

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2024CV00125

APPLICATION NO COA2025APP00205

BETWEEN	PROPRIETORS STRATA PLAN NO 73	APPLICANT
AND	CARIB OCHO RIOS APARTMENTS LIMITED	1ST RESPONDENT
AND	TREVOR CARBY	2ND RESPONDENT

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Co for the applicant

Garth McBean KC and Lemar Neale instructed by Garth McBean & Co for the 1st respondent

20 January, 2 and 17 February and 3 March 2026

Civil Procedure — Injunction pending appeal — Easements — Sale of property pending appeal — Distinction between injunction sought and Mareva/freezing orders- Adequacy of damages — Balance of convenience — Undertaking as to damages — Risk of prejudice — Delay and absence of reasons — Preservation of subject matter — Fair hearing — Court of Appeal Rules, rule 2.10(1)(b)

IN CHAMBERS

ORAL JUDGMENT

FOSTER-PUSEY JA

Introduction

[1] This is an application for an injunction pending the hearing of the appeal. Interestingly, the application is made by the 1st respondent in the appeal, Proprietors Strata Plan No 73, (hereafter referred to as 'PSP#73'), who was successful at trial. By its application filed on 22 October 2025, PSP#73 seeks the following orders:

- “1. An Injunction be granted restraining the Appellant, whether by itself, its servants and/or agents from dealing with, parting with, transferring, selling, mortgaging or charging or encumbering All Those parcels of land registered at Volume 1148 Folio 93 and Volume 1121 Folio 470 of the Register Book of Titles pending the hearing and determination of the Appeal.
2. Costs of and incidental to this Application be costs in the appeal.
3. Such further and/or other relief as this Honourable Court deems just.”

[2] During the hearing of the application, the appellant, Carib Ocho Rios Apartments Limited (hereafter referred to as ‘Carib Ocho Rios Apartments’), filed an affidavit revealing that new titles had been issued for the relevant properties after lost title applications. PSP#73 thereafter amended para. 1 of its application. Its amended formulation, filed on 30 January 2026, reads:

- “1. An Injunction be granted restraining [Carib Ocho Rios Apartments], whether by itself, its servants and/or agents from dealing with, parting with, transferring, selling, mortgaging or charging or encumbering All Those parcels of land registered at Volume 1606 Folio 161, Volume 1606 Folio 355 and Volume 1606 Folio 160 of the Register Book of Titles pending the hearing and determination of the Appeal.” (Underlined as in original)

[3] The grounds of the application are:

- “1. [PSP#73] obtained Judgment against [Carib Ocho Rios Apartments] in the Court below in respect of the access and use of All Those parcels of land registered at Volume 1606 Folio 161, Volume 1606 Folio 355 and Volume 1606 Folio 160 of the Register Book Titles.
2. That All Those parcels of land registered at Volume 1606 Folio 161, Volume 1606 Folio 355 and Volume 1606 Folio 160 of the Register Book of Titles form the subject properties that are affected by the Appeal.

3. [Carib Ocho Rios Apartments] has filed a Notice of Appeal to overturn the Judgment.
4. [Carib Ocho Rios Apartments] has already sought to deal with the Titles for the subject properties by way of a Lost Title Application and mortgages.
5. [Carib Ocho Rios Apartments] has commissioned a Valuation of the subject properties with the intention to sell the properties.
6. PSP#73 possesses an equitable interest in the subject properties.
7. [Carib Ocho Rios Apartments] has an Appeal before this Court but is not restrained from disposing of or parting with the properties.
8. [Carib Ocho Rios Apartments] has filed a Notice of Appeal.
9. Damages is not an adequate remedy.
10. The balance of convenience favours the preservation of the status quo.
11. It is just and convenient for this Honourable Court to grant the Injunction to preserve the subject matter of the appeal.
12. [Carib Ocho Rios Apartments] will not be prejudiced.
13. Pursuant to the Court of Appeal Rules 2002 as amended.
14. Pursuant to the overriding objective and in the interest of justice.
15. For the fair and just disposal of the matter.”

Procedural background

[4] On 23 December 2025, my brother Brown JA made an interim order in terms of para. 1 of PSP#73’s application for an injunction. The order was to be effective until 20 January 2026, when the *inter partes* hearing was scheduled to take place.

[5] I commenced the *inter partes* hearing on 20 January 2026 and adjourned it, part heard, to 2 February 2026. Having extended the interim order until 2 February 2026, I ordered Carib Ocho Rios Apartments to file an affidavit regarding the titles it received arising from the lost title applications it made for the relevant properties, and allowed the parties to file further submissions. The hearing was completed on 2 February 2026, and the interim order was extended to 17 February 2026 to allow a decision to be handed down. This order was then further extended to 3 March 2026 at 2:00 pm to allow additional time for consideration of the application and to facilitate the handing down of the decision.

Background to the appeal

[6] Before I outline the affidavit evidence, a broader background, somewhat lengthy, to the matter is required.

[7] The parties have a long, litigious history. Carib Ocho Rios Apartments owns property adjacent to that owned by PSP#73. Mr Radcliffe Butler is the managing director of Carib Ocho Rios Apartments. Mr Trevor Carby, the 2nd respondent, is a member of PSP#73's executive committee.

[8] Carib Ocho Rios Apartments and PSP#73 are parties to an amenity areas agreement and various leases by which PSP#73 leased certain buildings and received certain easements. Over the years, they have had disputes concerning the amenity areas agreement and leases. On one occasion, Carib Ocho Rios Apartments sued PSP#73 and Trevor Carby. Ellis J determined the matter and, on 23 June 1998, made the following orders in Suit No E R C-101 of 1989:

- “1. **That [the] Amenity Areas Agreement dated the 9th day of June 1977 is a binding and enforceable contract between [Carib Ocho Rios Apartments] and [PSP#73].**
2. **That the Amenity Areas Agreement dated the 9th day of June 1977 limits [Carib Ocho Rios Apartments] or their successors in title to develop**

30 Residential units or less on the Lot numbered 1/3 on the plan of the Certificate of Title registered at Volume 1148 Folio 93 [now registered at Volume 1606 Folio 355] of the Register Book of Titles.

