



[2023] JMCC COMM. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00027

BETWEEN	REXTON HOLDINGS LLC	CLAIMANT
AND	AMATERRA JAMAICA LTD.	1ST DEFENDANT
AND	AMATERRA JAMAICA H1 LTD.	2ND DEFENDANT
AND	AMATERRA JAMAICA VR1 LTD.	3RD DEFENDANT
AND	AMATERRA UTILITY LTD.	4TH DEFENDANT

Mr Jonathan Morgan instructed by DunnCox, Attorneys-at-law for the Claimant.

Ms. Ashleigh Ximines instructed by Knight Junor Samuels, Attorneys-at-law for the 1st to 4th Defendants

IN CHAMBERS VIA VIDEO CONFERENCE

Heard: 3rd, 25th May and 13th July, 2023

**APPLICATION TO REMOVE CAVEAT – INJUNCTION - WHETHER THERE IS A
SERIOUS ISSUE TO BE TRIED - WHETHER DAMAGES ARE ADEQUATE –
BALANCE OF CONVENIENCE – SPECIFIC PERFORMANCE – BREACH OF
CONTRACT**

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

- [1]** This is a claim for damages for breach of contract and specific performance. Rexton Holdings LLC (hereafter Rexton Holdings) is a company formed according to the laws of Qatar with its registered address in Doha Qatar. Rexton Holdings is also the assignee of all rights and responsibilities vested in Rexton Capital Partners Limited (hereafter Rexton Capital) a company previously governed by the laws of the UAE with its registered address in the UAE. Rexton Holdings and Rexton Capital were formed to carry on the business of investing in international development projects.
- [2]** Amaterra Jamaica Limited (hereafter Amaterra Jamaica) is a company formed under the laws of Jamaica and held itself out to be the owner of extensive lands in Trelawny in respect of which there was an intention to develop numerous all-inclusive resorts. Amaterra Jamaica H1 Limited (hereafter Amaterra H1), Amaterra Jamaica VR1 Limited (hereafter Amaterra VR1) and Amaterra Utility Limited (hereafter Amaterra Utility) were formed as holding companies.
- [3]** In or around October 2017, Rexton Holdings entered into several agreements with the Defendants for the conceptualisation, design, development, management and ownership of an eight hundred (800) room all-inclusive resort property to be developed on land known as Part of Stewart Castle, Trelawny registered at Volume 1523 Folio 54 of the Register Book of Titles (hereafter the property). After Rexton Holdings began transferring funds to Amaterra Jamaica pursuant to the terms of the agreement, it was discovered that Amaterra Jamaica was not the owner of the intended resort property. In fact, Amaterra Jamaica only became the owner of the resort lands in February 2019. According to Rexton Holdings, Amaterra was also unable to comply with several other obligations as agreed within the timeframe under the agreements.

[4] On April 4, 2021, Caveat No. 2309133 was lodged on the Defendants' properties to protect Rexton Holding's interest. On April 12, 2023, the Registrar of Titles issued three (3) Notices to Caveator that:

- a. Amatterra Jamaica VR1 is the registered proprietor of the property below has lodged for registration, Mortgage No. 249833 to Audley Evans.
- b. Upon the expiration of fourteen (14) days from the service of this Notice on you Caveat numbered 2309133 (lodged by you on the 12th day of April, 2021) will be deemed to have lapsed.
- c. The Registrar of Titles shall thereafter proceed to register the said Mortgage in accordance with the provisions of the Registration of Titles Act unless you sooner obtain and serve on me an Order from the Judge forbidding me to do so.

[5] On April 6, 2023, Rexton Holdings filed an application seeking the following Orders:

- a. Caveat Number 2309133 lodged on the 12th day of April 2021 by Rexton Holdings LLC remain endorsed on the Certificate of Title registered at Volume 1528 Folio 981 of the Register Book of Titles until the determination of this claim and the complete satisfaction of any Judgment granted to the Claimant herein.
- b. Caveat Number 2309133 lodged on the 12th day of April 2021 by Rexton Holdings LLC remain endorsed on the Certificate of Title registered at Volume 1528 Folio 982 of the Register Book of Titles, until the final determination of this Claim and the complete satisfaction of any Judgment granted to the Claimant herein.

