

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE  
HIGH COURT  
CIVIL JURISDICTION**

**CV 420 of 2021**

**IN THE MATTER** of the Companies Act Chapter 308 of the Laws of Barbados

**AND IN THE MATTER** of Clearwater Bay Limited, Company Number 33533

**AND IN THE MATTER** of the extension of time for the registration of a Debenture and Mortgage by Way of Legal Charge

**BETWEEN**

**Clearwater Bay Limited**

**Claimant**

**And**

**Blue Developments Limited**

**Defendant**

**Before the Honourable Mr. Justice William Chandler, Judge of the High Court**

**Date of Hearing: 2021 June 28**

**Date of Decision: 2021 August 31**

## Appearances:

**Mr. Andrew V. Thornhill QC, Ms. Shaddiah Hinds with him of Messrs. George Walton Payne & Co. Attorneys-at-Law for the Claimants.**

**Mr. BLV Gale QC, Mrs. Laura Harvey-Reade with him for the Defendant.**

*Application to register two charges out of time - Sections 237 and 248 of the Companies Act Chapter 308 - Whether it is just and equitable to allow registration out of time -. Alleged prejudice to chargor. Alleged non-compliance with maxims of equity. He who seeks equity must do equity. He who comes to equity must come with clean hands. Delay defeats equity – whether Claimant in breach of duty of full disclosure.*

## Decision

### Introduction:

[1] This is an application for an extension of time within which to register a debenture and mortgage over property situate at Paradise Beach, St. Michael (the Paradise Lands) under **section 248** of the **Companies Act Chapter 308** of the **Laws of Barbados (Cap. 308)**. The application is opposed by the Defendant which executed the debenture and mortgage in favour of the Claimant. The Claimant executed a conveyance of the lands to the Defendant contemporaneously with the debenture and mortgage.

### The Parties

[2] The Claimant is a company wholly owned by the Government of Barbados while the Defendant is a private limited liability company registered under **Cap. 308**.

## **The Application**

[3] The application is by Fixed Date Claim form filed 8 June 2021 seeking the following:

(1) An Order pursuant to section 248 of the Companies Act, Chapter 308 of the Laws of Barbados (the "Companies Act") that the period for the registration of the undated Debenture made between the Defendant of the One Part and the Claimant of the Other Part charging Lots A and B Paradise Lands to secure the sum of BDS \$58,000,000.00 be extended to thirty days from the date of the Order to be made herein.

(2) An Order pursuant to section 248 of the Companies Act that the period for the registration of the undated Mortgage made between the Defendant of the One Part and the Claimant of the Other Part charging firstly 47,659 square metres of land and secondly 957.0 square metres of land situate at Paradise Beach, Black Rock, St. Michael be extended to thirty days from the date of the Order to be made herein.

[4] The application is supported by an affidavit filed on even date with the application sworn to by Ms. Nancy Headley (the Headley affidavit) of the

Ministry of Finance, Economic Affairs and Investment whose office is situate at Government Headquarters, Bay Street Saint Michael. Ms. Headley is one of the directors of the Claimant. Ms. Headley deposed, inter alia, that:

- a. In or around 2016, the Claimant sold certain lands situate at Paradise Beach, Black Rock Saint Michael firstly containing an aggregate area of 47,659.3 square metres (Lot A) and secondly 128, 025.0 square metres sorry 76,680.0 square metres also situate at Paradise Beach, Black Rock, Saint Michael (Lot B) to the Defendant for the sum of 59 million dollars United States currency.
- b. The Defendant did not pay the purchase price but it was agreed that the debenture and mortgage charging the Paradise Lands would be executed to secure payment of the purchase price.
- c. An undated debenture (the Debenture) was executed by the parties on the same day as the conveyance by virtue of which the Defendant charged by way of a first legal mortgage and as a continuing security for repayment of the sum of BDS 50 million dollars being part of the purchase price all its estate and interest in lots A and B together with all present and future buildings,

fixtures, plant and machinery which are [sic] at any time on the said property.