3. **That [PSP#73] is entitled to exclusive and undisturbed possession of the ground floor of the office building and the laundry.**
4. That by virtue of the Amenity Areas Agreement, [Carib Ocho Rios Apartments] or its successors in Title are prohibited from constructing any residential or commercial building on the Lot numbered 1/3 as provided for by the Amenity Areas Agreement dated the 9th day of June 1977...." (Emphasis supplied)

[9] Ellis J also heard and determined a summons for further and better relief in Suit No E R C-101 of 1989 and, on 31 October 2000, ordered as follows:

- "(1) **that the following incumbrances be entered on the Certificates of Titles registered at Volume 1148, Folio 93 and Volume 1121, Folio 470 of the Register Book of Titles in favour of [PSP#73]**, that is to say, in common with the registered proprietors hereof, their grantees and all other persons having the like right-
- (a) the right to use the beach and jetty on the Lot designated as Lot 1/2 on the said plan.
 - (b) the right to use the swimming pool on the Lot designated as Lot 1/2 on the said plan.
 - (c) the right to pass and repass over the pathways and roadways on Lots 1/2, 1/4 and 3/3 designated on the said plan.
 - (d) The right to use the tennis courts the badminton court and the health club building constructed on Lot 3/3 designated on the said plan.
 - (e) The right to use such other buildings as may be erected on the Lot designated as Lot 1/4 on the said plan and to enjoy such other amenities as may be provided in the Amenity Area from time to time **subject however to the rights of any lessee or concessionaire of any premises used for the purpose of a bar and restaurant or the proprietor of any club operated in the Amenity Area from time to time.**

- (2) **that an instrument in the form appended to this Summons and marked 'A' be signed by the Registrar of the Supreme Court; and**
- (3) **that the Registrar of Titles enter on the said Certificates of Titles the incumbrances set forth in the said instrument** marked 'A'.
- (4) Costs to the [PSP#73] to be taxed if not agreed."
(Emphasis supplied)

[10] In **Carib Ocho Rios Apartment v Proprietors Strata Plan No 73 and Trevor Carby** [2013] JMCA Civ 33, Carib Ocho Rios Apartments challenged the decision of Sykes J (as he then was) in which he refused its application for a mandatory injunction ordering PSP#73 to vacate and deliver up a part of the ground floor of the office building. This court, in a judgment written by Harris JA, dismissed the appeal. At para. [29] of the judgment, the court commented, among other things, that there was nothing to show that Ellis J made an error in assigning exclusive possession of the ground floor of the office building to PSP#73. The court also stated that if Ellis J had made an error, then Carib Ocho Rios Apartments ought to have appealed the order, which it did not.

[11] Carib Ocho Rios Apartments' amended claim No 2010HCV03357 against PSP#73 and Trevor Carby went to trial before K Anderson J ('the learned judge') over the period 9-13 July 2012, 18 December 2012, with judgment handed down on 18 October 2024. Unfortunately, it is necessary to again include a lengthy insert of the terms of the judgment. It reads:

- "1. [Carib Ocho Rios Apartments] shall, by or before November 29, 2024, dismantle and remove the two buildings which it constructed on the beach.
2. [Carib Ocho Rios Apartments] is enjoined as of November 29, 2024 from entering into any lease agreement or granting any licence to any third party to take possession of or conduct any activity in the Amenity Area; enabling tourists or members of the public in any way whatsoever to use or enter the Amenity Area; enabling or facilitating

in any way whatsoever the conducting of any entertainment event in the Amenity Area, enabling or facilitating in any way whatsoever for buses, taxis and/or vehicles used by the general public to park in any section of the Amenity Area.

3. [PSP#73] and Trevor Carby are awarded damages for nuisance in the sum of JMD3,000,000.00.
4. All persons presently occupying any buildings, grounds and/or facilities of the Amenity Area save and except [PSP#73] shall, as of November 29, 2024 vacate their occupation of that or those buildings, grounds and/or facilities.
5. [PSP#73] is as of November 29, 2024 to have exclusive occupation and use of the buildings, grounds and/or facilities of the Amenity Area and [PSP#73's] exclusive use and occupation of same is to remain so unless this Court orders otherwise.
6. [PSP#73] has the exclusive right to relocate the main entrance gate and guardhouse and to employ such persons and to take such measures as may be deemed by [PSP#73] to be necessary in order to secure the premises described as Proprietors Strata Plan No. 73.
7. [PSP#73] is awarded as damages in the sum of USD542,088.00 which is to be calculated in Jamaican Dollars using an exchange rate of JMD155.00 to USD1.00 and said sum is awarded to [PSP#73] as against [Carib Ocho Rios Apartments] as damages for breach of the Amenity Area Agreement.
8. [PSP#73] is to be awarded Damages against [Carib Ocho Rios Apartments] for trespass arising from [Carib Ocho Rios Apartments'] use and occupation of both the ground and 2nd floors of the Office Building, Health Club, Conference Room and Amenity Area from May 1985 until present and continuing. The parties shall respectively file and serve detailed written submissions as to what quantum of damages is to be awarded to PSP#73 as against Carib Ocho Rios Apartments in respect of same and explaining how that submitted quantum was quantified. Same shall be filed and served by or before

November 29, 2024. This Court's hearing as regards the quantum of damages to be awarded for same, shall take place on paper and this Court's Judgment as regards same is further reserved.

9. Costs of this Claim and of PSP #73's Ancillary Claim are awarded to PSP#73 and Trevor Carby and such costs shall be taxed if not sooner agreed.
10. Liberty to Apply.
11."

[12] On 18 November 2024, Carib Ocho Rios Apartments appealed the learned judge's decision. The notice of appeal included several grounds that challenged the findings of fact. Some of the grounds of appeal are specifically directed to findings concerning the ground and upper floor of the office building, the health club, the laundry, and the conference room. Carib Ocho Rios Apartments also asserted, among other things, that the learned judge ought to have awarded it sums that PSP#73 owed it for maintenance and for loss of rental for a part of the ground floor.

