IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV656 of 2022 (No. 2)

BETWEEN:

[1] BIB PROPERTY OWNERS ASSOCIATION, INC.

Claimant/Respondent

and

[1] BETTER IN BELIZE LTD.
[2] BETTER IN BELIZE HOMEOWNERS ASSOCIATION LTD
Defendants/Applicants

Appearances:

Mr. Joseph Danilczyk and Ms. Rachel Montejo for the Claimant/Respondent
Mr. Hubert Elrington SC and Mr. Orson J. Elrington for the Defendants/Applicants

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2024: June 13;

August 15.

RULING

Interim Injunction – Serious Issue to be Tried – Covenants, Conditions and Restrictions (CCRs) for Gated Community – Community Maintenance Fees – Whether Maintenance Fees Can be Used for Legal Fees and Insurance Premiums for Board Members – Balance of Convenience – Damages as Adequate Remedy.

[1] **ALEXANDER, J.**: The present application is the latest in a series of applications by both sides in this matter. The application is for an interim injunction against the claimant.

[2] The applicants are the defendants, Better In Belize Ltd. and Better In Belize Homeowners Association Ltd. ("the defendants/applicants"). An interim injunction was previously granted by this court against the defendants/applicants and, having not been discharged or discontinued, it remains in existence.

[3] The present application came after the defendants/applicants obtained a security for costs order against the claimant on 16th April 2024. The present application aimed at addressing how the community maintenance fees, now being collected by the claimant, are to be used. By this application, the defendants/applicants ask the court to restrain the claimant from using community maintenance fees to cover allegedly "unauthorized" expenses.

[4] The unauthorized expenses include payment of the security for costs order made on 16th April 2024, payment of other expenses incurred by the ongoing lawsuit, and payment of insurance premiums for directors. The defendants/applicants seek, therefore, to inhibit the use of community maintenance fees for any purpose other than those expressly stated in the Covenants, Conditions and Restrictions ("CCRs").

[5] Given the above, the resolution of the current application lies squarely on the CCRs, and the interpretation of that document, specifically as to how residents' monies are to be applied in the community's interest. The interpretation of the CCRs is also a major issue in the substantive claim.

[6] At its core, the present application alleges that residents' monies are being misused or applied towards unlawful or inappropriate expenses. The defendants/applicants want to stop this from continuing to happen until the substantive matter before the court is fully ventilated. At first blush, it appears that the application is for legitimate and valid purposes and goes to the financial root of the practices of the claimant. Granting the order would likely protect the "unauthorized" depletion of community financial resources, if abuse is occurring.

[7] Having considered the application and submissions by counsel, however, I am not satisfied that this is a case that warrants the grant of injunctive relief.

[8] I find that there is no sufficient evidence before me that shows that the community maintenance fees are being misappropriated and/or applied outside the confines of the CCRs such as to require the urgent intervention of the court at this stage. If granted, the order would stymie the management of the community's finances and its day-to-day operations. Therefore, the balance of convenience lies with the claimant, the body charged with the responsibility for maintaining and operating the community. I was also not convinced that damages would be an inadequate remedy to compensate the defendants/applicants for any likely losses they will suffer should they be successful at the trial.

[9] I refuse the injunction and order parties to bear their own costs.

Background

[10] On 07th November 2023, this court granted an injunction against the defendants/applicants to prevent their unlawful acts of interfering with the claimant's operations; and/or to stop them from undermining, vandalizing and destroying the claimant's properties, facilities and infrastructure ("the previous injunction"). Because of the nature of the reliefs sought in the previous injunction and the evidence, it was considered urgent that the court intervened to maintain the *status quo* in the Better in Belize Community ("the BIB community") so that the substantive claim could proceed unhindered.

[11] Unfortunately, tempers have not cooled, and relations in the BIB community remain heated, causing parties to come running to the court yet again for its intervention. The acrimonious relations are clearly seen since, after I granted the previous injunction, at least three other applications were filed by parties inclusive of the instant application.

[12] On 16th April 2024, I granted a security for costs order, requiring the claimant to pay BZ$40,000 on/or before 5th July 2024 or the claim will be struck out. On the same 16th April 2024, an application for committal of Mr. Walter Browning, principal of the first defendant (or director), which was also listed for hearing, was adjourned to a date after the satisfaction of the security for costs order.