- d. On the same date, after executing the conveyance (the conveyance) and the debenture, the parties executed an undated Deed of Charge by Way of Legal Mortgage (the Mortgage) by virtue of which the Defendant charged to the Claimant as a second legal mortgage and as a continuing security for repayment of the other part of the purchase price or BDS 60 million dollars all their estate and interest in 47,659.3 square metres of land and being the Lot lettered B and secondly a parcel of land containing 957.40 square metres of land also situate at Paradise Beach, Black Rock, Saint Michael.
- e. Following the execution of the Debenture and Mortgage these documents were delivered to the law firm of Clarke, Gittens & Farmer, attorneys-at-law.
- f. The Debenture and Mortgage were being held in escrow pending applications by the Defendant to the central Bank of Barbados for certain approvals and exemptions with respect to exchange control and also pending applications to the Ministry of Finance and

Economic Affairs for fiscal concessions relating to the development of lots A and B.

- g. Following the outcome of these applications the documents were to be delivered to Mr. M Adrian King QC, the then attorney-at-law for the Claimant.
- h. She had been advised by her current Attorney-at-law and verily believed that, pursuant to **Section 237** of **Cap. 308**, the Debenture and Mortgage should have been lodged with the Registrar of Companies (the Registrar) within 28 days of their creation.
- i. She had also been advised that the Debenture and Mortgage are presently void and cannot be presented to the Registrar without an order of Court granting an extension of time.
- j. To date, the Claimant had not received any of the purchase price, nor had the Defendant settled the land tax due and owing for the period following the execution of the conveyance. With respect to Lot A, the outstanding land tax plus arrears owed to the Barbados Revenue Authority (BRA) totalled \$1,288,973.65, whilst the outstanding land tax plus arrears in respect of Lot B totalled \$573,550.00 at the date of swearing the affidavit.

k. The Claimant was desirous of perfecting its security so as to enforce the same.

l. She had been informed by her attorneys-at-law that, from searches conducted, no charges had been made and/or registered against the Defendant. She therefore believed, that the omission to register the mortgage and debenture, was not of a nature to adversely affect the position of creditors or shareholders of the Defendant.

Finally, she deposed that she believed that it would be just and equitable for the Court to grant an order under **Section 248** of **Cap. 308**, extending the time for registration of the Debenture and Mortgage for 30 days from the date of the order of Court.

### **The Affidavit of Philip Tempro**

[5] After service of the claim on the Defendant, Mr. Philip Tempro, a Director of the Defendant company, filed an affidavit on 25 June 2021, in opposition to the application (the Tempro affidavit), attaching a copy of an undated agreement between the Defendant and the Claimant (the **Agreement**). We reproduce the relevant parts of that agreement here since it is crucial to an understanding of the Tempro affidavit and the Defendant's submissions.

“BARBADOS

THIS AGREEMENT ("this Agreement") is made as of the \_\_\_\_\_ day of \_\_\_\_\_  
2016 BETWEEN:

(1) BLUE DEVELOPMENTS LIMITED a company incorporated and registered under the provisions of the Companies Cap, 308 of the Laws of Barbados as company no. 39858 and having its registered office situate at Port St. Charles, Heywoods, St. Peter, Barbados (hereinafter called the "**the Company**") which expression shall where the context so admits include successors and assigns) OF THE ONE PART;

-AND-

(2) **CLEARWATER BAY LIMITED** a company incorporated and registered under the provisions of the Companies Act, Cap, 308 of the Laws of Barbados as company no. 33533 and having its registered office situate at The Ministry of Finance, Government Headquarters, Bay Street in the parish of St. Michael in this Island (hereinafter called "**Clearwater**") OF THE OTHER PART.

**WHEREAS:**

- A. The Company is or will be the owner of the property described in Part A and B Schedule 1 (together the "Property").
- B. The Company has purchased the Property to market it to investors (an "Investor") for the purposes of developing it as a luxury hotel and private residential development ('the Development'). The Development will include the design, construction, development, operation and sale, of a luxury resort and residential development comprising: (i) a luxury hotel together with all associated amenities including pools, a spa, restaurants, shopping, tennis and water sports facilities to be constructed on a portion of the Property ("the Hotel"), and (ii) luxury private residences to be constructed on a portion of the Property ("the Private Residences").
- C. For the purposes of this Agreement, each of the following is referred to as a "Transfer": (i) the Company will sell the Property to an Investor; or (ii) the Company will be sold to an Investor; (iii) the holding company of the Company ("Holdco") will be sold to an Investor; or (iv) an Investor will subscribe for shares in Holdco or the Company (an "Investor Subscription"),

NOW THEREFORE, in consideration of the mutual Agreements contained in this Agreement it is agreed as follows:

- 1. Clearwater hereby agrees, with the Company and in consideration of, inter alia, the Company purchasing the Property, as follows:
  - a. The Company shall grant to Clearwater:

(i) a debenture over all of the assets of the Company including the Property in the maximum sum of BDS \$58 million (fifty-eight million Barbados dollars) ("Debenture A"); and

(ii) a deed of charge by way of second legal mortgage over the lands described in

Part A of Schedule 1 hereto (the "Hotel lands") which shall be effective as

Security for the repayment of the principal sum of BDS\$60 million (sixty million

Barbados dollars) (the "Principal Debt"), and which mortgage shall be

subordinated at all times to the rights of any other mortgagee or debenture holder

("Mortgage B");

b. Upon or simultaneously with the execution of an Agreement in respect of a Transfer the parties shall do or cause to be done the following:

i. Clearwater shall release the Company from all obligations and liabilities under Debenture A, or at the sole option of the Company shall assign all of its rights under Debenture A as directed by the Company;

ii. The Company shall issue such number of Class B Shares, (which Class B Shares shall have the rights set forth in Schedule 2 hereto) as shall represent the value on issue of BDS \$58 million (fifty-eight million Barbados dollars),

c. The Company shall repay the Principal Debt, secured by Mortgage B, as follows:

i BDS \$40 million (forty million Barbados dollars) within two weeks of completion of a Transfer;

ii BDS \$10 million (ten million Barbados dollars) upon commencement of the construction of the Hotel; and

iii BDS \$10 million (ten million Barbados dollars) upon receipt of planning compliance for the Hotel.

d. The Principal Debt shall bear an interest rate of 4% per annum. There shall be a moratorium on the imposition of interest for the first year following the date of issue of Class B Shares. Thereafter interest shall be payable annually.

e. Upon the receipt by Clearwater of the payment of the Principal Debt, and the issue of the Class B Shares, it shall RELEASE AND DISCHARGE the Property and the Company from Mortgage B and all security and other obligations owed by the Company to Clearwater thereunder or otherwise.

f. It shall not take any action to enforce its rights under Debenture A or Mortgage B for so long as the Company is in discussions with an Investor in respect of a Transfer, and in any event for a period of 9 months from the date hereof.

g. In the event that the approval or consent of Clearwater is required for a Transfer, Clearwater undertakes to give such consent or approval.

h. Construction of the Hotel is expected to commence within 90 days of receipt by the Company of all required regulatory approvals, consents and fiscal concessions for the Development and is anticipated to be completed within 36 months from the date of commencement.

i. In the event that the Company determines to sell any residential real estate comprised within the Hotel Lands, Clearwater undertakes and agrees to forthwith release such residential real estate from Mortgage B.

2. Upon an Investor Subscription, and provided that the Class B Shares have not been redeemed in full, Clearwater shall have the right to nominate an individual to the Board of Directors of the Company (which individual must be experienced within hospitality sector),

Clearwater shall cease to have a right to nominate an individual to the Board of Directors, and any director previously appointed to represent the interests of Clearwater, shall resign upon redemption in full of the Class 8 Shares.

3. No variation of this Agreement shall be effective unless it is in writing and signed by each of the parties (or their authorised representatives).

4. ...

5. This Agreement shall be governed by and construed in accordance with the laws of Barbados.

The description of the parcels of land are contained in the schedules and the Agreement is executed by the parties.

## **The salient parts of the Tempro affidavit**

[6] Mr. Philip Tempro, the managing Director of the Defendant swore an affidavit in opposition to the claim in which he gave a history of the acquisition of the Paradise Lands by the Government of Barbados because of their economic importance to the local economy. He provided particulars of a transaction reached between the Defendant and the GOV the salient provisions are that:

“15. ...

- 15.1. The Claimant would convey the Lands in its capacity as Mortgagee to the Defendant without any payment whatsoever and this conveyance is exhibit NH 1 to the Headley Affidavit.
- 15.2. Simultaneously with the Conveyance mentioned in 15.1 above, the Claimant would be granted the Securities which they now seek to register out of time.
- 15.3. The Defendant was given the mandate to find a suitable investor to complete the Four Seasons Development.
- 15.4. There was never any intention of the Claimant enforcing the Securities against the Defendant in that the intention and Agreement between the Claimant and the Defendant was that the investor, once found, would in essence "step in the shoes" of the Defendant by either purchasing the Lands and paying the Claimant the outstanding purchase price; or by selling the shares of the Defendant to the investor; or by the investor subscribing for shares in the Defendant.
- 15.5. The Claimant would on finding an investor who completed any of the options set out in paragraph 15.4 above would release the Defendant from all obligations under the Debenture.
- 15.6. The Defendant would also in those circumstances only repay the amount secured on the Deed of Charge by three (3) separate instalments as follows:

15.6.1. BDS\$ 40 million within 2 weeks of completion:

- 15.6.2. BDS \$10 Million upon commencement of the construction of the hotel; and
- 15.6.3. BDS \$10 Million upon receipt of planning compliance of the constructed hotel.
- 15.7. The BDS \$60 Million referred to in paragraph 15.6 above would carry interest at the rate of 4% per annum but with a moratorium on interest on the first year following the issuing of Class B shares hereinafter referred to.
- 15.8. On a transfer being made to a suitable investor that the Defendant would issue such number of Class B redeemable preference shares to the Claimant as shall represent the value of BDS\$58 Million as well as to have a seat on the Board of Directors of the Defendant.
- 15.9. Significantly, the Claimant would not seek to enforce any of its Securities against the Defendant for so long as the Defendant was in discussions with a potential investor in respect of a proposed investment in the Four Seasons Development. (Attached hereto and marked exhibit PT 1 is an undated Agreement ("The Agreement") executed in 2016 between the Claimant and the Defendant evidencing the above.)”

[7] Mr. Temprow provided details about his travels abroad to find a suitable investor at his company’s expense and his success in that regard. Suffice to say that Mr. Temprow also deposed that the failure of the Claimant to register the securities for over 4 years was not accidental or an oversight on its part, but was in keeping with the parties’ **Agreement**, either not to register or enforce the same.

[8] At paragraph 21, he deposed that he verily believed that, given that the Claimant indicated to the Court in the Headley affidavit, its desire to perfect the securities with a view to enforcing these securities against the Defendant at this time, it would be most unjust, unfair and inequitable for these

securities to be registered out of time and for the intended purpose of enforcing the same against the Defendant. The registration of these securities, for the purposes of enforcement, he opined, would be extremely prejudicial to the Defendant given the Agreement between the Claimant and the Defendant.

### **The Issue**

[9] There is only one issue arising on the facts of this case, namely, whether or not the Court ought to exercise its discretion and grant the extension of time sought within which to register these securities under **Section 248 of Cap. 308**. A secondary issue will arise if the Court exercises its discretion favourably to the Claimant, namely, whether it ought to attach any conditions to the extension of time.

### **The Law**

[10] The obligation to register a charge is found in **Section 237 of Cap. 308**, which provides as follows:

**237.** (1) Subject to this Division, where a charge to which this section applies is created by a company, the company must, **within 28 days after the creation of the charge**, lodge with the Registrar a statement of the charge and (a) any instrument by which the charge is created or evidenced; or (b) a copy of the instrument together with a statutory declaration verifying the execution of the charge and also verifying the copy as being a true copy of the instrument, **and if this provision is not complied with in relation to the charge, the charge is void so far as any security interest it thereby purported to create. (emphases added)**

**Section 248 of Cap. 308** gives the Court the power to extend the time within which to register a charge out of time. It provides that:

“On being satisfied that the omission to register a charge within the time required, or that the omission or mis-statement of any particular with respect to any such charge or in a memorandum

- (a) was accidental or due to inadvertence or to some other sufficient cause,
- (b) is not of a nature to affect adversely the position of creditors or shareholders, or
- (c) that, on other grounds, it is just and equitable to grant relief, the Court may, on the application of the company or any person interested, and on such terms and conditions as seem to the Court to be just and expedient, order that the time for registration be extended or that the omission or mis-statement be rectified.”

### **The Claimant’s Submissions**

[11] Mr. Thornhill QC, counsel for the Claimant, submitted that the Court’s power to grant an extension of time within which to register a charge is discretionary and that the Court is guided by the principles set out in **Cap. 308** when exercising its discretion: Reliance was placed on **Re Telomatic Ltd [1994] 1 BCLC 90**. He opined that the Court could properly exercise its discretion on the grounds that: (1) the omission to register the debenture and mortgage is not of a nature to adversely affect the position of creditors or shareholders, and (2) that it was just and equitable to grant the order. The first ground mandated that the Court should consider any likely prejudice to creditors or shareholders in the event of an order extending time to register the charge. Prejudice may result, he submitted, where (a) creditors have or

may have extended credit to, or acquired rights against the chargor on the basis that no charge existed; or (b) another secured creditor has agreed to rank, subject to, or (it is thought) *pari passu*, with the unregistered charged; or (c) the company is insolvent or liquidation is imminent.