- c. Caveat Number 2309133 lodged on the 12th day of April, 2021 by Rexton Holdings LLC remain endorsed on the Certificate of Title registered at Volume 1528 Folio 983 of the Register Book of Titles, until the final determination of the Claim and the complete satisfaction of any Judgment granted to the Claimant herein.
- d. It was also expressed that unless Rexton Holdings obtains a Court Order preventing the Registrar of Titles from acting within fourteen (14) days of April 4, 2023, the caveat will lapse. Defendants may dissipate of the assets.
- e. On the 25th May, 2023 when the parties first appeared before me Orders were made for the caveats lodged on the respective Certificate of Titles to remain. This Order was further extended until the inter-partes hearing.

CLAIMANT'S CASE

[6] According to the evidence presented in affidavits, Rexton Holdings entered into several agreements with the Defendants for the conceptualisation, design, development, management and ownership of an all-inclusive resort property in Trelawny. These agreements were entered into based on material representations made by Amaterra Jamaica to the Claimant with a view to solicit its agreement to provide financing for the 800+ keys family oriented all-inclusive resort operated by AM Resorts under the flagship brand Dreams. The Parties executed several agreements collectively referred to as The Partnership Accord. The documents included:

- a. Letter of Intention dated October 26, 2017 (LOI);

- b. Memorandum of Agreement (MOA) dated November 17, 2017 (MOA);
- c. Extension A to the Memorandum of Agreement dated March 16, 2018 (Extension A Agreement)
- d. Framework Partnership Agreement dated May 15, 2019 (Framework Partnership Agreement);
- e. The New Memorandum dated February 14, 2019 (New Memorandum)
- f. Shareholders Agreement dated May 15, 2019 (Shareholders Agreement).

[7] Under the MOA, Rexton Capital contracted with Amatererra Jamaica to serve as the financial lead and equity advisor for the purpose of covering 50% of the pre-financing budget and to source and supply a cash investment of Eighty Million United States Dollars (US\$80,000,000.00) from an Equity Investment Partner for the development of the resort. It was agreed that Rexton Capital would supply cash advance to Amatererra Jamaica to cover invoices for land valuations, surveys, feasibility studies, project due diligence, resort designs and plans, land clearing, soil improvement and construction of access roads as part of its coverage of 50% of that budget.

[8] In exchange for the investment of cash into the development works, it was agreed that the land comprised in the property and the resort being constructed would be owned and operated by a development company and that each party would share ownership of the property through the allocation of shares in the development company according to the specific percentage set out in the MOA. The parties entered into subsequent agreements to facilitate the disbursement of funds to facilitate the development of the business. The parties also agreed that the land comprised in the Parent Title would be transferred to three Jamaican Special Purpose Vehicles (SPV) namely Amatererra Utility, Amatererra H1 and Amatererra VR1.

[9] In early 2000, the land was subdivided and transferred as follows:

Parcel H1a All that parcel of land measuring approximately 4.5 acres, was transferred by way of gift to Amaterra Utility as comprised in Volume 1528 Folio 981 of the Register Book of Titles. This land is designated for the construction of a common utility and service facility to meet the needs of the resort.

Parcel H1 All that parcel of land measuring approximately 27 acres was transferred by way of gift to Amaterra H1 as comprised in Volume 1528 Folio 982 of the Register Book of Titles. This land is designated for the construction of an 800-room Family Resort.

Parcel VR1 All that parcel of land measuring approximately 16.17 acres, was transferred by way of gift to Amaterra Jamaica VR1 as comprised in Volume 1528 Folio 983 of the Register Book of Titles. This land is designated for the construction of a 400-room Adult's only Resort.

[10] Amaterra Jamaica also agreed to transfer the subdivided plots H1a, H1 and VR1 to three Jamaican SPV's at the pre-agreed purchase price. Once transferred, the parties agreed to buy them at a nominal share in the following ratio:

- a. Patriarch Jamaica to hold 62.5% of all issued shares of the 3 St. Lucian SPV that own the 3 Jamaican SPV's that hold titles to the 3 lands off the Hotel project;
- b. Rexton Holdings to hold 18.75% of all issued shares of 3 St. Lucian SPV's that own the 3 Jamaican SPV's that hold titles to the 3 lands of the Hotels project;

- c. TLDI Delaware to hold 18/75% of all issued shares of 3 St. Lucian SPV's that own the 3 Jamaican SPV's that hold titles to the 3 lands of the Hotel project.

