**IN THE COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law & Equity Division**

**2023/CLE/gen/01243**

**IN THE MATTER OF** the Breach of a Construction Contract regarding cost overruns and failure to complete construction in the time agreed AND in the matter of an application for interim relief pursuant to Part 11 and 17 of the Civil Procedure Rules 2022.

**BETWEEN:**

**PALM CAY DEVELOPMENT COMPANY LIMITED**

Claimant

**AND**

**CATAPULT CONSTRUCTION COMPANY**

Defendant

| | |
|---|---|
| **Before:** | The Honourable Madam Justice C.V. Hope Strachan, |
| **Appearances:** | Mr. Dion Smith and Mr. Ryan Williamson for the Claimants/Applicants |
| | Ms. Travette Pyfrom for the Defendant |
| **Hearing Dates:** | 20th December 2023: 31st January 2024; 26th March 2024 |

**JUDGMENT**

*Interlocutory Interim Injunction- American Cyanamid Principles – Duty to disclose material facts - Whether damages adequate remedy – Balance of convenience.*

## INTRODUCTION

[1.] This matter is predicated upon alleged breaches under a construction contract and the disposition of an Interim Injunction wherein the defendants and or its agents were granted an injunction on 20th December, 2023 that the defendants should be restrained from removing scaffolding located at Palm Cay Subdivision, particularly scaffolds erected at the properties known as Cove and One Marina 3 ("OM3").

[2.] The hearing proceeded before me as duty judge (civil division) in the absence of the defendant due to the matter coming on for hearing upon a Notice of Application (Without Notice) filed by the Claimant/Applicant (hereinafter referred to as "the Applicant") on 13th December 2023. The Notice was supported by an affidavit of one Jack Hannaby the purported director and General Manager of the applicant. A Certificate of Urgency was included with the application attesting to Counsel's belief and intention that the courts immediate intervention was critical. The applicant who is the developer of condominiums and town houses located off Yamacraw Hill Road, Palm Cay Subdivision, New Providence, Bahamas, submitted that they believed that if the defendants, their contractors of several aspects of the buildings, was allowed to abruptly remove building scaffolds from the Palm Cay construction site, as it had previously done it would cause significant damage and would weaken the applicant's claim of ownership.

[3.] At the conclusion of the hearing without notice and the grant of the Interim Injunction a substantive hearing of the application, to be heard inter-parties was set for 17th January, 2024. Bearing in mind that this was a matter of days before the Christmas Holidays and the attendant absences which inevitably occur at that time of the year, the court adjourned the substantive inter-parties hearing to 17th January, 2024. On 17th January, 2024 Mr. Dwayne R. Heastie appeared on behalf of the defendant company absent of legal counsel. The Court at the request of Mr. Heastie adjourned the hearing to 31st January, 2024 to allow Mr. Heastie to obtain counsel and to file any pleadings in response to the applicant's application. The Interim Injunction was extended to 31st January, 2024. On 31st March 2024 counsel for the defendant appeared and foreshadowed the defendant's application to have the Interim injunction set aside. An application was filed by the defendant by Notice on 30th January, 2024 seeking to have the Interim Injunction granted on 20th December, 2023 discharged. The application was supported by Affidavit of Mr. Dwayne R. Heastie who purports to be one of the Directors of the defendant. This application was slated by the court to be heard at the same time as the substantive inter-parties hearing of the injunction application by the applicant for 26th March, 2024.

[4.] This Judgment is determinative of the grant of the Injunction specifically whether the court will extend the Interim injunction granted to the applicants or whether it will be discharged. Regard shall be had to the affidavit evidence of the affiants particularized above as well as the submissions provided by counsel for the applicant and the submissions and supplemental submissions provided by the defendant's counsel.

## THE RELEVANT STATUTORY PROVISIONS

[5.] The applicant seeks relief pursuant to Part 11 and 17.1 (1) (b) and/or 17.1(h) (ii) of the SCCPR2022 ("CPR").