[13] On 19th April, the instant application was filed to prevent the use of the maintenance fees for payment of the security for costs order. It appears that by the time this *inter partes* injunction was heard, the claimant had already satisfied the security for costs order, using the community maintenance fees. It is this use of the fees, paid by residents to maintain their community for funding of this lawsuit, in particular, that is stiffly opposed by the defendants/applicants.

[14] When the applications came up for hearing on 13th June 2024, counsel for the defendants/applicants, Mr. O.J. Elrington, made compelling arguments that the present application must be disposed of before the committal proceedings. Mr. Danilczyk held an opposing view, stating that the security for costs order was already satisfied and that the CCRs were being put to proper use. He pressed the court to deal with the committal application instead of the present application. I did not find favour with the arguments as advanced by Mr. Danilczyk, though I commend learned counsel for his sage oral submissions, which assisted me in disposing of this matter.

[15] Given the continuing volatile and tense relations in the BIB community, however, I felt that I needed to consider the context of and dispose of the present application in priority to the committal proceedings. Therefore, I acceded to the arguments of Mr. O.J. Elrington, which I found as a reasonable request to interrogate, in a preliminary way, how residents' funds are being used by the claimant. Having determined the order in which the outstanding applications would be disposed of, I turn to the present application but must comment as follows.

[16] The several applications in this matter have retarded its progress through the system. The approach of both parties is to use these various applications as a litigation

strategy, which effectively has impeded the progress of this case towards trial. Despite giving case management orders on 5th June 2023, a pre-trial hearing is yet to be convened as the court must dispose of the various applications before parties could be readied for trial. This approach to litigation is most unfortunate. It works contrary to the overriding objective and against the interest of litigants. It does not help that both counsel engage unnecessarily in censuring each other for stalling the litigation by the filing of these several applications. Both counsel must own this approach, which is against the best uses of the court's time and resources and serves only to delay the actual litigation.

[17] The present application brings in sharp focus the 2016 Agreement, which forms a major part, if not the nucleic, of the substantive claim and the counterclaim. I do not propose by this ruling, therefore, to deal in any in-depth way with the 2016 Agreement or the CCRs that form a part of it. My resort to the CCRs will be only for the limited purpose of disposing of the specific issue raised in the present application.

The 2016 Agreement

[18] The 2016 Agreement consists of the CCRs governing the BIB community and a document called the 'Assignment of Authority and Responsibility' (together 'the 2016 Agreement'). Therefore, it is the operations agreement that guides how things are to function in the BIB community.

[19] In keeping with the 2016 Agreement, the first applicant/defendant had negotiated, sold and then transferred to the claimant the infrastructure in the BIB community between 2016-2017. This included the community's communications (internet) tower, buildings, solar power system, equipment and machinery necessary for the claimant to function and carry out its responsibilities. The 2016 Agreement also contains terms and conditions or the CCRs, to guide how the parties should function or run the BIB community. It is a central governing document.

[20] As stated above, the 2016 Agreement is at the core of the substantive claim and counterclaim before this court. A determination of all issues related to this document is reserved for the trial.

The Counterclaim

[21] The counterclaim was filed on 3rd January 2023. Because of the reliefs sought in the counterclaim, I will address it briefly. The reasons for doing so are obvious from the paragraphs below.

[22] By its counterclaim, the defendants/applicants seek an order for the return of community funds, received by the claimant for the maintenance and upkeep of the BIB community, that have been and are being used for unauthorized and unlawful purposes.

[23] The defendants/applicants also counterclaimed for a declaration that they are entitled to possession of the subdivision, an injunction prohibiting the claimant from accessing the property, an account of all income generated and spent, as well as an order for damages for trespass and wrongful conversion of community monies. In essence, the counterclaim was largely for damages.

The Injunction Application

[24] I have set out at paragraph 3 above, in a condensed way, what the present application is about. I see no wide divide, in the reliefs sought, as between the counterclaim and the present application. The defendants/applicants have filed this injunction to specifically stop the claimant from using maintenance fees to pay legal fees, directors' insurance and any "other unauthorized purposes" until the trial of the counterclaim. They seek the relief of damages among others.

[25] Essentially, the defendants/applicants are claiming that the claimant is using community funds, designated specifically for maintenance of the access roads, to pay for the present lawsuit. Paying legal fees is contrary to and/or not in conformity with the allowable expenses under the CCRs. This use of the community funds is an "extraordinary expense" or a major misappropriation of community finances that is not authorized by the homeowners. Moreover, it puts at risk the ability to continue to maintain and/or upkeep the BIB community particularly its roads, which imperils the security and safety of residents.