[11] Rexton Holdings complied with its obligations to supply pre-financing cash pursuant to the terms of the MOA and subsequent Agreements. Notwithstanding the Claimant's performance of its pre-financing obligations, the Defendants have refused to facilitate the creation of the St. Lucian SPV's or to supply the Claimant with 18.75% ownership and control rights over the properties. By letter dated November 18, 2019, Rexton wrote to Amaterra Jamaica to provide notice of default in relation to numerous obligations under the partnership agreements. The 1st Defendant responded by letter dated November 14, 2019 indicating that there is no current partnership between Amaterra Jamaica and Rexton Holdings and denies any knowledge that there is any current funding agreement. It is the Defendants' failure to transfer the contractual share of the ownership and control of resort land to St. Lucian SPV's 18.75% vested in the Claimant which led to the filing of this substantive claim.

[12] Rexton Holdings discovered that there was intended new partnerships between the Defendants and third parties and a possible substantial risk of a dissipation of fixed assets through separate deals. As a result of this, Rexton Holdings lodged a Caveat against the registration of any change in proprietorship or any dealing, supported by the requisite Statutory Declaration outlining the Claimant's caveatable interest.

DEFENDANTS' CASE

[13] The Defendants dispute the Claimant's assertions. Mr. Keith Russell, the Managing Director of the 1st to 4th Defendant, in his affidavit filed October 20, 2022, stated that Amaterra Jamaica is the registered proprietor of approximately two hundred and seventy (270) acres of land located in Stewart Castle in the parish of Trelawny. Amaterra H1 and Amaterra VR1 were incorporated to be used as special purpose vehicles for the development. He further stated that in or about

2016 to 2017, discussions were being held with the owner of Tourism & Leisure Development International ('TLDI'), Mr Francisco Fuentes with the view to the company becoming an investor in hotel development. During the course of negotiations, Rexton Capital entreated the Managing Director and shareholder of the 1st to 4th Defendants to engage them as investors together with TLDI. In their initial proposal, Rexton Capital made material representations that encouraged Amaterra Jamaica to accept their offer. As a consequence of the new found relationship and the length of time that existed, Amaterra Jamaica and Rexton Capital executed the agreements.

- [14]** Mr. Russell stated that at all material times, Amaterra Jamaica made no representation or statements that induced Rexton into executing the Partnership Accord. He further stated that it was always understood and agreed that Rexton Capital, the equity investment partner was obligated to provide the equity and secure the debt of the development without any personal guarantee or assurance from the Defendants.
- [15]** Mr Russell further stated that Amaterra Jamaica represented that they were the beneficial owners of property located in Stewart Castle in the parish of Trelawny having completed the sale of the property with the Government of Jamaica in 2007 for the two hundred and seventy (270) acres of land. Amaterra Jamaica received from the National Environment and Planning Agency (NEPA) the development approvals for the three parcels of land that were developed under the project. Approvals were also received for the three parcels of land which were the subject of the Agreement. The three (3) parcels of land totalled forty-seven (47) acres of the two hundred and seventy (270) acres. It was agreed that Amaterra Jamaica would incorporate a holding company for the purpose of executing the agreement and to have the shares of the company distributed. This would have been done if Rexton Capital provided the equity and debt financing for the development. They failed to satisfy this obligation.

[16] Mr Russell averred that though Rexton Capital failed to provide the financing as agreed throughout varying stages of the development, Amaterra Jamaica provided “Proof of Site Ownership”. He also stated that all tasks that were to be conducted after the pre-planning/pre-financing stage were contingent upon Rexton Capital providing the financing for the project, however, this financing was never received and the agreements were ultimately left at a standstill. Though promises were made to try to satisfy their obligations at various intervals from 2018 to 2019, nothing materialised and no financing was guaranteed. Mr. Russell further stated that on the night of September 19, 2019 a meeting was had between himself, Mrs, Russell, Mr. Mustapha Deria and Mr. Guillermo Velasco, the representative of the Claimant, who advised that they were no longer authorized to do business in Jamaica and/or with Amaterra as the Royal Family of Qatar had discovered that they were conducting business to their disadvantage.