[6.] **Part 11.**

**Provides general rules about applications for Court Orders, with an exhaustive inventory of the rules which must be adhered to when applying for interim relief as is the case of the Applicants here. I will not enumerate them all but suffice it to say that the Applicant adhered to the requirements for the most part except as it relates to Part 11.17 (2)–**

[7.] **Part 11.17 (2)**

**(1)"After the Court has disposed of an application made without notice, a copy of the application and any evidence in support, together with a copy of any order made, must be served by the applicant on all other parties".**

**(2) "Where an urgent application is made without Notice and the applicant undertakes to file evidence after the hearing he must also serve copies of the evidence on all other parties affected by the order."**

[8.] **Part 11.18 –**

**Application to set aside and vary order on an application made without notice.**

**(1)-**

**(2) A respondent must make such an application not more than Fourteen days after the date on which the order was served on the respondent.**

**(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule, and the time within which it must be made."**

[9.] **Part 11.20 –**

**Application to set aside order made in the absence of a party;**

**(1) A party who was not present when an order was made may apply to set aside or vary the order.**

**(2) The application must be made not more that fourteen days after the date on which the order was served on the applicant.**

**(3) The application to set aside the 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 order might have been made."**

[10.] **Part 17.1 (1) (b) – Orders for Interim remedies: relief which may be granted.**

**(1) The Court may grant interim remedies including –**

**(a)-**

**(b) "an interim injunction;**

**(c) –**

**(d) –**

**(e) –**

**(f ) –**

**(g) –**

**(h)- an order for the –**

**(i)-**

**(ii) detention custody or preservation of relevant property;**

**(iii)-**

**(iv)-**

**(v)-**

**(vi)-**

**(i)-**

**(j)-**

**(k)-**

**(l)-**

**(m)-**

[11.] **Part 17.2 (2)**

**Unless the Court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order.**

[12.] **Part 17.2 (4)**

**The Court may grant an interim order under this rule on an application made without notice for a period of not more than Twenty-eight days, unless any of these Rules permits a longer period, if it is satisfied that –**

**(a) In a case of urgency no notice is possible; or**

(b) **That to give notice would defeat the purpose of the application.**

**THE EVIDENCE**

**IN SUPPORT OF THE APPLICANT**

[13.] Mr. Jak Hannaby swore and affidavit in support of the grant of the injunction on behalf of the applicant. He did so in his capacity as director and general manager of the applicant. The applicant had a contract with the defendant company as follows:

i. The defendant was to complete the rendering on the Cove for the sum of $300,000.00 and One Marina 3 ("OM3") at $180,000.00.

ii. The defendant was to complete the super structure works on the Cove at $1,327,500.00 and to complete the super structure works on OM3 for $900,000.00

iii. That the defendant erected a scaffolding on the construction site to carrying out the agreed works. Mr. Hannaby says that however he believes that the scaffolding was given to the applicant by the previously mentioned Mr. Dwayne Heastie. He believed it to have been done through an individual called Paul Cummins.

iv. He says as time went on there were delays in the construction and completion of the agreed contracts and cost overruns were experienced to the tune of $1,029,212.90 damage.

v. Mr. Hannaby goes on to state that the applicant decided to ***"complete the remaining projects that had been contracted to Catapult."*** He saw when Mr. Heastie came to Palm Cay with the Police (without notice to the applicant) and began removing the scaffolding and other component parts. His actions causing significant damage to the company due to the interruption in the work schedule caused thereby.

vi. Mr. Hannaby says that Mr. Heastie some time subsequently asked him if the applicant wanted to purchase the scaffolds but he is of the view that the scaffolds belong to Palm Cay already. Moreover he further states that at the conclusion of their claim against the defendant they will actually owe the applicant money.

vii. He speaks to the further belief that if the scaffolds are removed it would cause significant damage and the applicant's claim will be weakened.

viii. He further avers that he believes the scaffolding to be worth $20,000.00 and that this amount can be set off against their claim for cost overruns on the project

ix. Mr. Hannaby avers that the reason that the application was being made without Notice was because it was urgent and it needed to be made to prevent a

repeat of Mr. Heastie coming to the site to remove the scaffolding with the police as he had previously done. That, giving him notice of the application would defeat its purpose as Mr. Heastie would seek to repeat his actions before the application was heard.

x. He undertook to abide any order as to damages caused by the granting of the interim injunction.

