

[1] The claimant is a company incorporated in the State of Texas in the United States of America. There is no dispute that it is owed a debt by the 1st defendant (a limited liability company incorporated in Canada), for the preparation of architectural designs pursuant to two agreements entered between them. On July 31, 2023, Batts J entered summary judgment for the claimant against the 1st defendant. The question before the court is whether the 2nd defendant, a limited liability company incorporated in Jamaica, who is not a party to any of the two agreements, ought to be held liable for the debt owed to the claimant. The 1st and 2nd defendants have common ownership in the person of Mr Paul Walker (“Mr Walker”), a Jamaican, who lives in both Canada and Jamaica.

The claim

[2] In its fixed date claim form, (which by order of Batts J was treated as a claim form)¹, the claimant claims damages against the defendants for breach of contract in the sum of USD\$86,473.33, plus interest at the contractual rate of the highest legal rate or JP Morgan Chase Prime Rate plus 2% per annum from the date of default to the date of judgment. The request for a declaration that Jamaica is the appropriate forum to resolve the dispute between the parties was earlier determined in the claimant’s favour by Batts J.² With judgment having been entered against the 1st defendant, the claim now before the court relates only to the 2nd defendant.

[3] The claimant is a company involved in architectural engineering and designing. It alleges in its particulars of claim,³ that it entered into a contract with the 1st defendant on August 21, 2020, for the preparation of architectural designs for a residential development in Jamaica known as the Hill Run Residential Development (“The Hill Run Agreement “). It was agreed that the 1st defendant would be invoiced for amounts owed, and that past due invoices in excess of 30 days would attract interest at the lower JP Morgan Chase Prime Rate plus 2% per annum. A second contract was entered into with the 1st defendant on January 13, 2021, with terms similar to The Hill Run Agreement. This time, the

¹ Order made on July 31, 2023.

² Ibid.

³ This document was filed on August 31, 2023, pursuant to Batts J’s order made on July 31, 2023, by which the claim was treated as if begun by claim form.

architectural designs were for a mixed-use resort and residential community in Green Island, Jamaica (“The West Beach Agreement”). The services contracted for were provided to the 1st defendant pursuant to the two agreements. Thereafter, between September 2020 and May 2021, invoices were issued to the 1st defendant. As of May 2021, the total amount owed was USD\$ 86,473.33. Promises were made by both defendants to pay the amount owed.

[4] The claimant sent a demand letter dated December 20, 2021, to the 1st defendant. By letter dated February 7, 2022, Juris Partners, wrote to the claimant stating that although the 2nd defendant was not a party to the “original contract”, it would make payments under it. The letter, written by Mrs Georgette Wiltshire (“Mrs Wiltshire”), sought the claimant’s forbearance in filing suit against the 1st defendant. By emails dated March 21 and 22, 2022, Mrs Wiltshire wrote to say that a funding timeline had been received, and instalments of USD \$10,000.00 would follow every 60 days. She further said, in response to a query from the claimant’s agent as to when the promised instalments would be paid, that all was being done to make the payments, and that Mr Walker intended to divert funds from other projects to pay the claimant. It is alleged that no payments were made by the defendants.

[5] It is further alleged that because of the 2nd defendant’s unequivocal promise to pay, the claimant forbore from initiating formal recovery proceedings against the 1st defendant and relied on the 2nd defendant’s representations to its detriment. The 2nd defendant is therefore estopped from asserting that it is not liable to pay the outstanding sums owed to the claimant. Its representations were intended to create legal relations. In the alternative, it is pleaded that by its commitment to pay, the 2nd defendant gave an undertaking or promise to pay the 1st defendant’s debt

The defence

[6] In its defence, the 2nd defendant says it never entered into either of the two agreements. It is pleaded that the February 7, 2022, correspondence from Mrs Wiltshire, was written on the 2nd defendant’s behalf, proposing to make certain

payments on the debt on behalf of the 1st defendant, on condition that it was in receipt of bank financing which was to become available to make the payments. It was clearly stated in that correspondence, that the 2nd defendant was not a party to The Hill Run Agreement, and it sought the claimant's forbearance in relation to taking legal action against the 1st defendant.

[7] The 2nd defendant pleads further that in the correspondences made on its behalf; it was never admitted that the 2nd defendant had any legal obligation to pay the claimant outside of the proposal made on February 7, 2022. Consequently, it is denied that the claimant could reasonably forebear to its detriment from pursuing formal debt recovery from the 1st defendant. It is alleged that the 2nd defendant did not receive the anticipated financing from the bank to make any of the proposed payments on behalf of the 1st defendant.