[17] Mr. Russell averred that it is the Defendants who suffered loss of investment, loss of time, loss of reputation and loss of income as a result of the failure of this project.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[18] In the written submissions filed on April 13, 2023, the Claimant relied heavily on the sections of the Registration of Titles Act that deal with circumstances under which a caveat may be registered or removed. The Claimant submitted that the legal rules concerning caveats were set out in **Half Moon Bay Ltd v Crown Eagle Hotels Ltd** [2002] UKPC 24 where the Judicial Committee summarized the relevant provisions of the Jamaican legislation as follows:

[25] *Caveats are dealt with by ss139-143 [of the Registration of Titles Act. Section 139 provides that any person with an adverse claim against the land may lodge a caveat with the Registrar forbidding (inter alia) the registration of any person as transferee or proprietor of the land unless the instrument of transfer is expressed to be subject to the claim of the caveator. Section 140 provides for notice of the caveat to be given to the registered proprietor, who may if he thinks fit summon*

the caveator to show cause why the caveat should not be removed. Except in the case of caveat lodged by the Registrar, every caveat is deemed to lapse upon the expiration of 14 days after notice to the caveator of an application for registration of a transfer or dealing. Section 142 provides that, so long as the caveat remains in force, the Registrar shall not enter a transfer in the Register Book without the written consent of the caveator.

[19] The Claimant also relied on the authority of **Venus Investments Ltd v Wayne Ann Holdings Ltd**. [2015] JMCA App 24 where Morrison JA (as he then was) analysed section 140 of the Act and outlined its three core functions as follows:

[19] *Section 140 does three things. First, as Mr. Chen submitted, it provides a mechanism by which the registered proprietor or persons claiming under him may summons the caveator to show cause why the caveat should not be removed. The Court may, upon proof that the Caveat has been summoned, make such order as it thinks fit, whether ex parte or otherwise. Second, it provides that the caveat will lapse 14 days after notice to the caveator that the registered proprietor has applied for the transfer or other dealing with the land.... Third, once such notice has been served, the Caveat will not be renewed unless within the same 14 days period the caveator or his agent appears before the court and gives an undertaking or security sufficient to indemnify every person against any damage that may be suffered by reason of the delay in the registration of any disposition of the property.*

[20] It was also submitted that the legal test that applies under section 140 of the Act was explored in **Mavis Rodney v Jane Rodney-Seale and Leleith Rodney-Roberts** (1994) 31 JLR 674 (CA) where Forte JA (as he then was) confirmed that a caveator may “show cause why the caveat should not be removed”, by demonstrating that it has a “caveatable interest” in the subject properties. A “caveatable” interest should be given a broad construction, to reinforce the premise that interest in land are rights which persons are entitled to protect.

[21] Counsel also relied on **Audrey Allwood v Administrator General of Jamaica** [2014] JMSC Civ 29 where Brown J confirmed the approach that caveats exist and should remain to protect actual interest in the land, as well as interests that have not yet been actualised. The Claimant advanced that the test for determining

whether a party has a caveatable interest is met simply by proving that the caveator has a claim to a defined right or interest relating to the land and enforceable against the owner and that a caveat should remain once the caveator proves the existence of an alleged interest in the property.

- [22] On behalf of the Claimant, it was contended that it is not disputed that it performed its obligations under the Agreement. Notwithstanding that performance, the Defendants have failed to transfer the agreed ownership share of the Defendants' properties to the Claimant through a share allocation in the St. Lucian or Jamaica Holding Companies or Special Purpose Vehicles (SPVs).

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

- [23] The 1st to 4th Defendants' written submissions surrounded the test for grant of an injunction. Counsel Ms. Ximines relied on the seminal case of **American Cyanamid Co. v Ethicon Limited** [1975] AC 396 to highlight that the questions of serious issue to be tried, damages as an adequate remedy and where the balance of convenience lies are to be considered. She further relied on the Privy Council decision of **Eng Mee Young and Others v Lutchumanan S/O Velayutham** [1979] UKPC 13 where the issues surrounding injunction were considered when determining whether to order the removal of caveats. Counsel submitted that these issues are necessary to be considered as the authorities have now created a correlation between caveats and injunctions.

- [24] It was also submitted that the parties are at different views as to the legal responsibilities owed to each other and whether the terms of the contract were satisfied, however the case at bar does not concern an interest in land, rather it is premised on the breach of a hotel development contract. There are no remedies that are being sought that would affect the legal or beneficial interest in the land.

