms Williams' explanation it was only after she was advised by the Postmaster General of the return, that she undertook a more comprehensive search and discovered that the return mail had been misfiled. Miss Williams who deponed that she is the paralegal who is in charge of the day-to-day operations of the respondent's attorney at law's office, was silent on the fact of the return of the mail sent to Millsborough address, although Mr Garrick acknowledged that it had been returned. Exhibit OCH 7 exhibited to the affidavit of Mr Hutchinson's April 11 affidavit also makes it clear that the respondent's attorney at law had notification that the mail addressed to the Millsborough address was returned in April of 2024, some 5 months prior to the granting of the final order. Mr Garrick simply acknowledged that the mail addressed to Millsbourough was returned. There is

really no explanation coming from the respondent as to any consideration given to the fact that at least piece of mail addressed directly to the applicant had been returned.

**[47]** Further, this court must take other factors into consideration. Mr Hutchinson deponed in his first affidavit that he had made observations of a sign affixed to the zinc fence on the road boundary of the land on which the development was to take place. That sign was a notice that the developer Bertnelle Construction intended to apply to construct multi-family units on the land. He said that he immediately contacted his attorneys-at-law and instructed them to write to the Chief Engineer of the KSAMC as well as to the potential developers to articulate his objection to any development that did not accord with the restrictive covenants endorsed on the subject land, which were also endorsed on the title to the applicant's land.

**[48]** Letters are exhibited to the applicant's affidavit which indicate that his attorney-at-law wrote to the KSAMC and set out in much detail the fact of, and the basis of the applicant's objection to the construction of multi-family dwellings on the property. It was indicated in that letter (Exhibit OCH3 to the April 11, 2025 affidavit of Mr Hutchinson) that part of the applicant's complaint was that they had not been served with any legal notice in relation to the application to modify the restrictive covenant. Exhibit OCH4 to that affidavit was a letter directed to Mr Daron Taylor and/or Mr Russel Nelson. This letter was sent by email to Bertnelleconstruction@gmail.com.

**[49]** From all indications, Mr Daron Taylor and/or Mr Russel Nelson are persons connected with Bertnelle Construction. Although this court cannot definitively say, it is reasonable to infer that the applicant's objection to the development conveyed by way of this email to Bertnelle Construction ought to have been brought to the attention of the person or entity responsible for undertaking the development and who was responsible for making the application for modification. Part of what was conveyed in that letter was the request which was made of the KSAMC to impose a cease-and-desist order on the developers and/or owners of 8B Millsborough

Crescent to be operative until an application was made and granted for modification. Implicit in such request would be an expectation that the applicant would be served with notice regarding the application for modification.

**[50]** Mr Hutchinson was clear that had the legal notices been served on the applicant, an objection to the proposed modification would have been filed within the stipulated time.

**[51]** I accept counsel's submission that Rule 39.6 of the Civil Procedure Rules is applicable to the present proceedings. The applicant did not state in his grounds that he was relying on Rule 39.6. He was therefore in breach of Rule 11. 7 (1)(b) which provides that an application must state briefly, the grounds on which the applicant is seeking the order. I do not however believe that that omission is fatal to his application. Rule 39.6 provides that:

> *(1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order.*
>
> *(2) The application must be made within 14 days after the date on which the judgment or order was served on the applicant.*
>
> *(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing-*
>
> *(a) a good reason for failing to attend the hearing; and*
>
> *(b) that it is likely that had the applicant attended some other judgment or order might have been made or made*

**[52]** Section 3(1) sets out the bases on which modification can be sought. section 3(1) of the Act states that:

> *A Judge in Chambers shall have power, from time to time on the application of the Town and Country Planning Authority or of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied–*

> *(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Judge may think material, the restriction ought to be deemed obsolete; or*
>
> *(b) that the continued existence of such restriction or the continued existence thereof without modification would impede the reasonable user of the land for public or private purposes without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction, or, as the case may be, the continued existence thereof without modification; or*
>
> *(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or*
>
> *(d) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:*
>
> *Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss.*

**[53]** The onus was on the respondent to establish that one or more of the grounds in section 3 of the Restrictive Covenant (Discharge and Modification) Act are satisfied at the time of the making of the application for discharge. The grounds referred to are:

1. Changes in the character of the neighbourhood
2. Whether the covenants impede reasonable user
3. The proposed modification or discharge will not cause injury
4. Persons entitled to the benefit of the covenant have agreed to the modification.