[8] The 2nd defendant denies that it is estopped from claiming that it is not liable to pay the claimant and denies that it had any intention of creating legal relations with the claimant. It had no prior dealings with the claimant and was a facilitator of the payment of the debt purportedly owed by the 1st defendant. It is alleged, that the payment proposal made on February 7, 2022, was made due to the limited connection between the 1st and 2nd defendants who are separate and distinct legal entities. It is denied that the 2nd defendant is liable to the claimant.

The evidence

The claimant

[9] The claimant called two witnesses, Mr. Scott Ziegler (Mr Ziegler) and Mr. Alan Haley (Mr Haley). Their witness statements (as redacted in the case of Mr Haley)⁴, stood as their evidence in chief.

Mr Ziegler

[10] Mr Ziegler is a director of the claimant. On March 1, 2021, he wrote to Mr Walker about the outstanding balance of USD \$86,417.09, owed on the Hill Run project

⁴ Paragraphs 38 and 39 of Mr Haley's witness statements were ordered redacted after an objection made by counsel for the 2nd defendant that they offended the without prejudice rule.

and the West Beach project. He requested a good faith payment and a schedule of how payment would be made on the outstanding balance. Mr Walker responded by email using an email address for both the 1st and the 2nd defendants. He gave assurances that he would have a payment schedule that would begin in April 2021. On April 5, 2021, Mr Walker said in an email that “Halton” should be in a position to start making payments by April 25, 2021, and that the West Beach invoices would be settled in four equal payments with the Hill Run invoices following immediately after that.

[11] In a letter dated June 10, 2021, on the 1st defendant’s letterhead, Mr Walker said in four weeks he expected to have improved liquidity and could begin making payments in increments of USD \$10,000.00. He responded to Mr Walker on June 11, 2021, and in reliance on the latter’s earlier June 10, 2021, letter, he advised that the claimant would pause any collection activities provided it receives at least USD\$10,000.00 on or before June 11, 2021⁵. Although later writing on August 9, 2021, that he was in the final stages with his bank, hoped to receive a draw down that month and would provide a realistic payment schedule, to date the debt remains outstanding.

[12] When asked on cross examination which of the two companies negotiated with the claimant to finalise The Hill Run Agreement, Mr Ziegler said he “thinks” that both were part of the agreement. When pressed, he admitted the document containing the agreement was addressed to the 1st defendant. He said he first dealt with the 2nd defendant in 2021, and as Mr Walker was involved with both entities, when he spoke with Mr Walker, he assumed he was speaking with both the 1st and the 2nd defendants.

Mr Haley

[13] Mr Haley is the claimant’s Director of Administration/Legal. He said that Mr Walker is the sole director of the 1st defendant, the sole shareholder of the 2nd defendant, and is one of its two directors, the other director being Mrs Wiltshire.

⁵ In another email dated June 11, 2021, he corrected this date and said he meant July 11, 2021.

The 2nd defendant was incorporated on May 15, 2020, and conducts construction and project management services.

- [14]** The Hill Run Agreement was signed by Mr Walker on behalf of Halton Development Management Limited. It was the claimant and the 1st defendant who entered into the agreement. It was a term of the agreement that the claimant would be compensated in three components: a lump sum fee for each phase of service, fees for additional services and reimbursable expenses. Payments were due on the dates the invoices were presented and amounts owed which were more than 30 days past due, would attract interest at the lower of the highest legal rate or the JP Morgan Chase Prime Rate plus 2% per annum. As to The West Beach Agreement, it was entered into by the claimant and the 1st defendant and was signed by Mr Walker. The terms of that agreement were identical to those of The Hill Run Agreement. According to him, as of December 15, 2022, the JP Morgan Chase Prime Rate was 7.5% and the highest legal rate was 10%.
- [15]** The invoices issued between September 2020, and May 2021 remain unpaid. The defendants made many representations to pay the amount outstanding but have failed or neglected to make good on those promises. The claimant demanded, by letter dated December 20, 2021, that the 1st defendant pay the outstanding sum of USD \$86,473.33. Juris Partners wrote a letter dated February 7, 2022, by which the 2nd defendant stated that even though it was not a party to the original agreement, it had decided to make payments under the agreement between the claimant and the 1st defendant.
- [16]** According to Mr Haley, in an email dated February 10, 2022, Mrs Wiltshire, as agent for one or both defendants, wrote to the claimant's debt collection agent to say, that Mr Walker was sourcing investments so that he could make a good faith payment on the outstanding invoices. No payments were received. Mr Haley recounted the correspondences between the claimant and Mrs Wiltshire which are pleaded in the claimant's particulars of claim and referred to in paragraph 12 of this judgment. Myers Fletcher and Gordon, attorneys-at-law, wrote a formal demand letter on the claimant's behalf to both defendants, dated

July 13, 2022, as The Hill Run Agreement was proffered to the 1st defendant but signed by Hilton Development Management Limited.