- [25] Counsel relied on **Tewani Limited v Kes Development Co. Ltd. and Another** (unreported) Supreme Court Jamaica Claim No. 2008HCV2729, judgment

delivered July 9, 2008 to ground the proposition that where an assessment as to whether damages are an adequate remedy is to be done, the starting point is the presumption in law that damages are not an adequate remedy where the significance of the subject matter being claimed is real property because land is unique or is of special value. It was however noted that the presumption can be rebutted in circumstances where there are exceptions to the principles. Counsel relied on **Lookahead Investors Limited v Mid Island Feeds (2008) Limited and others** [2012] JMCA App 11 where Brooks JA (as he then was) acknowledged that each case must be taken on its own facts because the presumption that damages are not an adequate remedy is rebuttable.

[26] Counsel contended that one exception was identified by the Court of Appeal in the case of **Silver Sands Limited v Lorenz Redlefsen** [2022] JMCA Civ 28. P. Williams JA in her Judgment stated:

[43] *Firstly, I am compelled to note that the first order sought in Mr. Redlefsen's claim against Silver Sands was an order for "damages for breach of contract in lieu of specific performance or in addition to specific performance of the contract. In the Particular of Claim filed and certified by Counsel on behalf of Mr. Redlefsen, there was a bald assertion that "as a result of [Silver Sands, DBJ and SPL's] breach of contract, [Mr. Redlefsen] has suffered loss and incurred costs". It is immediately pellucid that an order for an award of damages on Mr. Redlefsen's claim was sufficient for him.*

.....

[49] *.....being faced with the fact that Mr. Redlefsen's claim included one for damages and the plethora of evidence which tendered to raise serious doubts about Mr. Redlefsen's claim to any emotional or sentimental attachment, I am unable to reconcile the learned Judge's finding that damages would not be an adequate remedy for Mr. Redlefsen.*

.....

[52] *I am satisfied that the way in which the learned Judge addressed this issue, leading to the conclusion that he did, was palpably wrong. It follows, therefore, that since damages would have been an adequate remedy for Mr. Redlefsen and given the high likelihood that Silver Sands and DBJ could satisfy an order for compensation made against them, in my view, on this basis, the learned Judge*

erred when he refused the application for the removal of the Caveat. Ground (b) therefore succeeds.”

- [27] Counsel submitted that the remedy being sought in the claim at bar is essentially damages and not an equitable interest in land and so given the guidance in the authorities from the Judicial Committee of the Privy Council and the Court of Appeal, the request for the Caveat to remain in place should be refused. Although the Claimant has included a claim for Specific Performance this is not supported by the pleadings.
- [28] Counsel argued that when assessing where the balance of convenience lies, the Court may be guided by the Privy Council decision of **National Commercial Bank Jamaica Limited v Olint Corp Limited** [2009] UKPC 16 where the Court coined its primary consideration as being “whether the granting or withholding an injunction is more likely to produce a just result”. To answer that question, Counsel relied on paras 17-19 of the Judgment to arrive at the proposition that the Court must have regard to the likelihood of prejudice each party may face should the caveat be removed or left in place and the extent to which either party could be adequately compensated by an award of damages.
- [29] It was submitted that the Defendants are likely to suffer a far greater irremediable prejudice than that which would likely be faced by the Claimant if the orders are granted as prayed. It was submitted that the loss grows exponentially with every day that passes as the 1st Defendant is unable to engage in viable business solutions and/or the development of any part of the two hundred and seventy acres of land with the view of increasing its profitability. This on the basis that if any caveats were to be lodged it should only have been lodged against one to forty-seven acres of land but these caveats have been in place for over two years on the entire two hundred and sixty acres.

THE LAW

[30] Section 139 of the Registration of Titles Act (“the RTA”) provides for a person having the appropriate interest to register a caveat as follows:

139. Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat.