**[54]** The applicant in objecting to the modification, would have the onus of proof to show that the covenants still serve the original purpose and are still relevant and

necessary to preserve the character of the neighbourhood and have not become obsolete, and the modification would harm the neighbourhood. From all indications, the objector would not be required to prove the antithesis of all of the three basic ground on which modification may be granted, as set out in section 3(1) of the Act. The representative of the applicant, Mr Hutchinson, in his April 11 affidavit has set out reasonably detailed evidence as to how modification of the covenant would change the character of the neighbourhood. In that regard,

**[55]** In Mr Hutchinson's affidavit filed on April 11, 2025, the following was said:

*"25. That 1 do verily believe that the titles to the following lands in the Millsborough/Plymouth Avenue neighbourhood have had the Restrictive Covenant No. I only modified to permit a subdivision into smaller lots, the average areas being above 18,000 square feet. Some examples of this are as follows: -*

*<u>8 Millsborough Crescent (Lot 417A originally registered at Volume 940 Folio 47)</u>*

*Lot 1 11,649.5 sq. feet - Volume 1144 Folio 33*
*Lot 2 21,721,0 sq. feet - Volume 1144 Folio 34*
*Lot 3 18,854.9 sq. feet - Volume 1144 Folio 35*
***Lot 4 17,419.68 sq. feet - Volume 1144 Folio 36***
*Lot 5 16,406.6 sq. feet - Volume 1144 Folio 37*

*<u>2 Plymouth Avenue (Lot 419 registered at volume 940 Folio 452)</u>*

*Lot 1 25,321.00 square feet - Volume 1219 Folio 503*
*Lot 2 21,648.00 square feet - Volume 1219 Folio 504*

*<u>4 Plymouth Avenue (Lot 419A originally registered at Volume 940 Folio 453)</u>*

*Lot 1 26,292.10 square feet - Volume 1033 Folio 622*
*Lot 2 43,227.00 square feet - Volume 1033 Folio 621*

*<u>10 Plymouth Avenue (Lot 422 originally registered at Volume 940 Folio 397)</u>*

*Lot 1 29,500.00 square feet - Volume 1038 Folio 397*
*Lot 2 43,277.00 square feet - Volume 940 Folio 340*

*26. That I verily believe that majority of the lots in my neighbourhood have been used in accordance with and appear to comply with the covenants as they were*

*intended by the original Developers. The owners of the majority of these lots have constructed thereon a single-family dwelling house of a certain size, standing, quality and character and are surrounded by trees and manicured lawns and gardens with land space between each home and with outdoor domestic amenities which go towards settling and maintaining a high tone for the residential area and to enhance the value of each holding.*

*27. That it is evident from the Claim and the Final Order permitting modification of the restrictive covenants that the Claimant intends to subdivide the land, the subject of the Claim, for the purposes of establishing a development of private dwelling houses, townhouses and/or apartment of unstated size and density, with appropriate amenities. The Claimant has sought and obtained these modifications of relevant restrictive covenants in order to develop the Claimant's land so as to make it more convenient for his own financial advantage and private purposes, but which would be at the expense and disadvantage of the Applicant and others in the neighbourhood entitled to the benefit of the original covenants, and further, the proposed development will be totally inconsistent with the present appearance and character of the neighbourhood and will detract from the present reputation and quality enjoyed by the neighbourhood and will adversely affect its reputation and lower the value of the single family homes.*

*28. That the language used in the proposed modifications of the restrictive covenants numbered 1,2 and 3 is nebulous and totally non-specific in terminology and import and effectively seeks to totally erode and make obsolete the restrictions imposed by the original developers, Barbican Limited, which was intended to inure to the benefit of all successors in title in the subdivision. The restrictive covenants currently endorsed on the Certificate of Title for the Applicant's land and formerly for the Claimant's land are specific and negative in construction and import, and by virtue of the modifications he has sought to free himself of all restrictions that bind him in common with all other owners of parcels of land in the Barbican Heights subdivision aforesaid and will make him no longer answerable in law to other owners aforesaid, but rather having to comply only with the approvals of the non-specific "relevant authorities" of which adjoining owners will not have notice.*

*29. That the lot size of the Claimant's parcel of land is 17,419.68 square feet which is considerably less than less than half an acre based on the information contained on Paragraph 25 of this Affidavit. It makes the lot, the subject of the Claimant's Claim and Final Order smaller than most lots on Millsborough Crescent/Plymouth Avenue and therefore unsuitable for further subdivision into smaller lots and moreover, for a development of private dwelling houses, townhouses and/or apartments without considerable damage and dislocation for the other beneficiaries of the original covenants. which includes the said land owned by the Applicant.*

**[56]** The applicant has put forward what I regard as prima facie evidence that the neighbourhood still consists of predominantly single-family homes which is indicative of the fact that the covenants which existed before the modification was granted were still of value to the neighbourhood in the context of the provisions of section 3 (1) of the Act. Consequently, the proprietors of the other properties in the neighbourhood would still enjoy the benefit of those covenants. The evidence could prima facie establish that the construction of a multi-family property would not be in keeping with the existing character of the neighbourhood.

**[57]** Regarding the ground relating to whether the existence of the restriction would impede the reasonable user of the land, there is prima facie evidence from Mr Hutchinson which would show that the restriction did not impede reasonable user. That is evidence from which it could reasonably be inferred that there was in fact some practical benefit to be secured that could justify the continuance of the covenants.

**[58]** With regards to the third ground in section 3(1) of the Act, the representative of the applicant had made it clear that at least one (1) person (legal person) is not consenting to the modification.

**[59]** With regard to Rule 39.6(2) requiring that the application should be made within 14 days of being served with the order, there is no indication that the applicant was served with the order which it seeks to set aside. The respondent has not contended that it was served.