**THE EVIDENCE: IN SUPPORT OF THE DEFENDANT'S APPLICATION TO DISCHARGE THE INTERIM INJUNCTION AND IN RESPONSE TO THE AFFIDAVIT OF JAK HANNABY.**

[14.] Mr. Dwayne R. Heastie, as one of the Directors of the defendant, in support of the application to discharge the Interim Injunction granted 20th December 2023 to the applicant stated inter alia as follows:

i. The applicant is the owner and developer of Palm Cay Marina and Resort. The defendant is a construction Company who was contracted to complete certain renderings of Two (2) building projects currently underway at the Development. For the purposes of executing the project they delivered scaffolds to the project site and arranged the scaffolds around the relevant project sites. He states further that the scaffolds were at all times owned by the Defendant.

ii. Mr. Heastie goes on to state that on 10th February 2023 due to the applicant failure to abide the terms of the construction agreement the defendant incurred a debt with the company liquid assets could not meet. Consequently the defendant entered into an agreement with the applicant whereby it borrowed the sum of $60,000.00 from the applicant in return for the applicant's use and retention of the scaffolds until such time as the debt in the amount of $60,000.00 had been repaid.

iii. Mr. Heastie avers that the $60,000.00 was paid back in full by deposits to the applicant's bank account on 15th September 2023. Receipt of the payments were sent to Mr. Hannaby.

iv. Mr. Heastie further avers that on 28th November, 2023 the applicant without Notice to the defendant cancelled the contract and refused to permit the defendant's workmen to enter the property for any purpose. He wrote to Mr. Hannaby to advise him of the dilemma and what had transpired with his workmen on that same day but Mr. Hannaby did not respond.

v. Mr. Heastie further avers that on 1st December 2023 by letter, he notified Mr. Hannaby that his workmen would be collecting his equipment, including the scaffolds and that he required Three (3) weeks to do so. He asked that Mr. Hannaby

appoint a person from his team to arrange removal of the gear so as to reduce the possible disruption to the applicant's business and community.

vi. Mr. Heastie states further that after an exchange of emails a meeting was set and he and Jak met on Monday 4th December, 2024 to discuss the matter. In the meantime it was agreed that his men would not act to obtain the scaffolding. At the meeting Mr. Hannaby offered and agreed to pay the defendant for the use of the gear.

vii. On 21st December, 2023 Mr. Heastie says he wrote Mr. Hannaby to inform him his workmen would be coming to collect his gear and that he needed Three (3) weeks to complete the task.

viii. Mr. Heastie states further that between 4th December, 2023 and 29th December, 2023 he continued to follow-up with Mr. Hannaby concerning payment but the agreed payment was never received. He followed up again on 2nd January, 2024 reminding Mr. Hannaby that he had not received the agreed payment and therefore he was sending his men to collect his gear. Similar conversations with Mr. Hannaby took place on 3rd and 4th January, 2024. On 4th January 2024 Mr. Hannaby responded in an email; ***"I sent my dad a draft agreement- just waiting on a response."***

ix. Mr. Heastie points out that the defendant never received a copy of the draft agreement and heard nothing further from Mr. Hannaby.

x. It was on 9th January, 2024 that he was emailed a copy of the order restraining the defendant from removing its gear from the applicant's property. The email was received from Counsel for the Applicant Dion Smith. He avers further that Mr. Hannaby and Counsel Smith were aware of his several addresses and contacts at the time the application (for the injunction) was made. He asserts that when he received the email from Mr. Hannaby about his father it appears that the injunction had already been obtained.

xi. He goes on to state in fact he was never served with the order granting the injunction. He suggests that the failure to serve notice of the hearing of the injunction application and the injunction order was intentional.