[31] Section 140 of the RTA addresses the manner in which the life of the caveat may end and stipulates as follows:

140. Upon the receipt of any caveat under this Act, the Registrar shall notify the same to the person against whose application to be registered as proprietor, or as the case may be, to the proprietor against whose title to deal with the estate or interest such caveat has been lodged, and such applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he thinks fit, summon the caveator to attend before the Supreme Court, or a Judge in Chambers, to show cause why such caveat should not be removed, and such Court or Judge may, upon proof that such caveator has been summoned, make such order in the premises, either ex parte or otherwise, and as to costs as to such Court or Judge may seem fit. Except in the case of a caveat lodged by or on behalf of a beneficiary under disability claiming under any will or settlement, or by the Registrar, every caveat lodged against a proprietor shall be deemed to have lapsed as to the land affected by the transfer or other dealing, upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing, unless in the meantime such application has been withdrawn. A caveat shall not be renewed by or on behalf of the same person in respect of the same estate or interest, but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge, and gives such undertaking or security, or lodges such sum in court, as such Judge

may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, then and in such case such Judge may direct the Registrar to delay registering any dealing with the land, lease, mortgage or charge, for a further period to be specified in such order, or may make such other order as may be just, and such order as to costs as may be just.

[32] Under the provisions of section 40 of the Registration of Titles Act, a caveat operates in a similar manner to an injunction. The caveator is claiming an estate or interest in the land and the lodging of the caveat serves as notice of such interest to anyone dealing with that particular property. When a caveat is lodged it prevents any dealings with the Title. The **Eng Mee Young** case clearly establishes that parallels exist between caveats and interlocutory injunctions and explores the basis upon which they are to be lifted or granted. When considering whether or not to lift a caveat the Court should be guided by the principles laid down in **American Cyanamid Co. v. Ethicon Limited**. The main considerations therefore should similarly be whether there is a serious issue to be tried on the claim, whether damages are an adequate remedy and whether the balance of convenience lies in favour of the caveat being lifted or remaining in place.

DISCUSSION

Is there a serious issue to be tried?

[33] The Claimant argued that it has complied with the terms of the agreements entered into with the Defendants and that it facilitated the payments stipulated in the separate agreements however, to date the Defendants have failed to comply with the obligation to transfer shares in the property to the Claimant. The Defendants on the other hand have contended that the parties have entered into several agreements however, the Claimant has not made the payments as agreed and is not entitled to a transfer of shares in in the property.

- [34]** The Claimant has exhibited in its Particulars of Claim a spreadsheet summarizing the payments made to the Defendants. The Claimant further alleges that after accepting extensive pre-funding, receiving assistance with securing the title for the premises and utilizing the Claimant's network and goodwill, the 1st Defendant wrote to the Claimant informing that there is no current partnership and that the 1st Defendant denies any knowledge that there is any current funding agreement.
- [35]** Another issue raised is the nature of the interest created by the Claimant's investment in the property and whether the Claimant's interest would amount to a legal or beneficial interest in the land. There is no dispute that the Claimant's investment was to the tune of some United States Six Hundred and Eighty-Four Thousand, Seven Hundred and Thirty Dollars and Fifty Cents (USD\$684,730.50). The allegations raised relate to substantial sums of money which have passed between the parties. This could by no means be a frivolous claim and although there is a dispute as to the effect of the sums invested, there is no dispute that this substantial investment was made.
- [36]** The contract contemplates the transfer of shares in the ownership of certain plots of land by these SPVs and that specific shareholding percentages would be held by the Claimant. The Defendants on the other hand have argued that despite the creation of the SPVs the Claimant is neither a legal or beneficial owner of the 1st Defendant's properties. It is clear that the question as to whether the sums invested by the Claimant operate to create a specific interest in property is not one that is straightforward or easily resolved but rather requires further exploration preferably during the context of the trial process.
- [37]** Among the other issues that would have to be determined is the nature of the Claimant's Amended Claim which includes a claim for specific performance. In order to succeed on a claim for specific performance, the Claimant must provide evidence of a memorandum in writing and sufficient acts of part performance. Specific performance is an equitable remedy granted at the discretion of the court to compel the party in default to perform and complete the contract. The court also

has to consider whether the person seeking performance is prepared to perform his side of the contract, (see **Chappel v Times Newspapers Ltd** [1975] 1 WLR 482); whether the person against whom the remedy is sought would suffer hardship in performing (**Patel v Ali** [1984] 1 All ER 78); the difference between the benefit the order would give to one party and the cost of performance to the other, and whether third party rights are affected.

- [38] Based on all the evidence presented at this interlocutory stage, it is clear that there are serious issues to be tried and that the Claimant having invested significant sums in the Defendants' venture without there being any evidence of any benefit acquired from the Defendants under the terms of the contract would have a case with a real prospect of success.

Would Damages be an adequate remedy?