[26] I pause briefly here to explain the focus on the maintenance of the community roads and why this is argued as likely to pose a risk to the health, security and safety of residents if the maintenance is neglected. The roads to the BIB community are critical access roads and their importance must be viewed in the context of the remote and isolated location of this residential community from mainstream Belize. I have described this BIB community in detail in my previous injunctive ruling on 7th November 2023,[1] under the rubric "Background: Better in Belize" at paragraphs 3 to 5 and invite a reading of those paragraphs for a fuller understanding of this development.

[27] Regarding the present application, the main difference between the counterclaim and the present application is that the defendants/applicants now argue that damages would not be an adequate remedy.

[28] To be noted is that one of the reliefs in their counterclaim is for a return of all funds that the claimant has misappropriated. This is essentially a claim for monetary damages. They have now, some three months after the filing of the counterclaim, advanced in the present application that damages would not suffice to repair the damages done by the claimant. I am unsure if by this present application, the defendants/applicants have impliedly abandoned the relief in their counterclaim seeking a return of all monies.

[1] BIB Property Owners Association Inc. v Better in Belize Ltd. et al High Court Claim No. CV656 of 2022 decision of this court dated 07th November 2022.

[29] I turn to the parties' submissions.

Submissions

[30] Mr. O.J. Elrington, the defendants/applicants' counsel, submitted that the community maintenance fees are being misappropriated by its use to fund the present lawsuit. That is the major issue taken against how the claimant is using residents' funds.

[31] Counsel argued that the matter is urgent as the finances of the BIB community are at risk of depletion. He stated that only miniscule funds remain in the claimant's bank accounts, and that the claimant's directors have communicated their intention to use the remaining funds to cover the claimant's ongoing legal obligations. This intended use, or arguably "misuse", would place the health and safety of the community at risk. In fact, the claimant's current practice of applying residents' monies to fund lawsuits has exposed the flora, fauna and human lives comprising the BIB community to irreparable danger. Further, the roads are in a perilous state because of low maintenance. The claimant is failing in its responsibility to handle residents' funds in a fiduciary manner.

[32] Mr. O. J. Elrington pointed to the affidavit evidence of Mr. Walter Browning ("the Browning affidavit") and the affidavit of Mr. Looey Tremblay ("the Tremblay affidavit") both sworn and filed on 19th April 2024. Counsel relies on these affidavits to support the argument that the finances of the BIB community are in jeopardy and until and unless the court intervenes, the destruction of the community is imminent.

[33] In the Browning affidavit, the affiant stated that he is the director of the first defendant and a member of the claimant, BIB Property Owners Association Inc. The affiant averred that he reviewed the 2023 financials posted on the claimant's website, which provide a chart of the claimant's bank accounts and income (hereinafter "the financial chart"). He discovered that the community funds were surprisingly low.

[34] Based on the financial chart, the claimant has two sources of income for 2023: (1) Sale of a Tractor for $11,500 and (2) Home Owners Fees/community maintenance fees of $32,430.61. The financial chart also revealed that the BIB community, as of 31st December 2023, has three bank accounts: (1) Bank of Montreal Account, (2) BMO-Harris-USA Account and (3) PayPal.

[35] Mr. Browning stated further that as of 31st December 2023, the bank accounts only contained the sum of $22,260.74, which monies are community maintenance fees. According to Mr. Browning, these monies are to be used for the sole purpose of maintenance of the roads in the community.

[36] Mr. Browning stated that upon viewing the published financial chart on the claimant's website, he was "startled" to learn that the costs of the lawsuit and the directors' liability insurance made up more than 88% of the expenses of the claimant. A further review of the claimant's website also shows that in 2022, the claimant spent more than US$68,000 on legal fees and liability insurance for directors. Together these two items of expenditure made up 76% of all expenses of the claimant.

[37] Mr. Browning also stated that at a virtual meeting held on 24th February 2024, all members in attendance voted "unanimously" that they did not want the claimant to use BIB community maintenance fees to fund directors' insurance and the present lawsuit. The affiant then asked the court to exercise its jurisdiction to prevent the community maintenance fees from being used to fund the present lawsuit, as this is a manifestly unjust use.