**[60]** Having regard to the foregoing, I am of the view that the orders of Master Reid made on September should be set aside and a new hearing held in respect of the application for modification. The matter is to be fixed for case management hearing so that the appropriate directives can be given.

**APPLICATION FOR INJUNCTION**

**APPLICANT'S SUBMISSIONS**

**[61]** Mr McPherson submitted that there is a serious issue to be tried and that issue relates to the service of notice or lack thereof. He submitted that construction at the site is proceeding at an extremely rapid pace and that if it is allowed to continue, the construction might be completed before the court has the opportunity to give judgment in the matter. This he said would be prejudicial to the applicant. He said injunctive relief is appropriate so that the respondent is forestalled from carrying out an activity that is irregular in the circumstances, due to the applicant having not had the opportunity of responding to the application for modification. He said that the modification is so irregular that it is almost an illegality for the respondent to be allowed to proceed with the development.

**[62]** Regarding whether damages would be adequate for either party, Mr McPherson said that he did not know how the issue of damages would arise for the respondent in the circumstances, and that the circumstances are almost identical to that of the case of **Hopefield Corners Ltd v Fabrics De Younis Ltd**, wherein it was found by the Court of Appeal that the issue of damages did not arise. He stated further that damages in this kind of case is unquantifiable.

**[63]** He said the question of damages might arise on an objection to modification, but it does not arise where there is an application to set aside court orders. He also submitted that since the applicant is not seeking to recover monetary damages, damages do not arise in this circumstance. Counsel maintained that the applicant is seeking to avert the damage that will occur if this development is allowed to continue in the in light of the fact that the applicant was not given the opportunity to object to the modification. He strongly asserted that damages is not an adequate remedy for the loss of a lawful opportunity to object to the modification of restrictive covenants which will affect the entire character of that neighbourhood and the land use. Counsel pointed out that he was distinguishing between monetary damages and damage to be suffered if the court order is not set aside.

**[64]** Regarding an undertaking as to damages, Mr McPherson indicated that he was not in a position to give an undertaking as he had no instructions in that regard, and that he was not aware that the applicant was required to give an undertaking.

## RESPONDENT'S SUBMISSIONS

**[65]** The respondent filed submissions on June 27, 2025. Mrs Billings Reid submitted that the principles governing the grant of interlocutory injunctions are outlined in the landmark case of American Cyanamid Co v Ethicon Ltd [1975] AC 396 and were later affirmed by the Privy Council in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd** [2009] UKPC 16. Therefore, the proper approach submitted, is that the court should consider:

*i. Whether there is a serious issue to be tried;*

*ii. Whether damages would be an adequate remedy for either party;*

*iii. Whether the applicant has provided an undertaking in damages; and*

*iv. Where the balance of convenience lies.*

**[66]** It was also her submission that the first hurdle is that the applicant must establish that there is a serious question to be tried. She urged that the applicant's case does not meet this threshold as it is premised solely on a procedural complaint that one mode of service failed. She said this overlooks that service by advertisement was expressly authorised by the court and duly executed. Further that while the applicant denies receiving mailed notice, it is undisputed that they became aware of the development through the prominently posted building notice dated March 4, 2022, and that despite this, they failed to object through the proper statutory channels or engage with the court's process in a timely fashion.

**[67]** It was also the submission that the applicant deponed that he saw a construction notice under the Building Act, which clearly instructed objections to be filed with the KSAMC within fourteen (14) days. It is said that the applicant failed to do so,

and their first formal response came nearly a year later and was not addressed to the KSAMC or to the court, but to the construction company. Counsel submitted that this inaction, in the face of multiple opportunities to be heard, belies any credible claim of prejudice or injustice.

**[68]** Mrs Billings-Reid submitted that the applicant, being a registered company, must be treated accordingly, that is, as a legal entity distinct from its officers. She also submitted that Mr Overton Hutchinson was the only director that filed evidence, and that no other director or authorised officers have filed evidence affirming the alleged lack of notice. Counsel referred to the case of **Salomon v A. Salomon & Co Ltd** [1897] AC 22 in support of this point. She further submitted that it is therefore legally insufficient for a company to assert ignorance based solely on one director's personal knowledge, especially where the notice was published publicly and widely, as ordered by the Court.

**[69]** Counsel submitted that the company's claim of procedural deprivation lacks credibility and does not support the grant of injunctive relief as there is a real and reasonable likelihood that any of the company's other representatives or agents could have seen the publication or brought it to the company's attention. She said that on this basis, the application lacks merit, that the procedural argument is weak and that therefore, there is no serious issue to be tried.

**[70]** Regarding whether damages would be an adequate remedy, counsel submitted that if the court finds that there is a serious issue to be tried, then harm to the applicant is quantifiable. She said the alleged harm that the applicant fears, i.e., a change in the character of the neighbourhood and a potential diminution in the value of its property or amenity, is not irreparable or unquantifiable. She said if the applicant proves at trial that the modification of the covenants should not have been granted or that the applicant has suffered loss as a result of the respondent’s development, then the law is fully capable of compensating that loss in damages. Counsel further said that where Dr Hutchinson deponed that the multi-family development will depreciate the value of the applicant’s holding and others in the

area, is a classic economic injury which can be estimated by valuation experts and compensated in monetary terms

**[71]** She further submitted that under section 3 of the Restrictive Covenants (Discharge and Modification) Act, even when restrictive covenants are modified over objections, the Court has the power to award compensation to an objector for any diminution in property value attributable to the discharge or modification. She said that this statutory mechanism underscores that monetary compensation is deemed an adequate remedy for persons in the applicant's position.