xii. He denies owing the applicant and avers that it is in fact the applicant who owes the defendant. Further that prior to receiving the applicant's affidavit in support of their application he was unaware of the items listed in the alleged costs overruns accounts.

xiii. Mr. Heastie contends that it was the applicant who deviated from the contract and that at one point he sent Leonardo Simms the project Manager an email

advising him that the defendant would not accept any instructions to deviate from the agreed renderings without proper documentation signed off by the appropriate person.

xiv. Mr. Heastie states that while he was laboring under the belief that the applicant was interested in reaching some form of settlement as to the way forward, a belief which the applicant encouraged, in fact the applicant was using the defendant's good faith to stall to allow their attorneys to take action in court.

xv. He believes that the accounts Mr. Hannaby attached to his affidavits are fabricated. That the applicant intentionally misled the Court. That Mr. Hannaby and the applicant well knows that the defendant does not owe the money they are alleging and that the money borrowed was repaid and that it is them who owes the defendant money.

xvi. Mr. Heastie avers that it was the applicant who breached the agreement by refusing his workmen access and he is confounded by the allegations in Mr. Hannaby's affidavit that the defendant is responsible for any cost overruns, which they were never before advised of.

xviii. Mr. Heastie states that in the above circumstances the defendant requests that the interim order be discharged and that an inquiry be made as to damages suffered as a result of the granting of the injunction. That to date the scaffolds have not been released in spite of the fact that the 28 days granted by the order has passed.

## THE ISSUE

[15.] Whether the Interim injunction granted on 20th December, 2023 should be extended or discharged?

## DISCUSSION AND ANALYSIS

[16.] This court granted the applicant an interim injunction pursuant to Part 11 CPR and in accordance and having regard to the evidence disclosed in the Affidavit of Jak Hannaby using the principles in the seminal case, **American Cyanamid Co. v Ethicon Ltd. [1975] A. C. 396** in mind:

***(i) where there is a serious question to be tried on the merits.***

***(ii) if an award of damages at trial could not compensate the claimant.***

***(iii) whether on the balance of convenience the injunctions requested would not do more injustice to the Defendant than it would do the Applicant.***

[17.] The injunction was granted without notice, the rationale that the defendant would have the opportunity to be heard within the statutory Twenty Eight (28) day period. The applicant claim that the defendant breached a contract, caused delays in construction and the attendant damages for cost overruns in the sum of **$1,029,212.90** and averred that scaffolding on property, brought there by the defendant, which they valued at **$20,000.00** dollars, could be used to offset the $1,029,212.90 damages. This they say posed a serious issue to be tried. The Application couched in urgency, also influenced the Courts determination that the removal of the scaffolding was imminent and at risk to occur forthwith or at the very least within the succeeding days over the Christmas Holiday. The uncontroverted contentions of the applicant on the without notice application were sufficiently compelling to convince the court that damages would not compensate the applicants, fulfilling the main consideration of American Cyanamid. The Court exercised discretion in the applicants favour.

[18.] Now, the defendant seeking to have the injunction discharged, have pointed to material failures by the applicant to prove justification for the injunction granted. That Mr. Jak Hannaby's affidavit fell far short of the mark. The first material defect submitted by the defendant's counsel is that the applicant has breached their duty to disclose to the Court all material facts fully and frankly.

[19.] I wish to emphasize here that there is a "***duty***" in the sense of an obligation to disclose. The authorities have painstakingly provided clearly defined guidelines for ferreting out where there has been material non-disclosure and the consequence once it is found to be so. Crane Scott J approved a decision of Winder J to discharge an injunction granted by him ex parte on grounds of material non-disclosure; ***Ralph Gibson LJ's exposition in the Brink's Mat*** case is relied upon;

> ***"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following."***
>
> ***(i)*** ***The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ.***
>
> ***(ii)*** ***The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per Browne-Wilkinson J.***

*(iii)* ***The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.***

*(iv)* ***The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92–93 per Slade LJ.***

*(v)* ***If material [1988] 3 All ER 188 at 193 non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty … ': see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case.***

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

*(vii)* ***Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:***

***'… when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'*** *(See Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 at 183 per Glidewell LJ.)*