- [39] The Claimant's original claim was for damages only however, on April 24, 2023, an Amended Claim Form and Particulars of Claim were filed to include a claim for Specific Performance of the Framework and Shareholders Agreement both dated May 15, 2019.

- [41] The Amended Claim seeks specific performance of the Framework Agreement and the Shareholder Agreement. The essence of the Framework Agreement is to facilitate the creation of St Lucian Special Purpose Vehicles to purchase all the shares in the Jamaican SPVs which are the holders of the Title to the three parcels of land on which the hotels are to be built. The essence of the Shareholder Agreement was that the three (3) entities would have equitable ownership and control of the resort land through their control of the St Lucians SPVs. If the Court were to order specific performance of these Agreements, it would result in the project being continued and completed. This project is aimed at developing what has been described as beach front property and so the argument is made that there are certain unique characteristic features which would no doubt make it more amenable to this type of development therefore damages would not be an adequate remedy.

Counsel for the Claimant in the submissions directed my attention to Clause 2.2 of the Framework Agreement. At Clause 2.2(i) reference is made to the fact that “the Project is planned to be carried on the plots named H1 and H1a, plus the adjacent plots named VRI. Clause 2.2 (ii) stipulates that as follows:

“the project is planned to be carried by (6) different special purpose vehicles (i.e. the SPVs). In this sense: (a) the Jamaican SPVs shall own, respectively, the Plots; b) the Jamaican SPVs shall be fully owned, each one, respectively, by its mirrored Saint Lucian SPVs; and (c) the Parties shall be partners of each one of the Saint Lucian SPVs, according to their respective percentages established in M.O.As.”

[42] The Claimant’s contention is that on the basis of what could be classified as ownership in the resort land, damages would not be an adequate remedy consistent with the principles enunciated in the case of **Tewani Limited v Kes Development**. This case supports the position that where the contract deals with land, damages are not an adequate remedy as land is unique. This however is not an absolute rule and can be rebutted as was seen in the decision of the Court of Appeal in **Lookahead Investors v Mid Land Feeds**. Brooks JA (as he then was) enunciated that each case must be taken on its own facts. This decision was cited with force in the judgment of P. Williams JA in the **Silver Sands Estate Limited** case.

[43] In the **Silver Sands Estate** case the Court at first instance found that although the applicant’s situation was “far removed from a homeowner wishing to preserve his childhood home or a person who wishes to acquire a particular lot of land to build his home”, the starting point was the general legal principle that each parcel of land is said to be unique and has “a peculiar and special value”. The Court of Appeal, in reviewing the judgment, dissected the documentary evidence in order to determine whether this claim for peculiar and special value was supported. Having done so the following finding was made:

“To my mind, the documentary evidence and Mr Redlefsen’s own assertions did not credibly corroborate his claim of an emotional and

sentimental attachment to Silver Sands, nor did it support his desire to preserve the lots as a green space in perpetuity. Being faced with the fact that Mr Redlefsen's claim included one for damages and the plethora of evidence which tended to raise serious doubts about Mr Redlefsen's claim to any emotional or sentimental attachment, I am unable to reconcile the learned judge's finding that damages would not be an adequate remedy for Mr Redlefsen.

In my view, the learned judge, in recognising that there was conflicting evidence, ought to have made a finding as to whether Mr Redlefsen's interest in the lots stemmed from his emotional attachment or whether his interest was commercial, especially since this was the primary basis on which Mr Redlefsen maintained that the caveats should not be removed. This was extremely important in resolving the question of the adequacy of damages and was not a matter that would have required further investigation to be addressed and determined on Mr Redlefsen's claim as filed. Further, the learned judge made no reference to the fact that Mr Redlefsen had claimed damages for breach of contract, which itself was evidence that damages would be an adequate remedy for Mr Redlefsen.

[44] What this demonstrates is that, it is essential to assess the evidence presented to determine whether the Claimant's interest is merely commercial or whether there is some peculiar and special value attached to the Claimant's interest in the property. I have noted that the evidence in support of this Notice of Application came only from the attorney-at-law in the matter Ms. Mitchell. There is no evidence from any of the principals or directors of the company seeking to demonstrate any uniqueness of the property or emotional attachment. The affidavit of Ms. Mitchell in support of this application does not present any evidence capable of demonstrating uniqueness or any sentimental value attached to the property. It is also of note that the original claim sought primarily damages for breach of contract. The timing of the Amended Claim is also of moment. It was subsequent to the Notice of Application being filed that the Claim Form and Particulars of Claim were amended to make a claim for Specific Performance. The claim for specific performance does not refer to any land but rather to the Framework Agreement and the Shareholders Agreement.