[17] Mrs Wiltshire, who is a director of the 2nd defendant and attorney-at-law for the 1st defendant, when confronted with the defendants' promises to pay the debt, sought to resile from those promises. On July 18, 2022, she wrote to say that her firm acted for the 2nd defendant and not the 1st defendant, and that the former was not liable for the debt of the latter. Yet, in an email dated July 19, 2022, Mrs Wilshire said she did not act for the 1st defendant, but on behalf of Mr Walker who gave her instructions. She also incorrectly stated that the 2nd defendant did not exist at the time of the agreements. According to Mr Haley, based on "these contradicting positions", the claimant believes the 1st defendant is attempting to circumvent liability under the agreements, although having admitted that the sums were outstanding. In the alternative, he says that: "given the conduct of Ms Wiltshire and Mr Walker, the promises to pay were made on the basis that the 2nd defendant assumed the liability of the 1st defendant under the Hill Run Agreement and West Beach Agreements by way of novation".

[18] On cross examination Mr Haley said that in the June 10, 2021, letter, Mr Walker was not writing on behalf of the 1st defendant. He said he knew of the 2nd defendant upon entering into discussions to settle The Hill Run Agreement. He disagreed that both agreements were settled with the 1st defendant and said that The West Beach Agreement was signed in the same manner as The Hill Run Agreement. According to him, the very first time the 2nd defendant represented that it would pay the debt is in the signing of The Hill Run Agreement when: "they put us on notice that there was a Jamaican company". The 2nd defendant signed The Hill Run Agreement and promised to pay.

The defendant

Mr Walker

[19] Mr Walker was the sole witness for the 2nd defendant. His witness statement as redacted, stood as his evidence in chief. Mr Walker is businessman and the principal of the 2nd defendant. According to him, the 2nd defendant was

incorporated under the laws of Jamaica on May 13, 2020, and has its registered office at Unit 19A, Barbican Business Centre, 88 Barbican Road, Kingston 8. It is in the business of land acquisition, development and construction management services and is a separate and distinct legal entity from the 1st defendant. The 1st defendant was incorporated under the laws of Ontario, in Canada with registered office at 101-1450 Meyerside Drive, Dixie Place, Mississauga, Ontario, L5T2N5, Canada. He is a director of the 1st defendant.

[20] On August 21, 2020, the claimant and the 1st defendant entered into The Hill Run Agreement. It was always contemplated that they were the parties to the agreement. The provisions of the agreement were explicit in that they were never extended to the 2nd defendant. When The Hill Run Agreement was being negotiated on April 4, 2020, the 2nd defendant had not been incorporated. The project contemplated by the agreement did not materialise as the registered owners for the land withdrew from the project. It was not possible for the 1st defendant to obtain financing to monetize the project, but it owes the claimant fees under The Hill Run Agreement.

[21] Mr Walker says he was contacted by Mr Haley and was in discussions with him about how the 1st defendant's debt would be settled. There were no negotiations between the 2nd defendant and the claimant. All discussions were with him as director for the 1st defendant. It was during those discussions that the possibility of settling the 1st defendant's debt from pending opportunities through other businesses arose. In the discussions, it was made clear that the 2nd defendant was not a party to The Hill Run Agreement. It was further to those discussions that Mrs Wiltshire wrote her February 7, 2022, letter. Payments were promised informally on behalf of the 1st defendant, and Mrs Wiltshire, in her letter, sought to distinguish between the entity liable for the debt and the 2nd defendant.

[22] The 2nd defendant did not assume liability to pay the 1st defendant's debt under The Hill Run Agreement or any other agreement. Furthermore, the 2nd defendant did not issue any resolution or other governance procedure to grant the necessary approvals to assume the 1st defendant's debts, and it has no

intention of doing so. It did not enter into an agreement with the claimant, and it has no legal obligation to settle the 1st defendant's debts.

[23] On cross examination Mr Walker said he started living in Canada in 2000, but because of the Covid pandemic, he has been a resident of Jamaica since February 2020. In Canada, he had several business opportunities and operated an investment practice. Between 2010 and 2022, he was involved in several business ventures. He said the 1st defendant was incorporated on November 5, 2019, but its operations have since been suspended. Since suspension, it was however receiving phone calls and emails but was not carrying on any substantive business. Its bank account was closed by the bank due to inactivity. He was a licensed securities professional while in Canada and admitted that the Canadian Investment Regulatory Organization issued a permanent prohibition of his authority to conduct securities regulated business in any capacity, while in the employment of or associated with any dealers. He also admitted that the prohibition was in relation to findings of misconduct as a securities professional.