**[72]** Counsel referred to the case of **Hopefield Corners Limited v Fabrics De Younis Limited** where Harrison P (as he then was) observed that a developer should not be allowed to "cure his default by a mere 'recoverable compensation'". She however posited that this statement was made in the context of a developer who flouted the required process. She said that **Hopefield Corners** is inapplicable to the case at hand, as the respondent has not defaulted in the statutory requirements, he complied with them and obtained a valid order. Further, that nothing in **Hopefield Corners** suggests that where a party has a valid order for modification, that damages cannot be a remedy for an adjoining owner's consequent loss.

**[73]** Counsel said that the respondent is a commercial developer with a significant capital investment in the project and so these assets form a ready fund against which damages would be assessed and paid. Further that having submitted to the court's jurisdiction to secure a modification of covenant, the respondent is in no position to resist compensating for any adverse outcome flowing from that process.

**[74]** She submitted that the applicant has not discharged the burden of showing that damages would not be an adequate remedy as its affidavits speak only to generalised aesthetic concerns and offers no expert evidence of diminution in value or concrete loss. She submitted that damages would be an adequate remedy for the applicant if the development is found to be wrongful or if the court order is set aside.

**[75]** Regarding whether the applicant has provided an undertaking as to damages, counsel for the respondent submitted that it is a settled and fundamental principle of equity that an injunction will not be issued without a substantial undertaking in damages, which serves as a safeguard to ensure that the defendant is adequately protected against losses, if the injunction is later determined to have been unjustly granted.

**[76]** Mrs Billings-Reid submitted that the applicant has failed to provide any credible, enhanced or secure undertaking as there is no evidence of a bond being posted, no affidavit of means has bene submitted and there is an absence of any verifiable financial capacity. She also submitted that this exposes the respondent to a risk of irremediable prejudice. Further that if the injunction is granted and the respondent ultimately prevails, there will be no meaningful recourse for the substantial damages incurred. She said that this absence of a credible and robust undertaking must weight decisively against the grant of any interim injunction. The dictum of Mangatal JA (Ag) in the case of **TPL Ltd v Thermo-Plastics (Jamaica) Ltd** [2014] JMCA Civ 50 was referred to in support of this submission.

**[77]** Regarding the balance of convenience, counsel submitted that it decisively favours refusing this injunction as granting relief at this belated stage would inflict disproportionate and irremediable harm upon the respondent, which far exceeds any potential benefit to the applicant.

**[78]** Counsel submitted that were the court to grant the injunction now, this would freeze a multimillion-dollar development midstream. Further that the respondent would suffer severe prejudice in the form of breaches of contractor obligations, idle labour and materials, accruing loan interest and loss of market opportunity. She submitted that these harms are grave, difficult to quantify and largely irremediable.

**[79]** Mrs Billings-Reid submitted that the applicant itself is in violation of the very restrictive covenants that it seeks to enforce against the respondent. This is so, she submits, as there is no evidence of any other place of business for Mailey Farms Limited, leading to the inference that business operations are being

conducted at the subject premises. She also submitted that this use is in direct contravention of the express covenant found on the title, which prohibits any commercial activity on the premises. She said that this raises a compelling issue of equity, as the principle of equity bars a party from obtaining equitable relief where that party is guilty of misconduct in relation to the subject matter of the claim. The case of **Olive Grey v Robert Grey** [2018] JMSC Civ 52 was referenced in support of this submission, wherein it is said that the court denied relief based on the claimant's own improper conduct.

## THE LAW

**[80]** The guiding principles which the court must consider in determining whether to grant an injunction was set out in the House of Lords decision of ***American Cyanamid v Ethicon Ltd [1975] AC 396***. These principles have been adopted in our jurisdiction, as reiterated by the Privy Council decision of ***National Commercial Bank v Olint [2009] 1 WLR 1405***.

**[81]** The court must consider: -

1. Whether there is a serious issue to be tried;

2. Whether damages would be an adequate remedy; and

3. Whether the balance of convenience lies in favour of granting or refusing the injunctive relief that is sought. (per Lord Diplock in ***American Cyanamid***)

**[82]** Regarding these guiding principles, Lord Diplock in ***American Cyanamid*** expounded at pages 407 to 408. On the question of whether there is a serious issued to be tried, he said:

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

> *It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing":* ***Wakefield v. Duke of Buccleugh*** *(1865) 12 L.T. 628, 629.* ***So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought****." (emphasis added)*

**[83]** On the matter of the adequacy of damages he said:

> *"As to that,* ***the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to 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. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.****" (emphasis as in the original)*