[38] The Tremblay affidavit provides support for the application and confirms the evidence in the Browning affidavit. In particular, the affiant in the Tremblay affidavit stated that he is one of the co-founders of the BIB community, which was a pioneer concept in Belize premised on permaculture or the care of the earth. The BIB community was born out of "a vision of an ecological, respectful, safe, peaceful, equitable, harmonious, and happy place to live." Mr. Tremblay stated that the BIB community is a vast development that is remotely located by design. The concept of the BIB

community was built on a foundational guiding principle of the cohesiveness of its members, who would work together as a unified group to maintain the community for the benefit and safety of all.

[39] The Tremblay affiant stated also that the payment of the community maintenance fees, as embedded in the CCRs, was birthed on the understanding that these fees would be used exclusively for community maintenance especially the roads. Mr. Tremblay averred that he owns two lots in the BIB community. Thus, when he pays his maintenance fees, he does so "with the understanding that the monies would be used for purposes of maintaining roads, and open spaces, and providing general administrative services for the maintenance and operation of the Better in Belize community as mentioned in the CCR."

[40] This Tremblay affiant then categorically stated that that he does not authorize and never did authorize that the community maintenance fees that he pays are to be used to cover directors' insurance and to fund the present lawsuit. He stated that he wanted all monies used for legal fees and directors' insurance to be returned to the community.

[41] Based on the above evidence, Mr. O.J. Elrington argued that the injunction ought to be granted. The claimant has not used the community maintenance fees in accordance with the uses prescribed by the CCRs. The CCRs do not allow the claimant to pay any legal fees or security for costs orders with the residents' fees. Thus, unless stopped by the court, the claimant would continue to misappropriate the community maintenance fees for the unauthorized purposes that the defendants/applicants have identified.

[42] Counsel submitted that the balance of convenience lies with the defendants/applicants since the misuse of the community fees (unless stopped) will continue to cause loss and damage within the community and to destroy the subject matter of the claim. It is only an injunctive order that will prevent the claimant from acting in a manner that would cause further loss and damage to the community and

from destroying the subject matter of the claim. In oral submissions, Mr. O.J. Elrington raised for the first time that it would be in the public interest for the injunction to be granted as the BIB community is a tourist destination. He stated that if there is no proper care for the community and its roads then the wider community of Belize and the entire tourist industry are in jeopardy of experiencing harm.

Submissions of the Claimant

[43] Mr. Danilczyk, counsel for the claimant, submitted that there is a previous injunction in place, which operates to protect members of the BIB community from any likely harm to be caused to their investments and other third-party rights. The previous injunctive order bars the defendants/applicants from interfering with the claimant's status quo functions, responsibilities and decision making until the conclusion of the trial.

[44] The present application is a violation of the injunctive order dated 10th November 2023. It is also an attempt to stifle the ventilation of the substantive claim at trial.

[45] The claimant relies on the affidavit evidence of Ms. Cynthia Lauricella, a parcel owner and full-time resident of the BIB community ("Ms. Lauricella"). Ms. Lauricella stated that she is a duly elected board member of the claimant.

[46] This affiant averred that apart from the usual maintenance expenses and fees for professional services such as accounting and social security expenses, the claimant also funds the cost of legal services out of community maintenance fees. The legal services paid for are inclusive of title searches and costs of surveys. The claimant also uses the maintenance fees to pay for board members and employer liability insurance expenses.

[47] Ms. Lauricella stated that the security for costs order in the sum of BZ$40,000 was paid by the claimant on 27th May 2024. She averred that this payment was made pursuant to a special resolution of the Board of Directors taken on 1st May 2024. Both

the special resolution and receipt of payment of the security for costs order are attached to the affiant's affidavit. Of note is that Ms. Lauricella did not directly admit that it was the community maintenance fees that were used to pay the security for costs order, but I assumed that the silence as to this can be read as an admission of this use.

[48] Ms. Lauricella also stated that the alleged "unanimous" vote at a meeting held by the first defendant/applicant on 24th February 2024 under the guise of "a litigation status update" went beyond that purpose and was a violation of the injunctive order dated 10th November 2023 of this court. The affiant averred also that it was the attorney for the defendants/applicants (i.e. Mr. O.J. Elrington) who convened the meeting, by announcing on 30th January 2024 that an "Annual General Meeting" was carded for 24th February 2024. An important item at the meeting was a vote to replace the claimant in violation of the injunctive order dated 10th November 2023.