[24] According to him, the 2nd defendant did not owe the claimant a debt, and was not liable to the claimant to pay the 1st defendant's debt. He wanted to pay the invoices shortly after the claimant began demanding payment. Lack of project funding from financial institutions was the main impediment to settling the invoices. He admitted that the financing sought by the 2nd defendant included a component for the architects' costs. When asked whether the 2nd defendant had ever received funding for any project since its inception, he answered: "yes". Later, when reminded of this answer, he said: "I don't believe that is what I said". He then went on to deny that the 2nd defendant had ever received funding for any of its projects. He said that while there was some funding in place for certain projects, funding had not in fact been received by the 2nd defendant.

[25] Asked about the 2nd defendant's cash flow, Mr Walker said that in 2022, the 2nd defendant's monthly cash flow was on average JMD\$1,000,000.00 per month but said he did not allocate any of those funds to the claimant as: "the matter was subject to litigation." He said that the 2nd defendant's promise to pay the 1st

defendant's debt was conditional on it receiving financing, but such financing was never received. He admitted that when he wrote to the claimant, he wrote generally on behalf of both the 1st and 2nd defendants. His letter of June 10, 2021, was written from the perspective of both defendants.⁶

[26] Mr Walker denied that the 2nd defendant signed The Hill Run Agreement. He said that the entity that signed was the 1st defendant. In answer to a question from the court, he said the name Halton Development Management Ltd., on that agreement was an error, it ought to have been the name of the 1st defendant. There is no such entity known as Halton Development Management Ltd. He said there was no intention to apply the 2nd defendant's name to that document. He denied that the 2nd defendant was incorporated to assume the liability of the 1st defendant and to assist it with obtaining project financing. The 2nd defendant passed no resolution promising to pay the 1st defendant's debt to the claimant. According to him, Mrs Wiltshire's February 7, 2022, letter was not written based on a resolution passed by the 2nd defendant. She was instructed by him to write to protect both defendants from liability.

Analysis and discussion

[27] In her closing submissions, Miss Montague, counsel for the claimant, invited the court to find the 2nd defendant liable on the claim on two primary bases. The first, is that the 2nd defendant accepted liability for the debt owed to the claimant. The second is that the 2nd defendant unconditionally promised to pay the debt owed by the 1st defendant, the claimant accepted and acted on that promise to its detriment, and therefore the 2nd defendant is estopped from denying liability. As a further basis for the claim, Miss Montague also argued that the 2nd defendant is liable based on the principle of novation. I propose to address each of these bases in turn.

Acceptance of liability

[28] In relation to the acceptance of liability, learned counsel submitted that a promise and a statement in writing signed by the 2nd defendant accepting

⁶ I delve further into Mr Walker's evidence in respect of this letter in paragraphs 38 to 41 of this judgment.

liability, is all that is required for an enforceable guarantee or a promise to pay the debt of the 1st defendant, under the Statute of Frauds. Relying on **Re Hoyle [1893] 1 Ch 84**, she argued that the parties' intentions are irrelevant. In her view, there are two such statements made by the 2nd defendant. The first, clear and unequivocal statement of the 2nd defendant, is The Hill Run Agreement itself, as it was signed by the 2nd defendant. The second statement is Mr Walker's letter of June 10, 2021.

[29] In my view, there are two difficulties with this argument. The first difficulty, and arguably the more important, is the fact that this is not the claimant's pleaded case. The second difficulty is that The Hill Run Agreement was not signed by the 2nd defendant. It was signed by Mr Walker as the CEO for Halton Development Management Limited. The 2nd defendant is Halton Development Management Jamaica Limited.

[30] The first difficulty can be dealt with rather quickly. There is nothing in the claim form or the particulars of claim which alleges that either of the two agreements was signed by the 2nd defendant, and that the 2nd defendant accepted liability, under these agreements, to pay the claimant. The pleadings plainly allege that the two agreements were with the 1st defendant. Moreover, as argued by Mr Williams, the claimant obtained summary judgment against the 1st defendant on these very pleadings. **CPR 8.9A** stipulates that a claimant may not rely on any allegation or factual argument which is not set out in its pleadings, but which could have been set out there, unless the court gives permission. There was neither a request from the claimant, for the court's permission to rely on this allegation, nor any argument explaining why this allegation was not pleaded.