[12] Mr. Thornhill QC also submitted that the Court could guard against prejudice by the insertion of a proviso in the order, relying upon *Victoria Housing Estates Ltd v Ashpurton Estates Ltd* [1982] 3 All ER 665 (*Ashpurton*), in the following terms “but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered.” Counsel referred to the rationale behind the insertion of this proviso at paragraph 17 of his submissions, namely, the protection of rights acquired against, or affecting, the property comprised in the unregistered charge in the intervening period between the date of the creation of the unregistered charge and the registration of such charge. Such affected persons would include a subsequent chargee; a creditor who had levied execution against the property; and an unsecured creditor if the company had gone into liquidation before registration was effected.

[13] Counsel referred to the fact that the searches revealed that no charges were registered by or against the Defendant between 2015 and 2021 and that there

was no evidence that the Defendant is being wound up or that liquidation is imminent. There was therefore no prejudice likely to occur from the making of the order.

[14] With respect to the second ground, Counsel relied upon **Re Braemar Investments Ltd [1989] Ch. 54** to proffer to the Court that it was the legislative intent in **Section 248** to provide a guide to the exercise of the Court's discretion in the form of whether for any reason, whether specified in the Section or not, it would be just and equitable to grant relief.

[15] The Headley affidavit showed, in counsel's submission, that the Defendant had not paid any money toward the purchase price of the properties and that, consequent upon the transfer, the Defendant owed considerable sums in respect of land tax arrears on Lots A and B, it was therefore just and equitable to grant the extension of time since it would be the only way that the Claimant would be able to realise its consideration.

[16] It was Mr. Thornhill's submission that the Court also had to consider whether the application was made promptly. He conceded that a considerable amount of time passed between the omission to register the debenture and mortgage and the filing of the application, but urged the Court to find that the awaiting of certain approvals and exemptions with respect to

exchange control and the application the Ministry of Finance and Economic Affairs for various fiscal concessions relating to the development of Lots A and B, which were never done, accounted for the delay. He submitted also that promptitude in making the application is not decisive.

### **The Defendant's Submissions**

[17] Mr. BLV Gale Q.C, Attorney-at-law for the Defendant, submitted that it was significant that the Claimant had not applied under the first two limbs of **Section 248**, because the second limb required that the late registration be of such a nature as not to adversely affect either creditors or shareholders of the Defendant company. In his opinion, the issues for the Court were:

1. whether in all the circumstances it would be just and equitable to extend the time and if so,
2. what terms and conditions ought the Court reasonably to impose in the exercise of its equitable jurisdiction and discretion if late registration was permitted.

[18] It was his submission that this case was not one of inadvertence or accidental failure to register, given that the application was being made 5 years after the charges ought to have been registered.

[19] Mr. Gale opined that the Claimant was seeking equitable relief and therefore the following maxims of equity apply, namely:

1. he who seeks equity must do equity,
2. he who comes to equity must come with clean hands, and
3. delay defeats equity.

[20] Put another way, the third maxim is that equity has always refused its aid to stale demands where a party has slept upon his right and acquiesced for a great length of time. “Nothing could call forth this Court into equity but conscience, good faith and reasonable diligence, where these are wanting, the Court is passive and does nothing.”

[21] Mr. Gale QC submitted that a Claimant, in an application for an extension of time, ought to have set out all of the facts being relied upon in its supporting affidavit if it sought to convince the Court to exercise its equitable jurisdiction in its favour, he relied upon *Re Kris Cruises Ltd [1948] 2 All ER 1105*. It was his submission that the Claimant had not made full and frank disclosure of all the relevant facts. Counsel referred to the Headley affidavit and submitted that no information was given as to:

1. the details of the application submitted to the Central Bank or the Ministry of Finance and Economic Affairs for fiscal concessions;
2. how those applications would have excused or given sufficient reason for the non-registration of the charges;
3. when the applications were determined and if the documents were in fact delivered to the then attorney-at-law, Mr. King QC;
4. the reasons why the securities were not registered after these matters were completed.

[22] The evidence, in counsel's view, was insufficient to provide a full background to the Court as to the circumstances of non-registration as is required by law. On this basis the Court ought, he submitted, to refuse to exercise its discretion in the Claimant's favour.