[49] Ms. Lauricella also stated that subsequently, the defendants/applicants announced a change in the description of the meeting to a "Community Meeting" and deferred the vote to replace the claimant to a later date. The community meeting was still held on 24th February 2024. A vote was taken concerning the use of community maintenance fees to fund the present lawsuit. According to the affiant, non-financial members voted at this meeting.

[50] The Lauricella affiant also averred that the practice of using the community maintenance fees to pay legal costs is not new. It could be traced back to 2015 when at a Board Directors Meeting on 16th November 2016, chaired by the developer Mr. Tremblay, a resolution was taken to retain legal advice for US$15,000. She attaches the resolution emanating from 16th November 2016 meeting, which does show at 'paragraph 5.4 Legal Services' that a decision was taken to retain the legal services of a lawyer for the approved sum of US$15,000. Since then, including after the introduction of the 2016 Agreement, the claimant has retained and followed the developer's policies inclusive of retaining legal services as necessary for advice on community operations.

[51] Based on the evidence provided, Mr. Danilczyk argues that the present application is violative of the existing injunction. It is a carefully disguised ruse to stifle the progress of the claim towards trial. The concerns raised in the meeting held by Mr. O.J. Elrington and the vote taken do not represent the position of all community members but of the slim supporters of the defendants/applicants. Further, the voting residents have no authority to take a vote as they are non-financial members. This voting protocol was established at a Board Meeting and remains in place. The balance of convenience lies in favour of the claimant who already has an existing injunction in place, so the present application ought to be dismissed.

Issues

[52] The primary issue arising, as the court finds it, is whether the balance of convenience lies in favour of granting or refusing the injunction. Critical to this consideration is the issue of damages as an adequate remedy.

Discussion

[53] This discussion must of necessity start with the recognition of the court's power to grant an interim injunction **in all cases**, and at any stage of the proceedings, where it appears to the court to be just and convenient to do so. This jurisdiction of the court to hear and determine an application for injunction is found in the Senior Courts Act[2] and the Civil Procedure Rules 2005 ('CPR'). This power to dispose of the present application is not in dispute.

[54] Therefore, before exercising this equitable jurisdiction, my approach is to take a holistic view of the facts of the case before me. This approach is promulgated in **American Cyanamid** v **Ethicon**.[3] Any evidence available will be looked at to

[2] Act No. 27 of 2022.

[3] [1975] 1 All E.R. page 504 which stated that, 'The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the court's

determine if and what order is to be made. Any order and its terms and conditions must be based on what is just in the circumstances of the case before me. It means that I would also refuse to make an order and dismiss the application if I thought it just to do so.

[55] There is no dispute that this claim raises serious issues to be tried and that these are reserved for the trial. In fact, counsel for both parties have not addressed me on this issue in any substantive way, and it is assumed as agreed. I, therefore, focused my analysis primarily on the issue of where the balance of convenience lies.

Balance of Convenience

[56] To determine this primary issue, I start with the CCRs, which as stated above is the governing instrument for the BIB community. The relevance of the CCRs is not disputed by either party, though each seems to have a different interpretation and understanding of aspects of this document. For present purposes, I will focus specifically and only on the relevant portion of that document that deals with the community maintenance fees.

[57] By adopting this focus, I was mindful that the CCRs, particularly the community maintenance fees and the uses, are pivotal to the substantive claim[4] as well as the present application. I, therefore, make no conclusive determination on the document. Of particular note is that an integral order sought at paragraph 4 of the substantive claim[5] is an amendment to the part that deals with the community maintenance fees. Understandably, this aspect of the CCRs is for ventilation at trial. I, therefore,

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function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. … So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.'

[4] Claim Form and Statement of Claim filed on 21st November 2022.

[5] Claim Form and Statement of Claim filed on 21st November 2022.

proceeded very carefully below with how I treated with the CCRs, limiting my examination to the maintenance fees issue.

The Covenants, Conditions and Restrictions/CCRs

[58] The CCRs regulate how community maintenance fees are to be used. Therefore, both parties rely on the CCRs to support their arguments in the current application.