**[84]** In explaining when the balance of convenience should be considered, His Lordship explained that:

> *"****It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.*** *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. These will vary from case to case." (emphasis as in the original)*

**[85]** Specifically, with regard to the preservation of the status quo, His Lordship made it plain that:

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

**[86]** And the exposition continued thus:

> *"Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. 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."*

**[87]** In the Privy Council decision of ***National Commercial Bank v Olint [2009] 1 WLR 1405***, which emanated from our local courts, Lord Hoffman stated at paragraph 16 that:

> *"…The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in* ***American Cyanamid Co v Ethicon Ltd*** *[1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

**[88]** On the matter of an undertaking as to damages, His Lordship went on to state, at paragraph 16, that:

> "…*if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted."*

**ANALYSIS**

**Whether there is a serious issue to be tried**

**[89]** This court accepts that there is a serious issue to be tried. I do not accept the submission of the respondent that because one aspect of the order for service was complied with, then the applicant had notice. The core of the applicant's complaint at the end of the day is that he did not get an opportunity to object to the modification of the covenants. Thus even though he had become aware that construction was impending, it is not the same thing as saying that he was aware of the application for the modification. He had lodged his complaint with the authority that grants permission for building.

**[90]** One issue is whether the applicant was given notice of the application for the modification of restriction covenants which affected its property. Further whether if he had appeared at the hearing of the Fixed Date claim form in relation to the application for the modification and was heard, it is likely that that a different order would have been made. As explained in the analysis regard the question of whether the orders granted in the Amended Fixed Date Claim Form should be set aside, he has put forward evidence which a judge would be bound to give some weight to in deciding whether a modification should be granted.

**Whether damages is an adequate remedy for the applicant**

**[91]** Mr Mc Pherson's submissions on the question of whether damages would be an adequate remedy indicate a lack of understanding of the significance of the question in the context of an application for an interlocutory injunction. The questions that this court must consider so far as the applicant is concerned were correctly identified by Mrs Billings Reid.

**[92]** The issue is really, if the applicant were to be successful ultimately at the hearing in persuading the court that there should be no modification of the restrictive covenant, but the defendant were to be permitted to continue the construction, would the applicant be adequately compensated by an award of damages. Further, if damages would be an adequate remedy would the defendant be in a financial position to pay them. If damages would be an adequate remedy and the respondent is in a position to pay damages, then no interlocutory injunction should be granted notwithstanding the apparent strength of the applicant's case at this stage.

**[93]** It is the respondent's position that damages is an adequate remedy for the applicant. This was said on the view that the ultimate questions in this regard are whether a change in the character of the neighbourhood as explained by Mr Hutchinson in his April 11 affidavit and any potential and or consequent diminution

in the value of the applicant's property would be compensable by an award of damages. It was also advanced that the respondent is in a position to pay damages.

**[94]** An affected landowner could claim damages by reference to the amount which he might reasonably have demanded for the release of the covenant. This award could arise in two ways: where there has been a breach of the covenant and in lieu of opposing the application for modification where that application is properly granted.

**[95]** There is an abundance of cases which demonstrate that damages is a remedy available for the breach of restrictive covenants in those circumstances. Damages may be awarded for the diminution in the value of property. See **Wrotham Park Estates Ltd v Parkside Homes Ltd** [1974] 2 All ER 321.

**[96]** We are not in the instant case faced with a scenario where it can properly be said that there is a breach of the restrictive covenants. Neither are we faced with a scenario where the applicant is agreeing to forego objection to the modification and is willing to accept damages or has foregone his right to oppose the modification of the covenant. The question here is not therefore whether damages is an adequate remedy for changes in character of one's neighbourhood and diminution in value of applicant's property where that was brought about by the modification of restrictive covenants.

**[97]** The applicant is saying that the respondent obtained the modification of the restrictive covenants in breach of the order of the Master that the applicant should be served with notice. In essence he is saying that the modification granted was invalid. I agree that if the modification was granted in breach of a court order, in those circumstances, damages ought not to be an available remedy. By saying that damages is an adequate remedy in those circumstances, this court would be saying that where one breaches a court order then he may compensate another who may be adversely affected by that breach.

**The respondent's undertaking as to damages**

**[98]** In any event, Mr. Garrick deponed that in sharp contrast to the applicant, the respondent possesses real assets including the land and the physical improvements forming the substance of the litigation so that if the applicant were to proceed at trial, the respondent would be ready to satisfy any award of damages. That evidence stands unrefuted, although the court does not know the extent to which those assets would be available to satisfy an undertaking as to damages, given Mr Garrick's evidence regarding the existence of loans associated with the property.

**[99]** He further deponed that the prejudice that would befall the respondent would outweigh any speculative harm alleged by the applicant and therefore the balance of convenience lies squarely with allowing the respondent to continue construction in reliance on the court order that was lawfully obtained.