[20.] Defence Counsel augmented her submissions relying on;

> In **Memory Corporation plc v Sindhu [2002] 1 WLR 1443, CA, Mummery L.J. said (at page 1459)**
>
> ***"It cannot be emphasized too strongly that an urgent without notice hearing for a freeze order, as well as for a search order or any other form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case."***

[21.] There is a duty to hear the other side unless it's entirely beyond the realm of possibility. Only in rare circumstances should that duty be departed from. Klein J. expressed it succinctly quoting the Privy Council in ***National Commercial Bank of Jamaica v Olint Corpn. Ltd. [2002] UKPC 16 ("the NCJB case")***

> ***"a Judge should not entertain an application [for an injunction] of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a Mareva or Anton Pillar order) or there has literally been no time to give notice before the injunction is required to prevent the threatened wrongful Act."***

[22.] The onus on counsel to ensure full, fair and frank disclosure cannot be underscored and the almost critical nature of the obligation was spoken to by Klein J in the case of **Mortier & Ors v Weir & Ors,** citing "the NCJB case":

> ***"Even more axiomatically, there is a separate duty arising at all times not to mislead the Court and, should the court have been inadvertently misled, to correct that as soon as possible. These duties are prominent in the Solicitors code of conduct."***

[23.] It is obvious that much of the information disclosed in the affidavit of Dwayne Heastie which appears material to the issue of the alleged breach of contract and liability for damages was not disclosed in the Jak Hannaby affidavit. Examples of Mr. Hannaby's failure to disclose are replete in Mr. Heastie's affidavit and include, the existence of the ancillary contract about the scaffolding, the loan by the applicant to the defendant, the repayment of said loan by the defendant and the fact that the repayment was to satisfy whatever indebtedness the defendant owed to the applicant for the scaffolding to be returned. There was also several Emails from Mr. Heastie to the applicant giving ample notice that they were seeking to enter the construction site to collect their equipment. Also emanating from the emails of Mr. Heastie are demands made to the applicant for payment of money owed to the defendant to which there was no response. The emails also suggest that Jak Hannaby was well aware that the defendant was coming to the job site to collect the

scaffolding and other materials owed. Moreover given that the development is a gated community, Mr. Heastie and his men would not have been able to access the property to collect those equipment without Mr. Hannaby's permission or at the very least his approval, even with a police escort.

[24.] Ex Parte orders are granted only where the matter is urgent and notice is impossible or notice will defeat the purpose of the application. Part 17.2 (4). During the hearing without notice counsel for the applicant emphasized the timelines between the filing of the application, the date of the hearing of the urgent without notice application and the date of service of the interim injunction order on the defendant. These time lines are relevant to the issue of whether counsel for the applicant had sufficient time to serve the defendant but took what he might be deemed to be a strategic advantage for his client. In ***National Commercial Bank*** supra per Lord Hoffman:

> ***"These cases appear to show a disregard of Rule 17.4 (4) for which no justification is offered. If the rule is not generally enforced, plaintiffs will be encouraged to make a tactical use of the legal process which should not be allowed."***

[25.] Defence Counsel points out that the mode in which the application unfolded belies the argument that there was no time to serve the defendant. She posits that the application having been filed on 13th December 2023 was not heard until 20th December, 2023. The applicant therefore had seven (7) days in between within which the defendant could have been served with notice to attend the hearing. Notwithstanding that the interim order was made on 20th December, 2023 Counsel did not serve that order upon the defendant until 9th January, 2024 which was some Twenty (20) days after the Injunction was granted and only Eight (8) days before it's expiration. Jak Hannaby's affidavit in support of the ex parte hearing also failed the provisions of part 17 (2) (2) Defence Counsel contends, in that he failed to advise the court as to why the defendant could not be notified.

[26.] These timelines are stubborn facts which are incontrovertible. I accept Defence Counsel's argument that that there was ample time to notify the defendant between the application and the hearing date.