[59] I found a single reference to community maintenance fees in Schedule A of the CCRs under the rubric "Road Access and Maintenance of Roads as well as Open Space". The relevant part of the CCRs reads as follows:

> 5.4.20 ROAD ACCESS AND MAINTENANCE of ROADS AS WELL AS OPEN SPACE: The Forty-foot reserve is also declared a public easement and shall therefore be kept clear and accessible. The road right-of-way is not to be used for storage of construction materials or trash. The natural drainage of the road right-of-way is not to be blocked and a proper culvert shall be installed at the owner's expense. **A "Community Maintenance Fee" shall be payable by Purchaser to Better In Belize for purposes of maintaining roads, and open spaces, and providing general administrative services for the maintenance and operation of the subdivision.** The details to this will be laid out in the Annual Home Owners Association report. The Community Maintenance fee is currently approximated at $1000 USD per year per lot and shall be paid at the beginning of each year and prorated at the closing. The Purchaser agrees that a late fee of 1% per month is due on any outstanding balance of Community Maintenance Fees. The Purchaser hereby agrees that his land shall be equitably charged in favour of the EAB[6] as security for all outstanding amounts with respect to Community Maintenance Fees, late fees and collection or legal costs. [My Emphasis].

[60] Parties disagree on the interpretation of the above condition for use of the maintenance fees. I have not been directed to any "Annual Home Owners Association report" nor made aware that such reports exist. It means that a court ruling is to resolve the issue. The defendants/applicants argue that use of the fees is restricted in the CCRs to road maintenance while the claimant's counsel asserts that maintenance fees can properly be used to cover legal fees and costs involved in running the

[6] The EAB is the Ecological Advisory Board vested with the power to administer and supervise the enforcement of all covenants. The EAB is established by the Board of Directors.

operations of the community. These uses rightly can be viewed as payments for administrative services. Mr. Danilczyk maintained that the interpretation of administrative services to include legal costs was established at a board meeting presided over by the co-founder Mr. Tremblay and has been doggedly adhered to since then.

Analysis

[61] In examining the balance of convenience argument, the question is if the injunction is granted or refused, which party will suffer the greater risk of injustice?

[62] A practical approach is required when answering the balance of convenience question: see **National Commercial Bank Jamaica Ltd** v **Olint Corpn Ltd**.[7] Practicality must be shaped by the facts of the case before the court. In other words, the context of each case will influence the court's approach.

[63] **Olint** suggests that when considering this issue, a court ought to take a course that appears to carry the **lower risk of injustice**. This is described as 'the least irremediable prejudice'[8] approach. It involves a balancing of the parties' cases, to decipher who will suffer the most prejudice by the injunctive order and/or the possibility that any prejudice will occur. To be weighed in the balance is whether damages would suffice to compensate for any resulting injury (discussed below). The court should also consider the enforcement of any cross-undertaking given.

[64] In my view, given that the issue of the CCRs forms the crux of the substantive claim, the necessity of having a full ventilation of this issue, and all other issues, is not to be undermined by the fact that parties are back before the court crying foul over the use

[7] [2009] UKPC 16 where it was stated, 'Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' case.'
[8] Ibid.

of the community maintenance fees. I considered if I were to grant the injunction, then how would that decision prejudice the claimant who is tasked with the responsibility for running of a secluded community? I also considered that if I were to refuse the injunction, how would the defendants/applicants be prejudiced by this refusal?

[65] In oral submissions, Mr. O.J. Elrington stressed that the funding of the lawsuit from the community maintenance fees constitutes an "extraordinary expense", which falls outside of the confines of the proper uses for these monies. He pointed out that the claimant in its 2024 budget has set aside a "minuscule sum of USD 4,820.00" for road maintenance, which is 15.8% of US$30,586.00 to be received in community maintenance fees. Counsel stated that to allow the claimant to unabatedly continue this unauthorized trend of improper usage of community funds would cause irreparable damage to the delicate eco-environment that is the BIB community. The fragility of the BIB community demands that the community maintenance fees be restricted to the maintenance of the community especially the roads. Counsel then rested his case on the fact that the residents, at a meeting convened by or under his unadmitted auspices, voted against the use of their fees to fund lawsuits. He also advanced for the first time a fiduciary breach argument that does not form part of his defence or counterclaim.

[66] In the evidence called by the claimant, it was averred by Ms. Lauricella that these unanimously voting members were non-financial. Basically, they have not been paying their maintenance fees to the claimant. The defendants/applicants, however, did not acknowledge or admit to their non-financial status in their affidavits. They were also silent as to whether the "unanimously voting members" were also non-financial. This lack of disclosure by the defendants/applicants or their selective practice of producing before the court only information that benefits their case is unfortunate. He who comes to equity must come with clean hands or face any consequences for this failure.