**Whether damages would be an adequate remedy for the respondent**

**[100]** In addressing the question of the adequacy of damages as it relates to the respondent, the court must consider whether if the defendant were to succeed at the hearing in convincing the court not to set aside the order granting the modifications of the covenants, and consequently is allowed to proceed with the construction of multifamily dwellings, he would be adequately compensated by the applicant's undertaking as to damages for the loss he would have incurred as a consequence of the delay in being able to continue with the construction and all the losses flowing form that delay. If damages would be an adequate remedy and the applicant would be in a financial position to pay them, there would be no basis for refusing the interlocutory injunction.

**[101]** At paragraph 10 of the affidavit in response to the application for the injunction, Mr Garrick stated that the respondent has incurred substantial costs, that the foundation and primary structural work are significantly completed and financing, labour and material investments have been mobilized. He said that a halt to construction at this stage would occasion breach of multiple contractual obligations with contractors and consultants, idle site conditions leading to material wastage and additional overheads. The accruing of interest on loans and the loss of market opportunity as well as reputational harm. He further stated that the applicant's affidavit offers credible evidence of its ability to compensate the respondent if the injunction is granted in error.

**[102]** He pointed out that there is no affidavit of means, no bond posted and no demonstration of liquidity. He went to observe that based on the available information, the applicant's primary asset appears to be a single residential property. Mrs Billings Reid submitted that it is a settled and fundamental principle of equity that an injunction will not be issued without a substantial undertaking in damages.

**[103]** Normally, an undertaking which can be relied upon will be a necessity if an injunction is to be granted. (**Maldives Airports Co Ltd v GMR Male International Airport Pte Limited** [2013] S.G.C.A. 16 at 79 to80) But a court in its discretion may decide to grant injunctive relief in rare cases to an impecunious litigant, if the court takes the view that the risk that the undertaking may not be honoured should not prevent the grant of the injunction. This is a decision which should be at least in large measure dictated by the strength of the applicant's case. By strength of the case, I am here referring to the likelihood of the applicant succeeding in having the court refuse the orders for modification of the restrictive covenants after a final hearing duly conducted in accordance with the provisions of the Restrictive Covenant (Modification and Discharge) Act, Rules and Practice Directions, whether contested or not, depending on how the litigation unfolds.

**[104]** It is difficult to speak to the likelihood of that happening because the court will make a decision based on an assessment of all the factors set out in section 3 of the Restrictive Covenant (Modification and Discharge) Act. Although the applicant has in my view put forward evidence that could potentially lead to the setting aside of the orders previously made, all will be dependent on the totality of the evidence coming from both sides, therefore this court cannot predict the outcome of the case.

**Whether the applicant has given an undertaking as to damages**

**[105]** It is therefore a case in which the application should give an undertaking as to damages given the very great likelihood of the respondent experiencing very significant financial losses if an injunction should be granted. In the case of **TPL Ltd v Thermo Plastic (Jamaica)Limited** [2014] JMCA Civ 50 Mangatal J observed that without a an applicant indicating an ability and willingness to provide a proper undertaking as to damages, it would be impossible to carry out the balancing exercise and arrive at a proper assessment as to which course is likely to cause the least irremediable prejudice without requiring some substantiation posture and capacity to pay damages in the event they are required to do so. She further observed that this has been particularly so in relation to companies and commercial matters.

**[106]** Mangatal JA held that it was important for the trial judge in that case, to have required proof of the respondent's willingness to give an undertaking as to damages and the willingness to satisfy one. She accepted that there was no unbendable rule that a party must provide an undertaking as to damages.

**[107]** In **University Hospital Board of Management v Dr Sandra Williams-Phillips** [2014] JMSC Civ 47, there was extensive discourse regarding the undertaking as to damages in considering whether to grant or withhold an injunction. The substantive claim was for trespass. It had been alleged that the defendant entered

the cardiology clinic at the hospital on various days without authorisation and searched patients' records and molested staff members. An injunction was sought and granted

**[108]** The court at paragraph 14 referred to the case of **Cheltenham & Gloucester Building Society v Ricketts and others** [1993] 4 All ER 276, where Neill LJ outlined the following points as being applicable regarding undertakings as to damages:

> *"(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does.*
>
> *(2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted.*
>
> *(3) The undertaking is not given to the party enjoined but to the court.*
>
> *(4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.*
>
> *(5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued…".*
>
> *(6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd LJ pointed out in Financiera Avenida v Shiblaq [1990] CA Transcript 973 the court may occasionally wish to postpone the question of enforcement to a later date".*

**[109]** In the case of **Grant, Victoria, Linsford Hamilton, Cyril Anderson et al v. Noranda Jamaica Bauxite Partners, Noranda Jamaica Bauxite Partners 11 et**

**al,** [2023] JMSC Civ 6 the court relying on the Judicial Committee of the Privy Council decision **Belize Alliance of Conservation Non-Governmental Organizations v Department of Environment,** declined to insist on an undertaking as to damages.

**[110]** Residents, some of whom were farmers, filed a case claiming bauxite mining activities violated their "fundamental right to life; the right to receive information; the right to reside in any part of Jamaica; the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage; and the right to protection from degrading treatment. It was made clear from the evidence adduced on behalf of the respondents that they would suffer financial hardship and financial losses, were the Court to restrain the commencement of bauxite mining activities pursuant to special mining lease held by the respondents.

