

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2025/0506

BETWEEN:

CYPRIAN KOWALCZYK

Claimant/Applicant

And

CARIBBEAN DEVELOPMENTS(ANTIGUA) LIMITED

Defendant/Respondent

Appearances:

The Claimant in person

Dr. Errol Cort with Ms. Alketz Joseph and Ms. Jada Cort for the Defendant

2026: February 12,
April 2.

RULING

(Application for an Interim Injunction filed on 12th January 2026)

Introduction

[1] **WILLIAMS, J.:** By Notice of Application filed on 12th January 2026, the Claimant seeks wide-ranging interim relief which includes:

1. An interim injunction restraining the Defendant, whether by itself, its servants, agents, employees, attorneys, or otherwise howsoever, from asserting, alleging, or claiming in any document, correspondence, communication, affidavit, pleading, submission, statement, or other form of written or oral communication whatsoever, whether addressed to the Claimant, filed with any court, or communicated to any third party, that the Claimant has arrears, owes money, is a non-payer, or has failed to pay

maintenance charges, community charges, or any other sum claimed under Clause 27 of the Restrictive Agreement dated 23 January 2007, or that the Claimant is in breach of the said Restrictive Agreement or any covenant therein by reason of such alleged non-payment, pending the final determination of this Claim or until further order of this Court.

2. An interim injunction restraining the Defendant from:
 - (a) demanding payment of, threatening enforcement of, or taking any steps to enforce any maintenance charges, community charges, interest, or other sums alleged to be due under Clause 27 of the Restrictive Agreement;
 - (b) suspending, disconnecting, or denying water, electricity, or sewage services to Parcel 573 on the basis of alleged arrears or non-payment of the disputed charges;
 - (c) obstructing or restricting the Claimant's physical access to Parcel 573 by reference to alleged arrears; pending the final determination of this Claim or until further order of this Court.
3. An interim injunction restraining the Defendant from:
 - (a) publishing, listing, or identifying the Claimant as a debtor, "non-payer," or "member in bad standing" in any newsletter, meeting minutes, public notice, budget document, or circulation list addressed to freeholders;
 - (b) allocating the Claimant's purported arrears to other freeholders as "bad debt" in any invoice, budget, or financial communication;
 - (c) distributing or circulating to any freeholder or group of freeholders any document that identifies the Claimant by name or parcel number as having outstanding balances or being in breach; pending the final determination of this Claim or until further order of this Court.
4. An interim injunction restraining the Defendant from relying upon, referring to, or advancing any argument or submission (whether in writing, in any affidavit, or orally by counsel) based upon paragraphs 48 and 49 of the

Affidavit in Opposition sworn to on by Jamie Tarter on 7 January 2026 in Claim No. ANUHCV2025/0525, or any other allegation that the Claimant lacks "clean hands" or is in breach of the Restrictive Agreement by reason of non-payment of sums claimed under Clause 27, in Claim No. ANUHCV2025/0525 or any other proceedings, pending the final determination of this Claim or until further order of this Court.

5. An order that the Defendant shall:

- (a) continue to provide water, electricity, and sewage services to Parcel 573 without conditioning such provision on payment of the disputed charges;
- (b) not obstruct or restrict the Claimant's physical access to Parcel 573; pending the final determination of this Claim or until further order of this Court."

[2] The Claimant is the registered proprietor of a parcel of land located within a gated community known as Jolly Harbour (Parcel 573). The community itself is managed by the Defendant. The Defendant levies what is known as a "Community Charge" on the homeowners within the community which is used to defray the cost of common services. In the Claimant's case, the charge appears to be governed by clause 27 of the instrument of transfer by which he obtained title to Parcel 573. The Claimant challenges his liability to pay the said charge.

[3] The application is brought pursuant to CPR 17.1(1)(a) and the Court's inherent jurisdiction. The Claimant's substantive claim challenges the validity and enforceability of clause 27 and related provisions. This appears to be primarily on the basis that the clause is a positive covenant which is not binding upon him as successor in title to the original owner of Parcel 573.

[4] The Claimant also complains that the Defendant has, in separate proceedings, namely claim No. ANUHCV2025/0525, relied on the alleged non-payment of community charges to assert that the Claimant has not come before the court with

clean hands. He says that both matters are before the same judge and that there is accordingly a risk that the central issue in this claim may be prejudged if such allegations (in the other claim) are advanced before the validity of clause 27 is determined.