[67] In any event, I noted also that the evidence of Ms. Lauricella was incomplete since no evidence was produced in court as to those members at the meeting who were non-financial, or how long they have not been paying their maintenance fees. Ms.

Lauricella, as a director of the claimant, would have records that could have been put into evidence to support her allegations that they were non-financial members. Rather, Ms. Lauricella was content to simply state that these members were supporters of the defendants/applicants who were not financially up to date with their yearly subscriptions for maintenance. I did not find it safe to rely on this evidence or on the oral submissions of Mr. Danilczyk that hundreds of thousands of dollars are owed in maintenance fees.

[68] On the other hand, I also had serious concerns with the evidence of the affiants for the defendants/applicants. They both gave evidence that there was a "unanimous vote" taken at a virtual meeting held on 24th February 2024. At that meeting, all members in attendance voted against the claimant's current use of community maintenance fees to fund lawsuits. The disingenuity in this argument lies on the failure to come clean with the court as to the percentage of the membership in attendance and voting and whether they were financial members whose monies were being misapplied by the claimant. The affiants for the defendants/applicants did not even state in evidence whether they too were updated in the payments of their yearly fees. Again, the issue arises as to whether it was unsafe to take the evidence of these affiants. Where does the greater injustice lie if I were to grant or refuse this injunction?

[69] I accepted that at this stage of the litigation, the court's role is not to delve into facts, on which the claims of either party may ultimately depend. I am also not required to try to resolve conflicts of evidence on the affidavits before me. Detailed legal arguments and mature considerations of difficult points of law are reserved for the trial. The trial process ought not to be pre-empted by the holding of a mini trial of the evidence at this stage, which in any event is incomplete evidence.

[70] I appreciate that the evidence before me at this stage is untested affidavit evidence that has not been put through the rigours of oral cross-examination. Therefore, I draw no conclusion on the issue raised as to the interpretation of the CCRs and the claimant's application of the maintenance fees. The incomplete and selective evidence from both sides is clearly unsafe to ground any ruling at this stage. In any

event, this is not the stage to make any firm decision on core matters raised in the substantive claim and counterclaim.

[71] I have looked at the whole case, carefully considered the limited evidence before me and heard the arguments of counsel. Therefore, I only considered where the injustice would lie from any ruling I make on this application. In any event, an interim injunction is already in place to secure all residents' safety, properties and finances. It was hoped that my previous order would have cooled tensions in preparing this matter for full ventilation of all issues at trial. It apparently did not. In my view, granting another injunction would wreak more injustice to the claimant's ongoing management of the BIB community than to the defendants/applicants.

[72] Having considered all the evidence before me, I find that the balance of convenience lies with refusing the injunction

Damages as a Sufficient Remedy

[73] I briefly explore the issue of the adequacy of damages (after trial). Would an order for damages be an adequate remedy for the losing party?[9] The rights of both parties are to be weighed in the balance in making this determination. In my view, the arguments advanced by Mr. O.J. Elrington as to the inadequacy of after-trial damages were weakened by the counterclaim that seeks damages.

[74] In coming to a determination on the issue as to whether an award of damages would suffice to compensate either party for any damage or loss they might suffer, I gave serious thought to the fact that currently, the community's operations are continuing. I have no evidence, only unfounded allegations, that roads are not being cared for or maintained up to standard, in a way that protects residents from risk. I think if this were really the case, the defendants/applicants would have brought the evidence instead

[9] JIPFA Investments Limited v Natalie Brewley et al BVIHCV2011/0038 where a three-tiered approach was set out at paragraph 22 page 8.

of merely alleging that there is the possibility that maintenance of the roads would be at risk by the claimant's continuing activities. I must act in the interest of the entire BIB community in preserving the status quo so that life and properties continue to be maintained until the trial.

[75] Having considered the respective cases advanced by both parties, I find that should it be later shown that I was wrong, and the refusal of this injunction caused harm to the defendants/applicants, the remedy of damages will likely suffice as compensation.

[76] I refuse the injunction.

Disposition

[77] It is ordered that:

1. The application is refused.
2. Each party is to bear their own costs of the application.

Martha Lynette Alexander
High Court Judge