[13] Two days after filing the appeal, on 20 November 2024, Carib Ocho Rios Apartments filed and served a notice of application seeking a stay of execution of the judgment and orders made by the learned judge. Various interim orders were made before that application was finally heard. In one of the orders, which was made on 11 March 2025, the Registrar of this court was asked to contact the Registrar of the Supreme Court with an urgent request for the learned judge's reasons for judgment. Unfortunately, to date, this court has not received the requested reasons.

[14] On 17 October 2025, Carib Ocho Rios Apartments filed an Amended Notice of Appeal with the following added ground of appeal (h):

"The delay of approximately twelve years by the Learned Judge in delivering the Judgment and the delay of almost thirteen years by the Learned Judge in delivering the reasons for Judgment is in breach of the [Carib Ocho Rios Apartments'] Constitutional right under section 16(2) of the

Constitution of Jamaica to a fair trial within a reasonable time.”

[15] This ground was also added, in an amended notice of application filed 17 October 2025, as a basis for a grant of the stay of execution.

[16] As indicated earlier, PSP#73 then filed a notice of application for an injunction on 22 October 2025.

[17] The stay of execution application was heard, and on 23 December 2025, my brother, Brown JA, granted it, staying the orders made by the learned judge until the determination of the appeal. While the reasons for the grant of the stay have not yet been shared with the parties, King’s Counsel has repeatedly stated, and Mrs Senior-Smith appears to agree, that the main reason for the grant of the stay is Carib Ocho Rios Apartments’ ground of appeal asserting that its constitutional right to a fair trial within a reasonable time has been breached, coupled with the absence of the reasons for the judgment.

[18] It is in the context of this very involved background, which may not fully reflect the history between the parties, that PSP#73’s application for an injunction pending appeal came before me for a hearing.

Affidavit evidence filed in support of the application

[19] Mr Michael Anthony Shaw, a registered owner in PSP#73 and a member of its executive committee, swore an affidavit in support of the application. Mr Shaw stated that in or around September 2025, the PSP#73’s attorneys-at-law received an email warning a caveat that was lodged against the three certificates of title for the properties included in the application. The notices stated that Carib Ocho Rios Apartments had lodged lost title applications and a mortgage for registration in respect of three properties, including two on which easements in favour of PSP#73 were endorsed. Time had already run so that PSP#73 could not obtain a judge’s order pursuant to the warning.

[20] Mr Shaw deposed that Carib Ocho Rios Apartments had, in 2008, commenced Claim No 2008HCV04178 against PSP#73 and Mr Carby seeking to remove the caveat that PSP#73 had lodged against the three titles, and that the court refused the application. This order, made on 16 September 2009 by Sinclair-Haynes J (as she then was), refusing the claim, was exhibited to the affidavit.

[21] Mr Shaw also exhibited certificates of title registered at Volumes 1148 Folio 93 and Volume 1121 Folio 470 in the name of Carib Ocho Rios Apartments, on which Deeds of Easement were endorsed. The endorsements read as follows:

“Miscellaneous No. 1658646 Deed of Easement dated the 30th day of November 2000 and registered on the 7th day of July 2010 whereby the registered proprietors/s of the land comprised in this Certificate of Title (hereinafter called ‘the grantor’), hereby grants to the Proprietors of Strata Plan 73 (hereinafter called ‘the grantees’) their successors in title, owners and occupiers for the time being of the Grantees’ land, the right to use in common at all times, by day or by night for all purposes connected with the enjoyment of the Grantees’ land or any part or parts thereof, to use the laundry, tennis courts, the badmington [sic] court and the building designated as a health club and all other buildings erected on the said land subject to the rights of any lesser or concessionaire of any premises used for the purposes of a bar and restaurant or the proprietor of any club operated on the said land from time to time and the right to pass and re-pass over along all pathways and roadways constructed on the said land and to use all such other amenities as may be provided on the said land from time to time subject nevertheless to the conditions set out in the said Miscellaneous Instrument.”

[22] Mr Shaw referred to Ellis J’s ruling in 1998, and asserted that the court has already ruled on the validity of the amenity areas agreement. He commented that since Carib Ocho Rios Apartments had made lost title applications for the relevant properties, the new titles would have different numbers. He went on to indicate that Carib Ocho Rios Apartments had obtained a valuation report with the intention to sell the relevant properties, and there was nothing in place to prevent it from doing so. He expressed the concern that if Carib Ocho Rios Apartments were to sell the properties with the new titles,

there was no guarantee that PSP#73's interest would be preserved. In addition, there was no guarantee that it would be able to get the fruit of its judgment if the appeal were to be determined in its favour.

[23] He went on to state that damages would not be an adequate remedy, dissipation of and interference with the property before the appeal is determined is a serious issue and PSP#73 would suffer irreparable harm if the injunction is not granted. He stated that the balance of convenience was in PSP#73's favour and it was asking the court to maintain the status quo regarding the properties until the appeal is determined. He stated that PSP#73 gives an undertaking as to damages and has set aside a budget for the costs.

Affidavit evidence filed in opposition to the application

[24] Mr Radcliffe Butler filed an affidavit on 31 October 2025, responding to Mr Shaw's 22 October 2025 affidavit. He made statements concerning the warning of the caveats and admitted many paragraphs in Mr Shaw's affidavit. He admitted that Carib Ocho Rios Apartments had obtained a valuation report for the properties, but asserted that it did not intend to sell the properties before the hearing and determination of the appeal. He denied that PSP#73 had strong legal grounds to oppose the appeal and relied particularly on the constitutional issue of a right to a fair trial within a reasonable time. He stated that PSP#73 had not provided any evidence of its means to give an undertaking as to damages and asked the court to refuse the application for the injunction.

[25] On 16 January 2026, Mr Butler filed a further affidavit opposing the application for the injunction. He asserted that PSP#73 and Mr Carby do not have any proprietary interest in the properties in question, merely an easement. The easement having been endorsed on the titles, any sale of the property would be subject to the encumbrances, preserving PSP#73's rights.