[27.] Another argument advanced by Defence counsel as to why the injunction should be discharged is that the applicant has failed to establish a property right or interest in the scaffolding. She referenced ***Day v Brownrigg (1878) 10 ChD 294***.

> ***"The plaintiffs alleged in their statement of claim that their house was called 'Ashford Lodge' for 60 years. The adjoining house belonging to the defendant was called 'Ashford Villa' for 40 years, and that he recently altered the name of his house to that of the plaintiffs' house. The plaintiffs further alleged that the defendant's act caused them a great inconvenience and annoyance, and materially diminished the value of their property. They claimed an injunction to restrain the defendant from continuing to use the name of their house. The defendant filed a demurrer to the plaintiffs' claim. The Court of Appeal held that the alleged act of the defendant in calling his house by the name of plaintiffs' house was not a violation of any legal right of the plaintiffs and there***

***was no allegation of malicious intention. Thus, the demurrer to the statement of claim was allowed.'***

[28.] The argument that the applicant has not established a legal right to the scaffold would as the Defence Counsel suggest, situate their claim in wrongful interference with the defendant's personal property rather than any breach based on legal ownership to the scaffolds. Ownership in the scaffolding is indeed questionable as the only claim to ownership was included in Jak Hannaby's affidavit where in breach of the rules against hearsay evidence he states "I am advised and verily believe that Mr. Heastie gave the scaffolding particularly erected at the Cove and OM3 to Palm Cay, through Paul Cummins." This is denied by Mr. Dwayne Heastie in his affidavit. Paul Cummins played no part in the affidavit for the injunction. I prefer the evidence of Dwayne Heastie, the director of the Defendant who in his affidavit exhibited a "Security Agreement between Palm Cay Development and Catapult Construction evidencing a debt owed by the defendant to the applicant in the sum of $60,000.00 and the defendant was pledging the scaffolding as security for the said debt. The agreement specifically states that "Termination upon the full repayment of the debt by the Debtor to the Creditor this Agreement, and all interest in the Security it creates in favour of the Creditor, shall terminate. I also believe that based on the receipts Mr. Heastie exhibits to his affidavit showing payment of that debt that full unencumbered ownership of the scaffold reverted to the defendant. The defendant's argument is accepted.

[29.] Notwithstanding my acceptance of the arguments advanced by defence counsel because of the wide discretion given the courts in these proceeding the court has the option whether to discharge the injunction as a finality or whether to allow the injunction to remain in place and to continue. Again the **Brinks Mat** case (supra) provides the guideline:

***Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:***

[30.] It is important to consider:

"***whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived'*****.....,**

"***an important consideration it is not always decisive, by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented."***

[31.] Counsel's arguments that the applicant failed to give full, fair and frank disclosure to the court at the without notice hearing, neither was the opportunity to do so seized at the inter parties

hearing, is credible. The existence of the ancillary agreement in connection with the scaffolding was never disclosed or alluded to in the Jak Hannaby affidavit nor anywhere else in the applicant's documents. To all intents and purposes, it's very existence given the applicant's stated desire to seek a set off against damages points to the documents importance and materiality to the applicant's claim, that there is a serious issue to be tried. The decision not to provide the court with any information at all as to the existence of the document puts the continuation of the injunction in serious peril. The question as to the innocence or culpability of the applicant is difficult to conclude on the evidence. However I hesitate to accuse the applicant that the omission was intentional, so the applicant might have a lifeline.

[32.] The duty to make full and frank disclosure when applying for an interim injunction is also included among the guidelines espoused in **Series 5 Software Ltd. v Clarke [1996] 1 All ER 853** which is being relied on by the applicant;

> ***"(a) the court has a wide discretion whether to grant the injunction and all of the facts of the case must be considered. (b) The rules are not fixed and should be flexible; (c) the Court should rarely attempt to resolve complex issues disputed fact or law; and (d) important factors to be considered are (i) adequacy of damages; (ii) the balance of convenience, (iii) maintaining the status quo and; (iv) the Court's view relative to strength of claim"***