[23] It was Mr. Gale QC's opinion that the Headley affidavit simply painted a picture of non-receipt of the purchase price and the outstanding land taxes and a desire to perfect the Claimant's security which was insufficient to explain the facts and circumstances of non-registration for over 5 years or provide a relevant factual basis upon which the Court ought to exercise its discretion in the Claimant's favour.

[24] The certificate of urgency filed with the application, in counsel's view, merely stated that the Claimant was in discussion with an unnamed purchaser and the desire to finalize an Agreement for sale of the properties as soon as possible, and further, that the sale of the properties is critical to generating economic activity in Barbados. These matters, he submitted, are wholly irrelevant to the exercise of the Court's discretion. There was a failure on the Claimant's part to make full disclosure of all relevant facts.

[25] With respect to the Tempro affidavit, it was Mr. Gale's position that it painted a different picture with respect to the non-payment of the purchase price and whether or not the Claimant would in fact, seek to register its charges against the Defendant at this time and/or enforce the said charges.

[26] Mr. Gale QC submitted that, contrary to what the Headley's Affidavit alleges, the purchase price was in fact received by the Claimant in that this was satisfied by the Claimant being granted the two (2) charges. Indeed, exhibit NH 1 in Mr. Gale's opinion, shows that the Claimant acknowledged receipt of the full purchase price. In addition, he was of the view that paragraphs 6 and 7 of the Headley's Affidavit acknowledged that these charges were granted to the Claimant in satisfaction of the purchase price payable by the Defendant to the Claimant.

[27] The Tempro affidavit and in particular, the **Agreement** between the Claimant and Defendant, exhibited as PT1, in Mr. Gale QC's opinion, showed the following facts which are material to the exercise of this Court's discretion and none of which was disclosed by the Claimant in breach of their duty of full disclosure to the Court:

- a. There was a legal arrangement in place between the Claimant and the Defendant that the Defendant would look for a suitable investor to complete the Four Seasons Development which the Government wished completed given its significant investment in the project and the benefits this would bring to Barbados.
- b. After three (3) public tenders it chose the Defendant as being the person best suited to find this investor.
- c. Significantly the Claimant agreed that so long as the Defendant was in discussions with potential investors that it would not take any steps against the Defendant to enforce the charges.
- d. The substance of the Agreement with the Claimant was that neither the purchase price or the amount secured would be paid by the Defendant to the Claimant and instead the suitably qualified investor once found by the Defendant and approved by the Claimant, would "step into the shoes" of the Defendant, pay the Government the purchase price for the lands at Paradise and then these charges would be in part repaid in stage payments and with the Claimant itself retaining an investment interest in the project through the holding of preferred shares in the Defendant which would be redeemed in part.
- e. The Defendant in fact introduced to the Claimant a suitably qualified investor for the project with whom the Claimant and the Government of Barbados are currently in discussions to purchase and complete the project.
- f. The Defendant is in fact in discussions with other potential investors for the development should the current proposed qualified investor not proceed with the purchase and development of the project.
- g. The Defendant has undoubtedly expended considerable investment both in terms of time and expense in finding the suitably qualified investor for the development.
- h. The Defendant would undoubtedly suffer significant prejudice if the Claimant were permitted to register and enforce its securities at this time as it would in fact lose both its time and money invested in the project by it and significantly losing the opportunity to obtain the construction work for the project for an affiliated company which in fact was one of the main purposes of the Defendant entering into the arrangement with the Claimant and the Government of Barbados.

[28] It was Counsel's submissions that in the circumstances, the Claimant:

"1. failed to discharge his [sic] evidential duty of full disclosure;

2. failed to put all relevant facts and circumstances before the Court which would have allowed the Court to make a proper evaluation and determination as to whether to exercise its statutory jurisdiction;
3. had not come with clean hands since it was in clear breach of its Agreement with the Defendant;
4. the evidence showed that the Claimant was not prepared to do equity and be fair to the Defendant by seeking to register its charges and enforce them against the Defendant.”

Counsel further argued that it would be unjust and unfair to extend the time enabling the Claimant to enforce the charges against the Defendant in breach of its **Agreement** and that it would be unfair and unjust to permit registration out of time since this would have the effect of causing the Defendant significant and largely unquantifiable loss, expense and prejudice.

[29] Finally, Mr. Gale QC submitted that, if the Court was minded to grant the extension, the order ought to reflect that the extension was granted “without prejudice to any rights acquired prior to actual registration against the person (in this case, the Claimant) entitled to the mortgage or charge.” He relied, inter alia, upon *Halsbury’s Laws of England, 4th edn, Vol 7, page 13-5*.