**[111]** The court granted the injunction only in respect of mining pursuant one lease because no activity was imminent in respect of the others. In declining to insist on an undertaking as to damages, the court determined that in light of the magnitude of the issues raised by the applicants in their claim the court would exercise its discretion in favour of waiving the requirement that the applicants give an undertaking as to damages. The basis for so doing was that that course was likely to minimize the risk of an unjust result. It is to be noted that that is a case where the applicants had alleged breach of their constitutional rights, and there was evidence that the applicants, whether individually or collectively, were not in a position to give an undertaking. There is no evidence from the applicant as to its financial viability or otherwise and although this case is ultimately concerned with the breach of a right and one which involves property, the applicant's right affected in this instance cannot be elevated to the status of a constitutional right.

**[112]** This is not to suggest that there aren't other types of cases in which the court ought to exercise its discretion to not require an undertaking but the applicant has put

forth nothing for the court's consideration as to why an undertaking should not be given.

**[113]** Items (5) and (6) of **Cheltenham & Gloucester Building Society v Ricketts and others** are not applicable to the presence discourse, but the other observations are clearly applicable. In the present case, the applicant has not only failed to give an undertaking, but has wholly failed to satisfy this court that it has the means to honour an undertaking. That to my mind is the decisive factor in this application. The application will not be granted.

**Status quo**.

**[114]** Where other factors appear to be evenly balanced, then the court should seek to preserve the status quo. The status quo was explained in ***Garden Cottage Foods Limited v. Milk Marketing Board [1984] 1 A.C. 130*** (See paragraph 45 of ***Ralph Williams V Commissioner of Lands)*.** It was defined as *"generally being the state of affairs existing during the period immediately preceding the issue of the claim seeking a permanent injunction*". We are not here concerned with the granting of a permanent injunction, but the same definition would be applicable in an instance where an interlocutory injunction is being sought.

**[115]** Mr Mc Pherson urged the court to accept that the status quo is the state of affairs prior to the commencement of construction at number 8A Millsborough Crescent. If I accept the definition in ***Garden Cottage Foods Limited v. Milk Marketing Board***, then the existing state of affairs is that there is an ongoing construction.

**[116]** The evidence from Mr Garrick's affidavit filed in response to the application for injunction is that construction is underway. Mr Hutchinson deponed to the fact that construction is underway. In this instance it would not be a question of embarking upon an undertaking that has not yet commenced. This is not a case where the court would necessarily seek to preserve the status quo.

**Balance of convenience**

**[117]** Regarding the balance of convenience, Mr McPherson submitted that it favours restraint and maintaining the status quo, that is, what existed before the modification was granted and before the development commenced. He also submitted that the applicant stands to suffer irreparable harm if the development is completed unlawfully and that the respondent will suffer minimal prejudice if restrained, as the question of the modification must first be decided in a lawful manner.

**[118]** In balancing the convenience, the court should adopt the position that will result in the least risk of injustice. The court considers that the development on subject property is a commercial undertaking. The respondent is likely to be prejudiced if the interim injunction is granted in that he could be put to great expense, even financial ruin. There however could be even greater prejudice if the interim injunction is refused, he continues the construction, and the modification is ultimately refused. That prejudice could be to the applicant in that the applicant would now be left to deal with a neighbourhood that has changed, or the respondent could be left with a situation where he had to demolish the building.

**Delay**

**[119]** Mr Garrick also deponed that the modification order remains valid, a point with which I disagree. He also deponed that the construction is being carried out in accordance with the necessary municipal approval and he exhibited a copy of the building approval. He also stated that a sign had been erected in a prominent position at the property signifying the respondent's intention to build from as far back as March 4, 2022, although the applicant claims that he first became aware of any sign indicating that intention in February of 2023 and yet he only brought his application in April 2025 by which time the construction had substantially

progressed he says that the delay is incompatible with the principle of equity and interlocutory relief.

**[120]** Delay in making an application for an injunction is a relevant factor for the court's consideration. Among the issues to consider is how if at all the delay in making the application has affected the defendant. In this case, Mr Hutchinson became aware of the likelihood of construction taking place in February according to his evidence. Because of the absence of cross examination, this court cannot make a decision as to whether it should accept that signs were displayed since 2022 March. However, I have not seen anywhere in any of the affidavits filed on behalf of the respondents that signs were erected as far back as March 2022. That information appears before the court only by way of submissions, which is not an acceptable manner by which information is to be placed before the court. The notice itself that was exhibited by the applicant's representative Mr Hutchinson bears the date March 4, 2022. That is not proof that it was erected on that date.

**[121]** The respondent's application for modification was filed in June of 2023. Apart from lodging his objections with the developer/construction company and writing to the KSAMC, there is no evidence that the applicant took any other steps before the filing of the application in 2025. In any event, the court is mindful that even if Mr Hutchinson became aware that building was about to take place on the property that fact is firstly, not notice that there would be an application for modification of the covenant and secondly even if it were, that was not notice to the applicant. The basic for saying so is that notice received by a director of a company which was not received by him in his capacity as a director is not notice to the company **The Societe Generale De Paris and Another v The tramways Union Company Limited and Others** [1884] 14 QBD 424, as s It is not clear from the applicant's evidence at precisely what point he became aware that an order for modification had been granted and the evidence discloses that to date, the applicant has had no proper notice of the application. Notwithstanding that the applicant has brought the application on the knowledge garnered apparently by Mr Hutchinson, and this

court is slow in allowing the applicant the circumstances to say that there was delay in making the application.