[26] In an about turn, Mr Butler went on to state that he had a genuine need to dispose of one of Carib Ocho Rios Apartments' properties. He stated that he was the majority

shareholder, holding 245,000 of the 250,000 ordinary shares, and the Managing Director with authorisation to deal in Carib Ocho Rios Apartments' properties, which are essentially held in trust for him, as he used the company as a vehicle to hold the properties. These properties he said are the only source of income for his wife and himself. They were experiencing financial hardship and were unable to meet their ordinary living expenses. Mr Butler stated that he earns an income from the rental proceeds of the properties and currently only has one tenant who provides sporadic sums that are insufficient to cover his basic costs of living. He and his wife have mounting medical expenses which they are unable to meet. He complained that the properties in question have been the subject of litigation for almost two decades, and the situation is compounded by the delay of 12 years in delivering judgment, with no reasons provided to date. He reiterated his grounds of appeal based on excessive or inordinate delay.

[27] He provided greater detail of health issues that he and his wife have faced and are facing, and their very old vehicle needs costly repairs. He stated that in order to survive, he and his wife had to borrow funds at predatory high interest rates, are currently in severe debt and do not own a family home. He stated that if he were prevented from dealing with the properties, he and his wife faced the prospect of becoming homeless and destitute. He asked the court to refuse to grant the injunction and allow Carib Ocho Rios Apartments to deal with its properties so that he, Mr Butler, could settle his debts and attend to the urgent medical needs of himself and his wife. He reiterated that what was intended was not an unjustifiable disposal, but an attempt to meet his living expenses, and in any event, any new owner would have notice of the encumbrances in favour of the respondents.

[28] As mentioned earlier, at the court's request, Mr Butler filed a further affidavit on 22 January 2026. He exhibited copies of the new titles that were issued in response to the lost title applications. The Certificate of Title registered at Volume 1606 Folio 161 replaced that previously registered at Volume 1121 Folio 470. The Certificate of Title registered at Volume 1606 Folio 355 replaced that previously registered at Volume 1148

Folio 93, and the Certificate of Title registered at Volume 1606 Folio 160 replaced that previously registered at Volume 1121 Folio 469.

[29] Mr Butler highlighted that the deeds of easement granted to PSP#73 were registered on certificates of title registered at Volume 1606 Folio 161 and 1606 Folio 355. He explained that the certificate of title registered at Volume 1606 Folio 160 is a driveway, and the previous title did not have an easement in favour of PSP#73.

Further affidavit evidence in reply

[30] Mr Shaw, in an affidavit filed 30 January 2026, noted the mortgages endorsed on the titles and exhibited a copy of the mortgage document. He stated that the mortgagee is the managing director of the real estate agent of Carib Ocho Rios Apartments, and the owner of one of its strata lots. He stated that PSP#73's concern as to the dissipation of the property was heightened, having seen the mortgages that were endorsed on the titles. He highlighted that the mortgage sum entered on 17 October 2025 was for a "minuscule" amount compared to the value of the property, and the charge was registered after Carib Ocho Rios Apartments had filed its appeal and before the stay of execution hearing, but was never mentioned at the hearing.

[31] He opined that the subject properties are unique and critical to the proper use and occupation of PSP#73, and that if the properties are disposed of, this could severely prejudice the rights of PSP#73.

Submissions on behalf of PSP#73

[32] Mrs Senior-Smith referred to **John Ledgister v Sunny Crest Enterprises Ltd and Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10, **American Cyanamid Co v Ethicon** [1975] AC 396, **National Commercial Bank Jamaica Ltd v Olint Corporation** [2009] UKPC 16 (**NCB v Olint**) and **Auburn Court Ltd and another v Jamaica Redevelopment Foundation Inc** [2010] JMCA App 5 (**Auburn Court Ltd**) for principles relating to the grant of an interlocutory injunction.

[33] Counsel argued that the filing of the appeal and recent actions of Carib Ocho Rios Apartments raise serious issues on appeal. Mrs Senior-Smith highlighted that this court has already granted a stay of execution on the basis that the delay in the delivery of the judgment and the absence of reasons are reasonable grounds of appeal. Counsel referred to Ellis J's ruling in 1998 and drew attention to the fact that matters on which Ellis J issued a final ruling were raised by Carib Ocho Rios Apartments in the claim now on appeal, and Carib Ocho Rios Apartments had also sought a declaration that the amenity areas agreement was terminated by frustration.

[34] Carib Ocho Rios Apartments had also sought to have the court below set aside the endorsement of the deed of easement on the relevant titles, contrary to Ellis J's ruling. Counsel submitted that the pith of Ellis J's orders, which had not been appealed, are included in Carib Ocho Rios Apartments' grounds of appeal. Counsel noted that it is a serious issue as to whether the filed notice of appeal raises grounds of error of law or fact on the part of the learned judge. Further, it is a serious issue whether the delay in handing down the judgment in and of itself renders the judgment unsustainable or unreliable and should shut out PSP#73 from access to the amenity areas.

[35] Mrs Senior-Smith, on the question of the adequacy of damages, submitted that the subject properties are unique and cannot be replaced so that damages would not be an adequate remedy. Counsel also submitted that the stay of execution that Carib Ocho Rios Apartments secured, permits Carib Ocho Rios Apartments to continue to breach the amenity areas agreement. Counsel also noted that Carib Ocho Rios Apartments had applied for new titles for the relevant properties, completed a valuation of the properties after judgment was delivered against it for substantial sums and for use and access to the properties, and registered a mortgage over three titles. These steps, taken together, demonstrate a serious risk that it will dispose of the properties that are the subject of this appeal.

[36] Counsel for PSP#73 drew the attention of the court to the mortgages that were endorsed on the three titles exhibited to Mr Radcliffe Butler's affidavit filed 22 January

2026. Mortgage No 2634886 was registered on 17 October 2025 to Mr Wayne Nelson to secure \$120,000.00, a \$40,000.00 mortgage with interest on the title for each of three lots. These mortgages were registered after the judgment under appeal was handed down on 18 October 2024, after Carib Ocho Rios Apartments filed its appeal on 18 November 2024 and while Carib Ocho Rios Apartments' application for a stay of execution of the judgment was in progress in this court. The mortgages have a repayment date of 2027, an interest rate of 6% per annum, and a monthly payment of \$1,866.67 per title, totalling \$5,600.00. Counsel expressed concern that the endorsement of the mortgages creates a priority over the judgment creditor, PSP#73, which has been awarded damages in its favour for JA\$3,000,000 and US\$542,088.00.