[31] When this was brought to Miss Montague's attention during her closing submissions, she argued that the fact that The Hill Run Agreement is attached to the particulars of claim, means that it forms part of the pleadings. I cannot accept this a valid legal proposition. Documents which a claimant considers necessary to its case must be identified in the claim form or the particulars of claim and a copy annexed thereto. (See **CPR 8.9 (3)**). **CPR 8.9(1)** states that a claimant must include in the claim form or the particulars of claim a statement of all the facts on which it relies. To merely annex The Hill Run Agreement to

the particulars of claim in compliance with **CPR 8.9(3)**, without including in those particulars of claim, the allegation that the 2nd defendant signed that agreement and therefore accepted liability for the debt, does not satisfy **CPR 8.9(1)**. It follows therefore that the claimant cannot rely on arguments or evidence, that the 2nd defendant signed The Hill Run Agreement and is therefore liable under it, as this is not set out in its pleadings. To do so would offend **CPR 8.9A**.

[32] As to the second difficulty, there is no evidence to support the claimant's contention that the 2nd defendant signed The Hill Run Agreement, and that by doing so, it accepted liability under that agreement. A copy of this document, which is in the form of a letter, is an agreed document and was tendered and admitted into evidence. The addressee is the 1st defendant, and the letter was written by the claimant, for the attention of Mr Walker, who is referred to as the CEO. In its first paragraph, the letter says: "We look forward to working with Halton Development Management Inc on this prestigious residential project".

[33] Notably, the second paragraph reads:

"Ziegler - Cooper, Inc. (d/b/a Ziegler Cooper Architects) ('ZCA'), will begin providing design services when this Agreement is duly **executed by your organization to which the agreement is addressed above ("Client") and is received by ZCA**. If before this Agreement is executed Client asks ZCA to proceed with any services described in this Agreement, or if the Client makes any payment to ZCA on account of such services, such request or payment shall constitute Client's ratification and acceptance of all terms and conditions of this integrated Agreement." [Emphasis added].

From this paragraph, it is clear, that the agreement was entered into with the 1st defendant, to whom the document was addressed and who was referred to as the "Client". It is also equally clear, that it was the 1st defendant who was the entity whom it was intended would execute the agreement as "Client". Mr Ziegler admitted when giving evidence, that the agreement was addressed to the 1st defendant.

[34] Miss Montague, however, has urged me to accept the following inductive argument: The 2nd defendant was incorporated in May 2020, shortly after the incorporation of the 1st defendant. At that time, the 1st defendant, a foreign company, was not functional and had no bank accounts. Both companies have common ownership in Mr Walker who in February 2020, was stuck in Jamaica due to the Covid pandemic. It was the 2nd defendant that was seeking project financing, and local banks would more likely fund the 2nd defendant, a Jamaican company. Therefore, the argument goes, it is reasonable to infer that the 2nd defendant signed The Hill Run Agreement in August 2020, intending to be bound by it.

[35] I find it difficult to accept this argument. There is nothing in the agreement, whether expressly stated or implied, which suggests that any person, other than the 1st defendant (the “Client”), would be liable to compensate the claimant for the services provided under it. There is no mention in the agreement of the 2nd defendant. There is in fact, nothing in the agreement to suggest that the 2nd defendant intended to contract with the claimant and to assume liability under the agreement. At the end of the document, there is an invitation for the addressee to return an executed copy to the claimant if the agreement meets with its approval. The document is signed by Mr Walker as CEO, and he inserted the name “Halton Development Management Limited” beside the word “Entity”. His evidence, as observed earlier, is that there is no such entity known as “Halton Development Management Limited”, the use of that name on the document was an error, and what he ought to have written, was the name of the 1st defendant. He said there was no intention to affix the 2nd defendant’s name to the document. It seems to me, given the plain language of the agreement, that this evidence is quite plausible.

[36] As submitted by Mr Williams, all the claimant’s invoices were issued to the 1st defendant at its address in Canada. Moreover, the claimant obtained summary judgment against the 1st defendant in relation to the very agreement that it now says was settled with and signed by the 2nd defendant. In its own pleadings, the claimant says it issued invoices to the 1st defendant. While I can appreciate the claimant’s angst, chagrin and frustration in having unpaid invoices since 2020,

I find Mr Haley's evidence that the agreements were settled with the 2nd and not the 1st defendant, and that the 2nd defendant signed The Hill Run Agreement and promised to pay, unreliable. For the same reasons, I also find unreliable, Mr Ziegler's evidence, that he thought that both defendants were part of the agreement.