- [5] In its skeleton arguments, the Defendant describes the application as a strategic “gagging order” designed to hide the Claimant’s acknowledged failure to pay, and to stop the Defendant from addressing that behaviour in other civil cases. The Defendant claims that the Claimant paid community charges up until February 2025 but has since stopped making payments. Despite this, the Claimant continues to benefit from the services offered in the Jolly Harbour community. Additionally, the Defendant asserts there is no reliable evidence of any immediate threat of utility disconnection.

Undertaking in Damages

- [6] Before examining the merits of the Claimant’s application, the Court will examine the Defendant’s contention that the Claimant has not provided an undertaking in damages. CPR Rule 17.4(2) provides as follows:

“(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.”

- [7] The rule is clear. An applicant must provide an undertaking in damages unless otherwise ordered by the court. Accordingly, the court will examine the Claimant’s filings to ascertain whether the requisite undertaking has been given or not. At paragraphs 44 and 45 of his affidavit in support of the application, he states:

“44. I do not offer an undertaking as to damages in this application. I state that an undertaking is not required in these circumstances because:

- a) the injunction sought does not prevent the Defendant from operating its business, collecting maintenance charges from other freeholders, providing services, or maintaining its records of amounts it claims are owed;

- b) the only "loss" the Defendant could conceivably claim is the inability to assert breach of Clause 27 in other proceedings — but that is litigation strategy, not compensable financial loss;
- c) if Clause 27 is ultimately held void (which is the serious issue to be tried), the Defendant suffers no loss whatsoever from being restrained from asserting breach of a void provision — one cannot lose the right to assert something that was never true;
- d) the Defendant is a well-resourced commercial developer with audited assets of EC\$18.5 million; I am a private individual representing myself, and requiring an undertaking in circumstances where the Defendant has weaponized disputed clauses to defeat my application in separate proceedings would effectively deny me access to justice;
- e) to the extent any loss could arise, the Defendant remains fully protected: it maintains its claimed security interest over Parcel 573, and if Clause 27 is ultimately held valid, the Defendant can pursue all remedies including recovery of any unpaid charges with interest.

45. In the alternative, if the Court considers an undertaking necessary, I am prepared to discuss a limited undertaking at the hearing."

[8] It is clear from the Claimant's affidavit that he does not feel obligated to give an undertaking in damages. However, he softens the position somewhat at paragraph 45 of the affidavit where he states that he is willing to "discuss a limited undertaking at the hearing." This is not an unequivocal undertaking in damages but is conditional upon the Court requiring one. Accordingly, I regard the Claimant as having not given an undertaking in damages.

[9] At the hearing, the Claimant emphasized that CPR Rule 17.4(2) gives the Court a discretion as to whether an undertaking in damages is required or not. However, this discretion is exercised in accordance with long-established principles. In **F. Hoffman La Roche v. Secretary of State for Trade and Industry**¹ the House of Lords held that the Crown was not required to give an undertaking in damages where an injunction was sought to enforce the law of the land. In **Allen v. Jambo**

¹ [1975] AC 295

Holdings² the court noted that an undertaking could be waived in the case of an impecunious applicant.

[10] None of these exceptions are applicable here. The Claimant merely states that the Defendant is a “well-resourced developer” whilst he is a private individual. This is not enough to bring him within the impecuniosity exception. Finally, contrary to the Claimant’s assertion at paragraph 45 of his affidavit, the court cannot compel an applicant to give an undertaking in damages. All the court can do is refuse the injunction if no undertaking in damages is given.

[11] Thus, even if I were minded to exercise my discretion under **CPR Rule 17.4(2)** to dispense with the undertaking, I would decline to do so in the present case. The injunction sought would restrain the Defendant from asserting its position regarding alleged arrears and would potentially interfere with the Defendant’s ability to manage its affairs. Accordingly, having failed to give an undertaking in damages, the Claimant’s application for interim relief must be refused.