[37] On the issue of the mortgages, counsel expressed concern that the subsequent mortgage creates a risk in the enforcement of the judgment if the appeal is unsuccessful, as the mortgagee could exercise his powers of sale. This could lead to a change in the proprietary rights in the land and cause serious challenges in enforcing the judgment. Counsel submitted that it appeared that Carib Ocho Rios Apartments was using the opportunity, during the appeal process, to restructure its assets. Reliance was placed on **Evans Marshall & Co Ltd v Bertola SA and another** [1973] 1 WLR 349.

[38] Mrs Senior-Smith submitted that there is a great risk of dissipation of the properties in question while the appeal is ongoing.

[39] Counsel argued that the judgment under appeal does not only concern the preservation of rights but also the award of substantial damages and there is a likelihood that PSP#73 may not be able to get the damages awarded. In relation to the orders not related to money, where Carib Ocho Rios Apartments is to carry out certain works, if the properties are sold, there would be orders directing a person who no longer owns the apartments to carry out works on the property. This would be a challenge.

[40] As regards the balance of convenience, counsel submitted that the injunction, if granted, would preserve the properties, would not cancel the mortgage, and would not

dispossess Carib Ocho Rios Apartments. It will restrain further alteration and alienation. In contrast, if the injunction is not granted, PSP#73 will face irreversible prejudice. As such the balance of convenience strongly favours maintaining the status quo by not allowing any further encumbrances. This would be the most appropriate way of maintaining balance between the parties as justly as possible until the appeal is resolved.

[41] While PSP#73 has given an undertaking as to damages, relying on **Sheldon Gordon and another v Arleen McBean and another** [2023] JMCA Civ 41 (**'Sheldon Gordon'**), counsel submitted that the giving of an undertaking as to damages is not a rigid condition. It is an equitable safeguard imposed at the court's discretion, and so the court may dispense with the requirement. In a context where, since the litigation has commenced, Carib Ocho Rios Apartments has not been deprived of its lawful income from the subject properties, and is the only party earning and with control over the properties that are the subject of the amenity areas agreement, counsel submitted that, a grant of the injunction would not cause any commercial prejudice or operational prejudice to it. It would only maintain the status quo.

[42] Counsel submitted that there was no evidence before the court to support the Carib Ocho Rios Apartments' need to sell an apartment.

Submissions on behalf of Carib Ocho Rios Apartments

[43] Mr McBean KC submitted, relying on **First Financial Carib Trust Co Ltd v Delroy Howell et al** [2011] JMCA App 3 (**'First Financial'**), that rule 2.10(1)(c) of the Court of Appeal Rules ('CAR') is the same as rule 2.11(1) of the CAR before it was amended, which was considered in that case. He referred to a judgment of Phillips JA as stating that the applicant for an injunction must show there is a good arguable appeal, there is a risk that if the injunction is not granted the appeal may be rendered nugatory and there is a real risk that the assets will be dissipated.

[44] On the issue of a good arguable appeal, King's Counsel noted that PSP#73 is the respondent in the appeal. He highlighted ground (h) in the amended grounds of appeal

(concerning the right to a hearing within a reasonable time) and the reasons for the decision. King's Counsel stated that Brown JA granted a stay of execution of the judgment on the basis that Carib Ocho Rios Apartments has a prospect of success of appeal on that ground. He submitted that, on the other hand, PSP#73 has not shown that they have a prospect of success in the appeal.

[45] King's Counsel submitted that PSP#73 has not produced evidence to show that the appeal will be rendered nugatory if the injunction is not granted and the grant of the injunction would not produce a just result. It would inflict more hardship than it would avoid, as if the appeal is not successful, Carib Ocho Rios Apartments could not use the properties to satisfy the judgment of the large sums which the learned judge ordered ought to be paid.

[46] King's Counsel further submitted that PSP#73 had not submitted evidence to show that it would be in a financial position to pay damages as a result of a restraint upon Carib Ocho Rios Apartments' exercise of its rights in relation to the titles and mortgages. He maintained that the undertaking as to damages is not sufficient.

[47] Mr McBean KC stated that the failure to provide reasons is a free-standing ground of appeal. He highlighted that the judgment was handed down nearly 13 years late and with no reasons. There would be no basis for the PSP#73 to rely on the judgment obtained due to the delay.

[48] Mr McBean KC emphasised that the PSP#73's easements are endorsed on the two relevant titles, the third title only relating to a roadway, on which the easement is not endorsed. Any sale of the two properties would be subject to the easements so endorsed.

[49] When asked what might be the outcome of an appeal allowed due to the delay in handing down judgment and reasons, Mr McBean KC submitted that there may have to be a retrial of the matter.

[50] Finally, Mr McBean KC stated that PSP#73 was seeking an order in the nature of a freezing order. If that were to be granted, and Carib Ocho Rios Apartment is successful on appeal, the loss the company would suffer would not be compensated in damages. King's Counsel noted that the apartments were the only income earned by the company and by extension the majority shareholder. There is a greater risk of injury to Carib Ocho Rios Apartments if the injunction is granted. Counsel relied on **Paulette Kolbusch v Dr Peter Kolbusch and another** (unreported), Supreme Court, Jamaica, Claim No 2009 HCV 02600, judgment delivered 31 July 2009, **Jamaica Citizens Bank Limited v Dalton Yapp** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 82/1993, judgment delivered 14 February 1994, among others in support of his submissions.

Discussion

[51] Rule 2.10(1)(b) of the CAR provides that a single judge may make orders for an injunction restraining a party from "dealing, disposing or parting with possession of the subject matter of an appeal pending the determination of the appeal".