[37] Miss Montague also argued, that by Mr Walker's June 10, 2021, letter, it can be construed, that the 2nd defendant assumed liability for the debt owed to the claimant. Counsel submitted that by this letter, the 2nd defendant promised to pay the debt, and Mr Walker, clearly and unequivocally stated that the 2nd defendant had secured construction funding. This letter, Miss Montague contends, is the second example of a statement in writing reflecting the 2nd defendant's acceptance of liability. An analysis of this letter is warranted.

[38] I will first set it out in full:

“June 10, 2021
Alan Haley
Director of Administration/Legal
700 Louisiana Street, Suite 350, Houston, Texas 77002

Dear Alan,
RE OUTSTANDING INVOICE

I write to provide some solutions on how HDM plans to settle the outstanding invoice. Please understand that this delay in payment is a function of our financial reality which we are close to solving and not an unwillingness to deal with the debt. HDM's ability to begin paying down the invoice will come from there (sic) projects that are currently active, these are as follows:

NAME	LOCATION	# OF UNITS	STATUS
PARADISE GLADE	CLARENDON	29	IN CONSTRUCTION FUNDING IN PLACE

HAVENRIDGE	STONY HILL	96	CONSTRUCTION FUNDING IN PLACE
GOSHEN	ST. ELIZABETH	32	IN DESIGN FUNDING IN PLACE

HDM has secured most of the construction funding for the Paradise Glade project based on the outcome of negotiations as recent as June 9th with our Banker. Additionally, we have secured funding for 80% of the material requirements of the project. We expect to have improved liquidity in the next four weeks and can begin making payments in increments of \$10,000.00 to settle the debt. Should we have the ability to make additional amounts greater (sic) \$10,000.00 we will forward those payments.

HDM regrets the inconvenience these delays have caused and give our commitment to settling the debt. We would like to have this debt settled quickly as in the coming months we would like to resume work on the drawings once the balance is paid and new payment arrangement put in place.

HDM values the work done by ZCA and we hope for a speedy resolution of this on our side.

Again, we are sincerely sorry for the inconvenience caused and pledge to work with you to have this settled.

I will keep you abreast of our progress and alert you on the date of first payment.

You have been beyond patient and for that we are appreciative.

Sincerely Yours,

Paul Walker, B.sc. Econ.”

- [39]** Mr Walker in cross examination, said that “HDM” in the first sentence of this letter refers to the 1st defendant, while in the third sentence and the second paragraph, it refers to the 2nd defendant. Thereafter, he said, its use is in reference to the 1st defendant. This evidence was not challenged or refuted by the claimant. It seems to me, that this letter is more a statement of the 2nd defendant’s anticipated ability to pay, and its proposed arrangements for payment, rather than an assumption of legal liability. In referring to the 2nd defendant’s source of funds, Mr Walker says that the 2nd defendant’s ability to begin paying, will come from the stated projects. When he writes that in the “next four weeks”, the 2nd defendant “can begin making payments in increments of \$10,000.00 to settle the debt”, this clearly suggests a proposal, and not a clear and unequivocal assumption of legal liability.
- [40]** In the second paragraph, Mr Walker makes assertions about the 2nd defendant’s finances and expected liquidity, which seems to me, to explain why the 2nd defendant was able to make the proposal to pay the debt. These assertions do not create legal liability. The letter does not say that the 2nd defendant will become jointly liable with the 1st defendant. Neither does it say that the 2nd defendant will be substituted for the 1st defendant. It also does not say that the 2nd defendant guarantees payment or undertakes to be primarily liable for payment.
- [41]** In my view, by this letter, the 2nd defendant was proposing to make payments. The letter does not say however, that by doing so, the 2nd defendant would become indebted to the claimant. A proposed payment arrangement does not necessarily constitute an admission or acceptance of liability. It may simply indicate a willingness to pay without any acknowledgement of legal liability. It seems to me that this is what the letter expresses on behalf of the 2nd defendant. I find, therefore, that in relation to the 2nd defendant, the letter of June 10, 2021, was a proposal to pay and not an assumption of liability.
- [42]** Miss Montague made the further argument that Mr Walker’s evidence that he instructed Mrs Wiltshire to write the February 7, 2022, letter to protect both the 1st and 2nd defendant from liability, and that he did so upon realising that overtures made by the 2nd defendant , may encumber it, is a clear indication

that the 2nd defendant accepted liability for the debt. I reject this argument for the reasons that follow.