The Applicable Principles

[12] Despite this, the Court will go on to consider the merits of the Claimant’s application. The starting point is **American Cyanamid Co. v. Ethicon Ltd.**³ as further refined by the Privy Council in **National Commercial Bank Jamaica Ltd v. Olint Corp Ltd.**⁴

[13] The relevant factors to be considered are:

1. Whether there is a serious issue to be tried?
2. Whether damages would be adequate?
3. Where does the balance of convenience lie?

Serious issue to be tried

² [1980] 1 WLR

³ [1975] AC 396.

⁴ [2009] UKPC 16

- [14] I am satisfied that the Claimant has demonstrated that there is a serious issue to be tried. The substantive claim squarely challenges the legal validity and enforceability of clause 27. The Claimant contends that clause 27 is a positive covenant which does not run with freehold land. The Defendant relies on **Westerhall Point Residents Association v. Anthony Bathick** where the headnote states as follows:

“As a general rule, a positive covenant is a matter of contract between the parties to the contract and does not run with the land. However, the rule is not absolute and is subject to the exception that the person who takes the benefit of the covenant must also subscribe for the burden attached to the covenant...”⁵

- [15] Thus, it is immediately apparent that there is a triable issue as to whether clause 27 falls within the exception to the general rule that positive covenants do not run with the land. This is a substantive issue which falls for determination at trial. Accordingly, there is a serious issue to be tried.

Adequacy of damages

- [16] The Claimant submits that damages are inadequate because being branded a non-payer or debtor may cause reputational harm. The Claimant further argues that the use of such allegations in other proceedings may cause prejudice that cannot be fully compensated by an award of damages. However, the Claimant has provided no evidence to substantiate any such loss. If the allegations made by the Defendant turn out to be untrue, damages or an injunction preventing the Defendant from repeating the said statements would be available. The Claimant has not adduced any compelling evidence to the contrary. Accordingly, I find that damages would be an adequate remedy in the circumstances.

Balance of convenience

- [17] If I am wrong on adequacy of damages, I would in any event refuse the application on the balance of convenience. In **National Commercial Bank v. Olint**⁶ the Privy Council outlined the balance of convenience as follows:

“It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the

⁵ GDAMCVAP2015/0004 Judgment Dated May 3rd, 2016

⁶ [2009] UKPC 16

world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result."

- [18] In terms of the Claimant, I agree that there is a serious issue to be tried as previously outlined. I have also not discounted the likelihood of reputational harm that he may suffer. However, granting the relief sought would significantly prejudice the Defendant. This is as the proposed injunction would interfere with the Defendant's ability to state its position, manage its affairs and advance arguments in related proceedings.
- [19] Crucially, this would materially hinder the Defendant's ability to defend the other proceedings referred to earlier. In my view, this is not an appropriate use of interim injunctive relief. A court seized of any proceedings is competent to decide what issues properly arise for decision in those proceedings, what evidence is admissible and what submissions may be advanced. The court's ability to act should not be unduly fettered in any manner.
- [20] The Claimant also seeks orders restraining the Defendant from suspending, disconnecting or denying water, electricity or sewage services pending trial. The evidence falls woefully short of establishing a sufficiently immediate or real threat to justify the relief sought. The Defendant points out that despite the Claimant's cessation of payment of community charges from February 2025, it has continued to provide essential services to Parcel 573.
- [21] In applying the approach outlined in **National Commercial Bank Jamaica Ltd v. Olint Corp Ltd**⁷, the Court must adopt the course which carries the lower risk of injustice pending trial. In this case the likelihood of prejudice to be suffered by the

⁷ [2009] UKPC 16

Defendant if an injunction were to be granted has been identified. Further, the relief sought by the Claimant is disproportionate to the legal rights which the Claimant seeks to protect. Therefore, the balance of convenience favours not granting an interim injunction as sought.

[22] At the hearing, the Court observed that the relationship between the parties appeared to be very acrimonious which is very concerning. I strongly urge the parties to take steps to reduce these tensions as this matter proceeds before the courts.

Order

[23] It is hereby ordered that:

1. The Claimant's notice of application for an interim injunction filed on 12th January 2026 is dismissed.
2. The matter shall proceed in accordance with the Civil Procedure Rules (Revised Edition) 2023.
3. The Claimant shall pay costs of this application in the sum of \$2000.00 to the Defendant within twenty-one (21) days of this order.
4. The Claimant shall have carriage of this order.

Rene Williams
High Court Judge

By The Court

Registrar