[52] What is the subject matter of the appeal in this case? The main issues arising from the judgment of the learned judge concern easements granted to PSP#73 over properties now registered at Volume 1606 Folio 161 and Volume 1606 Folio 355 in the name of Carib Ocho Rios Apartments.

[53] According to the text Commonwealth Caribbean Land Law written by Sampson Owusu:

"An easement is a property right enjoyed by an owner of a property over or in respect of the property of another, whereby the latter is obliged to suffer the former to do or himself refrain from doing something on his property for the benefit of the former's property. It is a right exercised over the property of another person, i.e., a right in alieno sol, a right in the land of another person. A right of way across another's land is a classic example of an easement."

[54] It is in that context that the two properties in question are subject matters of the appeal.

[55] Carib Ocho Rios Apartments has also challenged the damages awarded and has raised the issue of a breach of its constitutional rights to a fair hearing within a reasonable time. That issue presents a particular difficulty, in that PSP#73 would have waited the same amount of time for a judgment from the court and could similarly complain of the lack of reasons for judgment. Any determination of the issue by the court will involve the balancing of the rights of two 'innocent' parties in respect of that issue. I will return to this point later in this judgment.

[56] There is no dispute concerning the usual principles that the court takes into account in considering whether to grant an injunction pending trial or pending the determination of an appeal.

[57] However, King's Counsel suggested an approach that I took the time to consider. I read **First Financial**, to which King's Counsel referred as outlining the principles guiding the court in considering this application for an injunction pending appeal. In the **First Financial** case, Phillips JA considered and ruled on an application by the applicant trust company for an injunction restraining the respondents from disposing, transferring, charging, diminishing, or dealing with their assets wherever situated or withdrawing or transferring funds from any accounts held on their behalf, save so far as they exceed US\$13,911,092.15 pending the hearing of its appeal. The appeal arose from an order made by Brooks J (as he then was) in an application for a freezing order. Phillips JA granted an injunction against the respondents restraining the disposal of their assets or withdrawal of sums in their accounts up to the amount of US\$3,400,000.00, or the sum that represents the balance of the proceeds of sale of the asset and purchase agreement undertaken by the 3rd and 5th respondents.

[58] Phillips JA was, therefore, considering an application for a Mareva injunction pending the hearing of the appeal. This explains why the learned judge referred not only

to the importance of a good arguable appeal, but also to the risk that, if the injunction is not granted, the appeal may be rendered nugatory, as well as to the risk of asset dissipation. It is a similar situation with **Jamaica Citizens Bank Limited v Dalton Yapp**, on which King's Counsel also relied, which was an appeal concerning the discharge of a Mareva injunction. **Paulette Kolbusch v Dr Peter Kolbusch and another**, to which King's Counsel also referred, was a case relating to the discharge of a freezing order. While the analysis in this matter may touch on some of those issues, in my view, the broader principles of whether there is an arguable case on appeal, whether damages would be an adequate remedy, and where the balance of convenience would lie, are the main principles to be considered in the application currently before this court.

[59] I found aspects of this court's judgment in **Michael Drakulich and others v Karibukai and others** [2021] JMCA App 4 helpful. Brooks P wrote the decision of the panel that was reviewing the decision of a single judge of this court to refuse to grant an injunction pending appeal. At para. [25], he quoted from the judgment of **Novartis AG v Hospira UK Ltd – Practice Note** [2014] 1 WLR 1264:

"[25] ...The court is also guided by the principles concerning the grant of injunctions pending appeal, as set out in **Novartis AG v Hospira UK Ltd – Practice Note** [2014] 1 WLR 1264. Floyd LJ, at paragraph 41, summarised the principles relating to the grant of an interim injunction, pending appeal, where a claimant was unsuccessful at first instance, as follows:

`.....The court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted. **(4) The grant of an injunction is not limited to the case where its refusal would render an appeal nugatory. Such a case merely represents the extreme end of a spectrum of possible factual situations in which the injustice to one side is balanced against the injustice to the other.** (5) As in the case of the stay of a permanent injunction which

would otherwise be granted to a successful claimant, the court should endeavour to arrange matters so that the Court of Appeal is best able to do justice between the parties once the appeal has been heard.” (Emphasis supplied)

[60] Bearing in mind the above principles, PSP#73 does not have to prove that a refusal of the injunction would mean that its successful defence of the appeal would be rendered nugatory.

[61] Importantly, PSP#73 has not applied for a Mareva injunction pending the determination of the appeal.

[62] The main principles in an application for an interlocutory injunction were very usefully outlined in **NCB v Olint**, a decision of the Privy Council. On a reading of that judgment, we see a number of considerations that are helpfully outlined by their Lordships, particularly in paras. 16 through to 20. These considerations are, of course, not exhaustive and different cases may have peculiarities. Nevertheless, over the years they have proved to be a helpful synopsis of some relevant principles when considering an application for an interlocutory injunction. A court should, therefore, take the following into account that:

- i. The purpose of an interlocutory injunction is to improve the chances of the court being able to do justice after a determination of the merits at trial;
- ii. At the stage of the application, the court must assess what is more likely to produce a just result, is it granting or is it refusing the injunction?
- iii. If damages can adequately compensate the plaintiff/applicant, the court ought not to grant an injunction so as to interfere with the defendant’s freedom of action;
- iv. If there is a serious issue to be tried and the plaintiff/applicant would suffer prejudice by what the defendant does or fails to do pending

trial, and the cross-undertaking in damages would be an adequate remedy for the defendant if it turns out that the injunction ought not to have been granted, then the court would ordinarily grant the order;

- v. Where it is difficult to determine whether damages or a cross-undertaking will suffice, the court has to assess whether granting or withholding an injunction is likely or not to cause irreparable prejudice if it turns out the injunction should or should not have been granted. The court should take the route that it appears is likely to cause the least irreparable prejudice to one party or the other;
- vi. Among the matters the court may consider are:
 - a) What is the prejudice that the plaintiff/applicant may suffer if no injunction is granted;
 - b) What is the prejudice that the defendant may suffer if the injunction is granted?
 - c) Is it likely in either case that the prejudice will actually occur?
 - d) How, if at all, could the prejudice be compensated by an award of damages or enforcement of the cross-undertaking?
 - e) How likely is it that either party can satisfy an award of damages?
 - f) What is the court's opinion of the strength of the parties' cases such that it is likely that the injunction may turn out to have been wrongly granted or refused?
 - g) What will be the 'practical consequences' of a grant of the injunction?