## Discussion and Analysis

[30] A distinction must be made between registration of a charge out of time and enforcement of that charge. By virtue of section **237** of **Cap. 308** a charge is void if not registered within the prescribed time, however, **section 248** provides the Court with jurisdiction to permit registration out of time on such terms and conditions as seem to the court to be just and equitable, and order that the time for registration be extended or order that any omission or mis-statement be rectified.

[31] This jurisdiction is exercisable where the Court is satisfied that the omission to register a charge within the time required:

- (a) was accidental or due to inadvertence or to some other sufficient cause,
- (b) is not of a nature to affect adversely the position of creditors or shareholders, or
- (c) that, on other grounds, it is just and equitable to grant relief,

It has not been argued that the omission was due to inadvertence and therefore (a) is inapplicable. The Defendant is not a creditor or shareholder of the Claimant and likewise (b) is inapplicable. The Claimant's case is that the omission is not of a nature to affect adversely the position of creditors or shareholders, but principally the application is posited on the ground that it

is just and equitable to grant the relief. Clearly from the language of **section 248 (a)** the Court's equitable jurisdiction is being invoked.

[32] I accept the view of *Lord Hanworth M.R.* in *In re M.I.J. Trust Ltd.* [1933] *Ch.542* at 560 quoted approvingly by *Hoffman J* in *In re Braemar Investments Ltd.* [1989] *Ch. 54* that the underlying guide to the exercise of the Court's discretion is whether for any reason, whether specified in the section or not, it would be just and equitable to grant relief. The real challenge to the application, proffered by the Defendant, is that it is unjust and inequitable to grant the relief.

[33] The evidence in support of the application is contained in the Headley affidavit. It is not as fulsome as the Temprow affidavit. Mr. Gale QC argued that the Claimant failed to make full and frank disclosure to the Court of all relevant facts and therefore the relief sought, on equitable grounds, ought not to be granted. Whilst I did not have the benefit of seeing the deponents to these affidavits since they were not called or cross-examined, I am of the view that there was no attempt to mislead or mis-inform the Court for these reasons; firstly, the application is to register out of time and therefore the evidence in support is tailored to support the application. The Claimant's wish to enforce the securities is irrelevant to the exercise of my jurisdiction.

Registration and enforcement are two different matters. If registration out of time is disallowed, no question of enforcement arises.

[34] That does not end the matter, however, since Mr. Gale QC's submission is that it would be unjust and inequitable to allow the extension so that the Claimant could enforce the security. It is in this regard that the Tempro affidavit assumes importance. This affidavit contextualizes the Conveyance, Debenture and Mortgage. It remains unchallenged. The purport of this affidavit is that the Conveyance, Debenture and Mortgage were part of a wider plan to facilitate the development of the Paradise Lands by the Government of Barbados under its Agreement with the Defendant. In summary, Mr. Tempro deposed that no consideration for the transfer to the Defendant was contemplated but that it was to be settled according to the terms of the **Agreement**, namely when an investor was found and a concluded agreement made.

[35] In this context, we must now examine Mr. Gale QC's submission that the purchaser price for the property was paid. The fact that the receipt clause in the Conveyance says that receipt and payment of the purchase price is acknowledged by the Purchaser is prima facie evidence of payment, however, the **Agreement** adduced in evidence in the Tempro affidavit contradicts the submission and alleges that no money was to pass for the

transfer but that the consideration was to be satisfied otherwise and in accordance with the **Agreement**.

[36] The Tempro affidavit is also of importance to the application. Whilst it is submitted, on behalf of the Defendant, that the application ought not to be granted, it is evident that the Defendant's submission relates to the issue of enforceability, that is, the fear that, if the Debenture and Mortgage are registered out of time, the Claimant will seek to enforce them against the Defendant. Thus the Defendant's reliance on the **Agreement** cannot exist independently of the Debenture and Mortgage which they submit, ought not to be recorded. I hasten to add, however, that it is not for this Court to determine the rights of the parties under the **Agreement** or the Debenture and Mortgage under this application. That is for another Court provided that this application succeeds.