[33.] However as in most situations of a legal nature there are always provisos and conditions which may swing the pendulum in one direction or the other. Notwithstanding that one issue may not be determinative of the application it may still be so material as not to be overlooked when deciding the issue. So the importance of disclosure was underscored by ***Klein J. in Dyphany Mortier & others v Darnette Weir (President of the Bahamas Lawn Tennis Association) put by Slade J***;

> ***"American Cyanamid Co. v Ethicon may have led prospective plaintiffs to the belief, partially justified, that it is not necessary for them to adduce affidavit evidence in support of the motion for an interlocutory injunction of such a precise and compelling nature as might have been required before that decision. Nevertheless, in my judgment it is still necessary for any Plaintiff who is seeking interlocutory relief to adduce sufficient precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for permanent injunction at trial. If the facts adduced by him in support of his motion do not by themselves satisfy the court of this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success. (emphasis mine)***

[34.] The court has already demonstrated it possesses a wide discretion whether to grant the injunction or not and that the rules are not fixed but are flexible, turning on the circumstances of

the case and even in circumstances where there has been non-disclosure of facts and information. There has been no attempt to resolve any complex issues, therefore at this juncture it is left to address the adequacy of damages, the balance of convenience, maintaining the status quo and the courts view of the relative strength of the claim.

[35.] **Whether damages are an adequate remedy**.

The applicant has themselves spoken to an offsetting of the retention and continued use of the scaffolding against the alleged damages they intend to seek in their court action. Assuming that the applicant intends to sue in contract or tort their claim can be asserted for monetary damages. Accordingly the defendant has demonstrated that any loss they may experience can be compensated by their having valued the scaffolding and secured a loan for Sixty Thousand Dollars ($60,000.00) using the scaffolding. I ca foresee however, that futuristically, determining the value of any chances lost through the inability to have the use of the scaffolding, for other contractual opportunities, may be difficult if not impossible of proper calculation. I find that damages ***are*** an adequate remedy for either party upon the conclusion of the trial if and when that occurs. However since the applicant is currently the beneficiary of the interim injunction this decision focuses on the fact that the applicant's remedy can successfully lie in damages.

[36.] **The Balance of Convenience**

The Balance of convenience varies from case to case and Lord Diplock put it succinctly in American Cyanamid supra;

> **"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration, let alone to suggest the relative weight which is to be attached to them"**
>
> **It comes down to deciding "whichever course seems likely to cause the least irremediable damage to one party or the other," (See the NCBJ.")**

[37.] Neither counsel addressed the balance of convenience in their submissions. I am entreated by Counsel for the applicants that they have a credible claim for damages against the defendant for losses suffered due to what can only be described as poor performance under the construction contract resulting in undue delays. The applicant has filed their application to enter Judgment in default against the defendant for damages. This is a trial still to be had. The substantive issue of damage will be determined and I am content that the retention of the scaffolding is an unnecessary inconvenience to the defendant when damages are an adequate remedy at the end of the day. The balance of convenience favours the defendant.

**Maintaining the Status quo.**

[38.] I consider the time which has elapsed between the grant of the interim injunction and the substantive hearing up to the time of this ruling to be material to the question of enlarging the injunctive period. The status quo was maintained and the applicant's so far, unsubstantiated claim, about the damage caused by the defendant remains to be adjudicated. I am therefore of the view that maintaining the status quo is no longer a critical aspiration for the applicant.

## CONCLUSION AND DISPOSITION OF APPLICATION

[39.] In all the circumstances of the case and for the reasons given above, I find, that the balance of convenience does not favour the continuation of the Interim Injunction granted on 20th December, 2023 and the grant of a new injunction. I therefore discharge the Interim Injunction dated 20th December 2023 and dismiss the application made by the applicant on 13th December, 2023. The applicant is ordered to permit the defendant access to the construction site to collect the scaffolding, the subject of this application, within seven (7) days, between the hours of 9 a.m. to 5 p.m., Monday to Friday, except on holidays. Costs of the application is granted to the defendant to be assessed if not agreed.

**Dated the 29th Day of May, A.D., 2024**

**Justice C.V. Hope Strachan**