[63] In **Auburn Court Ltd**, Morrison JA (as he then was), in ruling on an application for an injunction pending appeal before him, stated that at that stage what the applicant needs to show is that it has reasonable grounds of appeal, which is similar to the serious question to be tried test that is applicable at first instance, see para. [18]. That case, however, also had special features as the injunction being sought was to prevent a mortgagee's exercise of powers of sale.

[64] It is now necessary to apply the relevant principles to the application at Bar.

Are there reasonable grounds of appeal or a good arguable appeal?

[65] The first question asked is usually whether the applicant for the injunction, PSP#73, has reasonable grounds of appeal or a good arguable appeal. This matter, however, has a twist. PSP#73 is not appealing the judgment. It was successful at first instance. It is Carib Ocho Rios Apartments that is appealing both findings of fact and law made by the learned judge. In the absence of the learned judge's reasons, the notes of evidence, and the full documentary record before the learned judge, it is difficult to assess whether Carib Ocho Rios Apartments has reasonable grounds of appeal in general or whether PSP#73 would be on strong ground to resist the overturning of the judgment in full or in part.

[66] However, Carib Ocho Rios Apartments has relied on the ground of appeal that the learned judge's delay in delivering judgment and reasons for the judgment is a breach of its constitutional rights to a fair trial within a reasonable time. Counsel on both sides have stated that it was on the basis of this ground of appeal being 'reasonable' that my brother, Brown JA, granted Carib Ocho Rios Apartment a stay of the judgment on appeal. As I stated before, this is a ground of appeal that would affect both parties. Neither PSP#73 nor Carib Ocho Rios Apartments is to blame if the ground of appeal were to succeed.

[67] King's Counsel has submitted that if the ground of appeal were to succeed, one possible remedy is the ordering of a retrial. While, in the absence of the reasons from the learned judge it is difficult to assess whether PSP#73 would be able to resist the

grounds of appeal, it does appear that some aspects of the claim before the learned judge touched and concerned matters on which Ellis J had ruled in 1998 and perhaps 2000, and which had not been appealed. For example, Carib Ocho Rios Apartments has asserted that in making certain orders, the learned judge erred as, by the amenity areas agreement, Carib Ocho Rios Apartments only granted PSP#73 a portion of the ground floor of the office building by lease. This contrasts with Ellis J's ruling that PSP#73 is entitled to exclusive possession of the ground floor of the office building. Admittedly, there are other aspects of the appeal that are not clearly addressed by Ellis J's ruling and this court will have to, again, review the various documentation to assist in determining the long-running disputes between the parties.

[68] In addition, Carib Ocho Rios Apartments will have the burden of establishing that the learned judge was plainly wrong in his findings of fact that do not relate to Ellis J's 1998 findings or other rulings of the court that were not appealed. I would conclude that PSP#73 appears to have grounds to resist certain aspects of the appeal at least insofar as they relate to Ellis J's ruling in 1998.

Would damages be an adequate remedy? What is the balance of convenience?

[69] These questions have to be considered in the context of the orders granted by the learned judge and the stay of the judgment that this court granted to Carib Ocho Rios Apartments. I will consider the adequacy of damages as an element in the balance of convenience or the balance of justice. See **Brilliant Investments Ltd v Rory Chinn** [2020] JMCA App 6, paras. [42] and [43] in respect of this approach.

[70] By the orders, Carib Ocho Rios Apartments was to dismantle and remove by or before 29 November 2024, two buildings it had constructed on the beach. It was also enjoined, as of 29 November 2024, from entering into leases in respect of or enabling members of the public to use or enter any section of the amenity area. All persons occupying the amenity area, apart from PSP#73, were to vacate that area. PSP#73 was to have exclusive occupation and use of the amenity area, and was also granted the exclusive right to relocate the main entrance gate and guardhouse. PSP#73 was awarded

damages of JA\$3,000,000.00 for nuisance, US\$542,088.00 for damages for breach of the amenity areas agreement, and damages were to be assessed for trespass by the use and occupation of various areas by the Carib Ocho Rios Apartments. This court, on 23 December 2025, stayed all the orders of the learned judge until the determination of the appeal. Therefore, PSP#73 would not be able to benefit from the orders made by the learned judge pending the determination of the appeal.

[71] While it is arguable that damages would be an adequate remedy for the monetary aspects of the judgment, this would not be so for the non-monetary aspects of the judgment. Carib Ocho Rios Apartments was, for example, directed to dismantle certain buildings. It was also directed to cease entering into leases and allowing members of the public to enter certain areas. PSP#73 was granted the right to relocate certain areas. As a consequence of the grant of the stay, Carib Ocho Rios Apartments is able to remain in possession of the areas in dispute and PSP#73 asserts that Carib Ocho Rios Apartments is able to collect whatever earnings may accrue to it in that regard.

[72] While PSP#73 is unable to benefit from the orders made in its favour, pending the determination of the appeal, Carib Ocho Rios Apartments now plans to sell one of two apartments on which the easement to which PSP#73 is entitled is endorsed. It is correct that the easements would bind any successor in title to the apartments in question. However, counsel for PSP#73 has legitimately raised concerns about the impact of introducing a new owner to one or both of the properties. Would Carib Ocho Rios Apartments be in a position to comply with the non-monetary orders of the court, if a new owner or owners take over the apartments? In my view, this would introduce difficulties in the enforcement and compliance process.