[43] Mrs Wiltshire's letter of February 7, 2022, was written after Mr Walker's June 10, 2021, letter and his email correspondences in which he spoke to his engagements with the bank, his belief that he was in the final stages, and his hope that he would receive a draw down during the month of August 2021. Importantly, this letter appears to have been written in response to Mr Haley's letter of December 20, 2021, in which he wrote to the 1st defendant, demanding payment and threatening to send the matter to a debt collector. In her letter, Mrs Wiltshire says she acted for the 1st defendant who instructed her that it is indebted to the claimant. She goes on to say that her further instructions are that the development for which the contract was undertaken, did not materialise, and that her client was depending on financing from a financial institution to fulfil its obligations to the claimant. She then said:

“Halton Development Management Jamaica Ltd. (HDM) even though not a party to the original contract, has decided to make the payments under the contract between [Ziegler-Cooper Inc.] and Halton Development Management Inc. Presently, HDM has several developments in Jamaica for which it is in the final steps of obtaining financing. HDM is therefore requesting a structured payment plan that it will honour when bank financing is made available. Our client expects to be in receipt of its first instalment on or around the 1st day of March 2022.

We understand that there has been a prolonged delay in the settlement of the debt. However, HDM has been working very closely and diligently with several financial institutions in an attempt to settle the debt of Halton Development Management Inc. As you are no doubt aware the pandemic has caused a delay in the processing of many matters including financial applications. The delay is as a result of staff absences or the loss of efficiency with staff working from home.

HDM remains committed to paying the outstanding sums and ask your forbearance in taking legal measures against Halton Development Management Inc.”

[44] I see nothing in this letter, which could be interpreted as the 2nd defendant admitting to being legally liable for the 1st defendant’s debt. It conveys, in my view, a promise by the 2nd defendant to pay the 1st defendant’s debt when it receives financing. This promise is conditional upon the 2nd defendant obtaining financing. Significantly, it also acknowledges that the 2nd defendant is not a party to the contract with the claimant. When Mr Walker says that he instructed Mrs Wiltshire to protect the 2nd defendant from liability, because its prior overtures may result in it being encumbered, it seems to me that he was referring to his June 10, 2021, letter and the statements he made in that letter, about the 2nd defendant paying on the outstanding invoices. I have already found that that June 10, 2021, letter was not an admission of liability by the 2nd defendant, but a proposal to pay. I consequently cannot see how Mr Walker’s stated instructions to Mrs Wiltshire, is proof that the 2nd defendant accepted liability.

Unconditional promise to pay

[45] The second primary basis on which Miss Montague invited the court to find the 2nd defendant liable, is that it made an unconditional promise to pay the debt, which was accepted by the claimant to its detriment. Consequently, the 2nd defendant is estopped from denying liability. Mr Williams argues in response, that the 2nd defendant accepts that it made a promise to pay, but the promise was conditional on it obtaining financing, which it never received. He submits that there is no binding legal agreement between the 2nd defendant and the claimant.

[46] It seems to me that to succeed, the claimant must first show that the promise made by the 2nd defendant was either not conditional or, although initially conditional, the condition was eventually fulfilled or waived by the 2nd defendant. I have of course already found that Mrs Wiltshire’s February 7, 2022, letter, represents a promise by the 2nd defendant to pay the 1st defendant’s debt,

conditional upon the 2nd defendant obtaining financing. The question then, is whether the condition was satisfied or waived.

[47] It is evident from Mr Walker's June 10, 2021, letter, that payment was premised on the 2nd defendant's liquidity, to be generated from projects which were dependent on bank financing. Mr Walker's evidence on the issue whether the 2nd defendant had secured funding, was inconsistent and contradictory. His letter clearly stated that construction funding was in place for at least two of the 2nd defendant's projects. In cross examination, he initially said that the 2nd defendant had received project funding since its inception, yet shortly after giving that answer, he denied that that was his evidence. He later denied that the 2nd defendant had secured construction funding. He also said that in 2022, the 2nd defendant had cash flow of approximately JMD\$1,000,000.00, per month but did not pay the claimant, because the matter had become litigious. It seems to me, based on this evidence, that funds were indeed available to the 2nd defendant, which it could have used to pay to the claimant, but it chose not to do so.

[48] I find Mr Walker's evidence on this issue, not only inconsistent and contradictory, but also lacking in credibility. This, coupled with his evidence that he instructed Mrs Wiltshire to write to protect the 2nd defendant from liability, lead me to find, that it is more probable than not, that the 2nd defendant had received funding , but nevertheless failed to keep its promise to pay.