[45] Apart from the insertion of this claim for specific performance, no other aspect of the pleading was amended. The essence of the pleadings when examined remains

consistent with the claim for damages and does not really support a claim for specific performance. When the Framework Agreement and Shareholder Agreement are examined, it is clear to me that the interest of the Claimant is purely financial. Even if a Court were to grant specific performance of these Agreements, it would give effect to the continuation of this arrangement between the Claimant and the Defendants, the very purpose of which is to acquire shares in the hotel for financial gain. It strikes me that the venture is a wholly commercial one therefore if the Claimant were to lose the prospect of an interest in this property then damages would be an adequate remedy.

[46] The Defendants have not given any cross-undertaking as to damages, however they are the owners of this two hundred and seventy (270) acres of property. The Defendants' principal Mr. Keith Russel had previously made an offer to make an ex-gratia payment of United States Six Hundred and Nine Thousand, Seven Hundred and Twelve Dollars and Thirty-Five cents (US\$609,712.35) which represented the total sum paid to date by the Claimant. It would be difficult to say in these circumstances that the Defendants would not be able to compensate the Claimant if it turned out that the caveat was wrongfully discharged. I am of the view that damages would be an adequate remedy for the Claimant. On that basis I am prepared to say that the Claimant's application for the caveat to remain in place fails however, in the event I am wrong in so finding and it is found that it was too difficult to determine the adequacy of damages at this stage I will proceed to consider the other issues raised.

[47] This brings to mind dicta in **NCB v Olint**. The difficulties attendant to the determination of the adequacy of damages were highlighted as follows:

*"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.”

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

[48] In keeping with the principles enunciated in the **American Cyanamid** case the court is therefore urged to carry out a balancing exercise to determine where the balance of convenience lies.

Where does the balance of convenience lie?

[49] If the injunction was withheld and the caveat lifted it would mean the Defendants could proceed to have the mortgage registered to Mr Audley Evans. In terms of prejudice to the Claimant they have asserted that they have a caveatable interest in the properties, and that the Orders are necessary to protect that interest to prevent the Defendants’ potential dissipation of assets and to safeguard the viability of any judgment granted to the Claimant. The Claimant has not provided evidence of any attempt on the part of the Defendants to dissipate their assets but rather that the Defendants have attempted to register a mortgage to another entity or individual.

[50] If the caveat were ordered to remain in place the Defendant would be prevented from taking any further steps to register the mortgage or to treat with the property as they see fit. This could result in a loss of viable business opportunities from other entities and reduce the nature of their investment. This caveat has already been in place for over two years and so has stymied the ability of the Defendants to engage in other arrangements to further the development, in circumstances

where the Claimant had previously expressed an intention to bring the arrangement to an end.

[51] There has been no evidence presented that the Defendants are attempting to dispose of the entire property to the detriment of the Claimant. Their intention is to have the property, the subject of a mortgage. In terms of weighing the balance, if the Defendants were to be allowed to register this mortgage any prejudice to the Claimant could be remedied by an award of damages. On the other hand, if the Defendants were to lose the opportunity to register the mortgage, I accept what has been outlined in the affidavit of Ms. Simpson that they would suffer “the loss of investment, loss of time, loss of reputation and loss of income.

[52] The caveats lodged operate to prevent the Defendants from dealing with all three (3) Certificates of Title amounting to Two Hundred and Seventy (270) acres of land but only Forty-seven (47) acres of land are relevant to the transaction with the Claimant. This position in and of itself has prejudiced the Defendants in their ability to use all of their property and so the prejudice to them is greater than any prejudice to be occasioned by the Claimant. In these circumstances, I am of the view that the balance of convenience lies in favour of the removal of the caveats. The Claimant has not met the threshold for the caveats to remain in place.

[53] I therefore order as follows:

1. The Orders sought in the Claimant’s Notice of Application for Court Orders filed on April 6, 2023 are refused.
2. Costs to the Defendants to be agreed or taxed.

.....
Stephane Jackson Haisley
Puisne Judge