[37] It is agreed by all sides that the jurisdiction of this Court is to be exercised equitably. I have no doubt that the maxims of equity, cited and relied upon by counsel for the Defendant, apply. Whilst I do not ascribe any malfeasance to any of these parties, we cannot fail to observe that the Conveyance may be registered out of time without an order of Court provided that the parties comply with the provisions of the Laws of Barbados.

- a. The execution of the Conveyance conveys the estate in fee simple in the Defendant who, under the **Agreement**, is allowed to pay the purchase price which is secured by the Debenture and Mortgage as agreed therein. This is the gravamen of Mr. Gale QC's submission. It would, in my view, be inequitable to allow the property to be conveyed and the Claimant deprived of its security. By the same token it would also be inequitable to deprive the Defendant of the benefit of the **Agreement** which is part of a larger agreement between the parties.

### **Delay**

[38] It is trite law that an application for an extension of time ought to be made without delay after the discovery of the fact of non-registration: See: *Ashpurton*. In the matter at Bar the Claimant has excused the delay on the fact that it was awaiting certain Exchange Control permissions and concessions from the Ministry of Finance and Economic Affairs. It is the Defendant's submission that no sufficient particulars of these permissions and concessions have been provided to the Court. Whilst this may be so, it cannot be overlooked that confirmation is found in paragraph [14] of the *Tempo* affidavit. Where Mr. *Tempo* deposed that:

“14 These negotiations took place over several months and involved discussions on various aspects of the proposed development and what would be required in order to attract the correct brand and developer to complete the project. These discussions involved not only how the legal structure was to be organised but would also include matters such as the grant of Government concessions for the project as well as permissions from the Central Bank relative to the development and other related matters, **all of which were at the Defendant’s request subsequently granted by the Ministry of Finance and the Central Bank of Barbados.**” (Emphasis added)

I therefore find that the delay was occasioned by the matters deposed to in the Headley affidavit and ought not to be a bar to the application.

### **Prejudice**

[39] It remains only for me to deal with the submission of Mr. Gale QC that it would be wholly unjust and unfair to permit the Claimant at this time to register its two (2) charges out of time given that this will undoubtedly have the effect of causing the Defendant significant and largely unquantifiable loss, expense and prejudice. Firstly, it has not been demonstrated in what

way registration out of time would cause the Defendant to incur **unquantifiable** (emphasis added) loss and expense. Secondly, expenses attendant upon charges are statutorily imposed. Thirdly, we are here concerned with registration out of time, the issue of enforcement will come afterwards. Should that occur, the expense of defending an enforcement application is an inevitable consequence of those proceedings. Additionally, the recoverability of any loss and expense incurred by the Defendant under the **Agreement** is dependent upon the outcome of any enforcement proceedings and difficulty in quantifying loss is no bar to the Court's obligation to assess loss and damage. In any event, the Court may by Order preserve the rights of the Defendant under the **Agreement**.

## **Conclusion**

[40] Whilst the application is for registration out of time and not for enforcement, it is my view, having been provided with a fuller factual matrix in which the application was necessitated by the filing of the Tempco affidavit, that to fully understand the Conveyance, Debenture and Mortgage and to give context to what the parties agreed, all of the documents ought to be available so that the parties' full rights can be appreciated. It would therefore be unjust not to allow the application, however, I am of the view that the position of

the Defendant ought to be secured in a manner which manifests that the Court is mindful of the Defendant's rights also.

[41] I am of the view that this can effectively be done by inserting a clause in the Order which will provide that no prejudice is occasioned to either party and, in particular, the Defendant. Counsel for both parties are in agreement that a clause similar to that adverted to in *Ashpurton* would suffice. I therefore propose to insert such a clause in my Order.

### **Disposal**

[42] In the circumstances, it is ordered as follows:

- a. That the period for the registration of the undated Debenture made between the Defendant of the One Part and the Claimant of the Other Part charging Lots A and B Paradise Lands to secure the sum of BDS \$58,000,000.00 is extended to thirty days from the date of this Order.
- b. That the period for the registration of the undated Mortgage made between the Defendant of the One Part and the Claimant of the Other Part charging firstly 47,659 square metres of land and secondly 957.0 square metres of land situate at Paradise Beach, Black Rock, St. Michael is extended to thirty days from the date of this Order.

- c. These Orders are made without prejudice to any rights acquired prior to actual registration against the person entitled to the Debenture, Mortgage or Charge.
- d. Each party shall bear its own costs.

It is further ordered by consent that:

- e. There be a stay of execution on this judgment for a period of 28 days from today.

**William J Chandler**

**High Court Judge**