**Other factors**

**[122]** Regarding the respondent's submission that it is legally insufficient for a company to assert ignorance based solely on one director's personal knowledge, especially where the notice was publicly and widely published as ordered by the Court, this court says that Mr Hutchinson was clear that he is a director with majority shares in the company, and he is therefore authorized to speak on behalf of the company. I do not believe it was necessary for all officers of the company to give affidavits indicating that the company had no knowledge of the application for modification.

I now address the respondent's submission that the applicant is in violation of the very restrictive covenants that it seeks to enforce against the respondent. While I accept that there is no evidence of any other place of business for Mailey Farms Limited, it cannot lead to the inescapable inference that business operations are being conducted at the subject premises. The applicant in my view was not required to place any evidence before the court in relation to what business it carries on. If the respondent wishes the court to come to the conclusion that the applicant is carrying on business at its registered address, the onus is on the respondent to place evidence before the court. The respondent has not brought any evidence to say what business if any is carried on by the applicant or that the business is carried on at 8A Millsborough Crescent.

**RELIANCE ON AFFIDAVIT AND SUBMISSIONS OF RESPONDENT**

**[123]** Mr McPherson took issue with the timing of the filing of the affidavit and submissions of the respondent in relation to the application for injunction. He claims that they were not filed in obedience to the order of Stamp J. The minute of

order revealed that Stamp J made no order regarding the filing of documents by the respondent in relation to the injunction. Though not in these terms the effect of the directive regarding the filing of documents re an injunction was that the applicant could file the application for the injunction so that it could be heard by or before June 30 The application for injunction was filed on June 12, 2027 along with an affidavit. The affidavit in response and the submissions were filed on June 27. There is no evidence to this effect as the issue was raised on the final day of the hearing, but Mrs Billings Reid advised the court that the application was not served until June 20. Mr Mc Pherson did not refute that. In those circumstances, the filing of the affidavit and submissions was not in breach of any rule of court or order of the court.

**WHETHER ORDER SHOULD BE MADE AS TO ENDORSEMENT ON THE CERTIFICATE OF TITLE**

**[124]** On July 16, 2025 when I was about to deliver the judgment, Mr Mc Pherson asked the court to make an order that the final order for modification made on September 17, 2024 which was endorsed on the certificate of title registered as Volume 1144, Folio 36 of the Register Book of title be expunged from the said certificate of title, and that the Registrar of Titles be instructed accordingly. Mr McPherson indicated that the applicant had included in the orders sought, one that requested of the court that it grants any other order that the court sees fit. He submitted that that omnibus order permits the court to make the order sought. I agree with his position that it is open to the court to make the order sought. However, because Mrs Morris Rattray who appeared for the respondent then, had misgivings about an endorsement and particularly an order for expungement, I adjourned the matter until July 17 to give her the opportunity to address the court on the matter. On the 17th of July, Counsel did not urge on me any valid reason as to why the endorsement should not be made. She took the view that the order to set aside the modifications already effectively encapsulates the instructions to the Registrar. In fact, she ultimately accepted that an endorsement should be made. I did not accept her submission that there should be no order directing an expungement. The order of the court

directing an expungement does not speak to the precise form of the endorsement that is to be made on the certificate of title. The Registrar decides the form. Therefore, that order will be made.

**CONCLUSION**

**[125]** In light of the discussion and my conclusions, the orders made by Master, Miss S. Reid on the 17th day of September, 2024 on the Amended Fixed Date Claim form, are set aside. A new hearing is to be held in respect of the application for modification. The matter is to be fixed for case management hearing so that the appropriate directives can be given. The applicant was not clear and definitive in respect of what document disclosure was sought, therefore the court declines to make an order for disclosure. The application for injunction is refused because the applicant has failed to give an undertaking as to damages or to demonstrate that the applicant or anyone on the applicant's behalf, is in a position to give a meaningful undertaking.

**[126]** On the question of costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Neither party has had complete success on these applications. This court is of the view that each party should bear its own costs, since the applicant was successful in relation to one application and the respondent was successful in relation to the other.

**ORDERS**

1. The orders made by Master, Miss S. Reid on the 17th day of September 2024, on the Amended Fixed Date Claim form, are set aside.

2. The final order for modification made on September 17, 2024 which was endorsed on the certificate of title registered at Volume 1144, Folio 36 of the Register Book of Titles is to be expunged from the said certificate of title, and the Registrar of Titles is instructed accordingly.

3. A new hearing is to be held in respect of the application for modification.

4. The matter is to be fixed for case management conference on November 18, 2025 at 2pm for 30 minutes.

5. Each party is to bear their own costs.

**……..**
**Andrea Pettigrew Collins**
**Puisne Judge**