[49] Promissory estoppel is being relied on by the claimant as a cause of action, but in our jurisdiction, it is not a cause of action, even though it may be used to support one. (See **Caribbean Cement Company Limited v Freight Management Limited [2016] JMCA Civ 2**). This is a claim in contract. I have found that The Hill Run Agreement was not signed by the 2nd defendant and that it was an agreement between the claimant and the 1st defendant. Without a contract or some other cause of action against the 2nd defendant which promissory estoppel is being used to support, it cannot arise on the claim.

Novation

[50] Halsbury's Laws of England Volume 22 (2025) provides the following useful definition of novation at paragraph 390: -

“Novation occurs where one contract is substituted with another, either between the same parties or different parties, the consideration usually being the discharge of the old contract. However, where the 'new' contract modifies the old contract between the same parties, this has come to be termed a variation; and the expression 'novation' has more recently tended to be used rather for the situation where the acts to be performed under the old contract remain the same, but are to be performed by different parties. Hence, novation requires a subsequent binding contract and the consent of all parties. Where the new party takes over liabilities formerly resting on one of the original parties, it is a question of construction whether the new party takes them over with or without benefit of time which has run under the statutory rules of limitation.

Novation should be distinguished from assignment. At common law novation was the only known method of assigning a contractual right. In modern law, contractual rights, but not liabilities, may, as a general rule, be transferred by assignment without the consent of the promisor. Novation, however, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter discharged.”

[51] Miss Montague, quite commendably, conceded that novation, was her client's weakest argument. As I understand the argument, it is that in promising to pay, the 2nd defendant was substituted for the 1st defendant in the agreements with the claimant. It is plain however, that the evidence before the court, does not support novation. *A fortiori*, novation was not pleaded and as is the case with the argument that the 2nd defendant accepted liability, CPR 8.9A prevents the claimant from relying on it.

[52] In any event, there is no evidence that the parties agreed to substitute the 2nd defendant for the 1st defendant in respect of the two agreements. Furthermore, the claimant has already obtained summary judgment against the 1st defendant. It could not have sought to do that, had the 2nd defendant been substituted for the 1st defendant, with the former assuming the obligations and rights of the latter.

Summary of findings and Conclusion

[53] The argument that the 2nd defendant assumed liability under The Hill Run Agreement was not pleaded. I find therefore, pursuant to **CPR 8.9A**, that the claimant is not entitled to rely on it.

[54] In any event, I find that The Hill Run Agreement was not signed by the 2nd defendant. The claimant has failed to discredit Mr Walker's evidence that Halton Development Management Ltd. does not exist, that placing that name on The Hill Run Agreement was an error, and that it was not intended that that agreement would be signed by the 2nd defendant. The provisions of this agreement do not support the claimant's contention that it was signed by the 2nd defendant with the intention to be legally bound. Besides, in its own pleadings the claimant asserts that it contracted with the 1st defendant and issued to it, invoices for which it has not been paid. Moreover, prior to trial, the claimant obtained summary judgment against the 1st defendant. I find that The Hill Run Agreement was between the claimant and the 1st defendant.

[55] I reject the argument that the June 10, 2021, letter, written by Mr Walker, is evidence of the 2nd defendant's admission of liability under The Hill Run Agreement. I find, based on this letter, that the 2nd defendant made a proposal to pay the 1st defendant's debt, and that proposal was contingent upon it securing financing. It was not an assumption of liability. I find as well that the promise in Mrs Wiltshire's letter of February 7, 2022, was also conditional on the 2nd defendant obtaining financing.

[56] I find Mr Walker's evidence in relation to whether this condition was fulfilled, to be inconsistent, contradictory and lacking in credibility. I find on a balance of probabilities that the 2nd defendant had received funding, but nevertheless

failed to keep its promise to pay the claimant. The evidence is that the claimant did forbear for a time in pursuing legal action against the 1st defendant, based on this promise.

[57] Promissory estoppel is not a cause of action in our jurisdiction, but it may be used to support one. This claim is brought in contract. I have found that The Hill Run Agreement was not an agreement between the claimant and the 2nd defendant. Without a contract or some other cause of action against the 2nd defendant which promissory estoppel is being used to support, it cannot arise on this claim.

[58] Novation was not pleaded, but nevertheless, it too, cannot arise on the facts of this case. The evidence neither supports the substitution of the 2nd defendant for the 1st defendant in any of the agreements, nor that any such substitution was agreed.

[59] I apologise sincerely to the parties and to counsel for the delay in delivering this judgment. Unforeseen challenges and a heavy docket made it impossible to do so sooner.

Orders

[60] In the result, I make the following orders:

- (a) The claim against the 2nd defendant is dismissed.
- (b) Costs to the 2nd defendant to be agreed or taxed.

A Jarrett
Puisne Judge