[73] In addition, there are concerns relating to the monetary aspect of the judgment. Without a stay, PSP#73 would have been entitled to enforce the monetary awards. If Carib Ocho Rios Apartments were to sell one or both apartments before the appeal is determined, as it is a company, how would it satisfy the award of damages? It seems to me that there would even be uncertainty whether Carib Ocho Rios Apartments would be

able to do so. Furthermore, the endorsement of the mortgages on the titles of the two apartments underlines this concern. The registration of the mortgages does pose a risk that the mortgagee could exercise a power of sale over the relevant properties resulting in a change of ownership.

[74] It is true that Carib Ocho Rios Apartments is counterclaiming for damages from PSP#73. However, there is nothing preventing it from continuing to use the properties, as it appears to have been doing for some years, and earn pending the determination of the appeal. From the available information, it appears to me that PSP#73 would have more to lose if the injunction is not granted than would Carib Ocho Rios Apartments if the injunction is granted and prevents it from disposing of the relevant apartments.

[75] I continue to assess the balance of convenience. I note that Mr Butler deposed as to prejudice that he would suffer if the company is prevented from disposing of an apartment as he wishes and clearly intends for it to do. However, it is Carib Ocho Rios Apartments that is the appellant, not Mr Butler. Any issues of prejudice must relate to the party before the court, that is Carib Ocho Rios Apartments. See **Brilliant Investments Limited v Rory Chinn**, in which a similar argument was raised and a similar ruling made at para. [50]. I have not seen any evidence of possible loss, risk of injury, or potential prejudice that Carib Ocho Rios Apartments may suffer if the injunction is granted.

[76] In assessing the best course this court is to take, the question of the undertaking as to damages made by PSP#73, and its adequacy, comes into focus.

[77] In **TPL Limited v Thermo-Plastics (Jamaica) Limited** [2014] JMCA Civ 50, this court indicated, at para. [67], "that there is no rule 'writ in stone' that the court must" obtain evidence as to a party's ability to give a cross-undertaking as to damages before an interlocutory injunction will be granted. The usual practice is to require evidence of the willingness and ability to provide a suitable undertaking as to damages. This is usually required to assist the court in carrying out the balancing exercise that it must undertake to determine which course is likely to cause the least 'irremediable prejudice'. Especially

where companies are concerned, some authorities even suggest placing financial statements, records and accounts before the court so the court can consider the adequacy of the remedy of damages and a claimant's ability to pay them. A part of the issue in that case was that the respondent had not even expressed "a willingness to give an undertaking as to damages much less to assert or elucidate upon its financial ability to fulfil such a commitment".

[78] In **Sheldon Gordon**, the issue arose as to whether the judge at first instance erred by failing to require the applicant, Corporal McBean, seeking an injunction to reinstate herself as the chairman of the Police Federation, to give an undertaking as to damages, as is usually required. The judge opined that the requirement to give an undertaking as to damages is not inflexible, but that each case ought to be considered on its merits.

[79] This court, on appeal in that matter (see para. [86] of that judgment), ruled that the judge had not erred in the exercise of her discretion and noted that the claim was only for Corporal McBean's interest. Further, the circumstances of the case were unusual because there was no "potential significant financial impact on either side of the grant of the mandatory injunction". Since there were unlikely to be any significant financial consequences for the respondents, the judge had a valid basis for waiving the requirement of the cross-undertaking (see para. [87] of that judgment).

[80] In the case at bar, I agree that PSP#73 has not demonstrated its ability to fulfil the undertaking as to damages that it has offered, and this is a usual requirement. In my view, it is not appropriate to require PSP#73 to provide an undertaking as to damages in these particular circumstances. The injunction that PSP#73 has sought seeks merely to preserve the status quo as best as possible in a context where the appellant, Carib Ocho Rios Apartments, does not have to fulfil the terms of the judgment that it appeals pending the determination of the appeal. Nevertheless, it plans to sell at least one of the apartments directly concerned with the easements from which the disputes between the parties' flow, and has mortgaged both. The proposed sale of one apartment, and the

current mortgaging of both could cause irremediable prejudice to PSP#73. There are aspects of the learned judge's decision that would prove difficult to enforce if the properties are in the hands of new owners. On the other hand, Carib Ocho Rios Apartments has not demonstrated any potential loss, injury, or prejudice that it might suffer if it is prevented from disposing of the properties in question. In my view, it is only fair that the status quo be maintained as far as possible to maintain a balance between the parties, pending the hearing of the appeal.

[81] If the appeal fails, PSP#73 would be able to pursue the non-financial elements of the judgment and would determine how best to pursue enforcement of the damages element of the judgment. A sale by Carib Ocho Rios Apartments before the determination of the appeal would perhaps require PSP#73 to take other legal steps to secure funds for payment of the judgment debt in the event the appeal is not successful.

[82] In any event, even if it were necessary for PSP#73 to prove a risk of dissipation of assets, as asserted by King's Counsel, but with which I do not agree, that test would be satisfied by Carib Ocho Rios Apartments' admission that it wishes to sell at least one apartment and by its charging of the properties. In addition, PSP#73 would have a difficulty enforcing the non-financial element of the judgment against new owners.

[83] If indeed there is a strong ground of appeal that the parties' rights have been breached by the delay in handing down judgment and a judgment without reasons, it would be best that the status quo remain pending appeal. A sale of the properties in question would prejudice the court's ability to determine the matter on retrial, which is a possible outcome if that ground of appeal succeeds.

[84] I agree with counsel for PSP#73 that if the injunction is granted, the properties are preserved, Carib Ocho Rios Apartments remains in possession, and the mortgages already endorsed will not be impacted.

[85] In all the circumstances, the grant of the injunction sought best secures the chances of this court being able to do justice after the determination of the appeal.

[86] I note that the deeds of easements were not endorsed on the title for the roadway and so I will not include that title in the order, as it would not be seen as a subject matter of this appeal.

[87] The court, therefore, orders as follows:

- i. An injunction is hereby granted restraining the appellant, whether by itself, its servants and/or agents from dealing with, parting with, transferring, selling, further mortgaging or charging or encumbering all those parcels of land registered at Volume 1606 Folio 161 and Volume 1606 Folio 355.
- ii. Costs of and incidental to this application be costs in the appeal.
- iii. Formal order to be prepared, filed and served by the applicant's attorneys-at-law.