JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00050

APPLICATION NO COA2019APP00147

BETWEEN	**GREGORY DUNCAN**	**APPLICANT**
AND	**ORVILLE PALMER**	**1ST RESPONDENT**
AND	**LORINDA PALMER**	**2ND RESPONDENT**

Applicant in person

Craig Carter and Ms Gnoj McDonald instructed by Althea McBean & Co for the respondents

27 November 2019 and 4 February 2020

IN CHAMBERS

FOSTER-PUSEY JA

[1] This is an application for a stay of execution of the decision of the learned judge, Jackson-Haisley J, delivered on 14 May 2019. Having heard evidence and submissions at an assessment of damages hearing, the learned judge made the following awards:

> "(i) General Damages in the sum of $16,600,000.00 with interest at a rate of 3 percent from March 14, 2014 to April 12, 2019.
>
> (ii) Special Damages in the sum of $8,492,540.84 plus interest at a rate of 3 percent from August 2013 to April 12, 2019.
>
> (iii) Costs to [the respondents] to be agreed or taxed."

[2] By way of an amended relisted notice of application for stay of execution of orders filed on 21 November 2019, the applicant has sought the following orders:

> "1. An order granting the Stay of Execution of the judgment of Jackson-Haisley, J. Heard [sic] 26th, 27th February and 12th April, 14th May 2019 until further orders;
>
> 2. Any further Order as this Honourable Court deems fit; and
>
> 3. Costs to the [applicant] to be agreed if not taxed."

[3] The grounds on which the applicant seeks the orders are as follows:

> "i. Rule 2.11 of the Court of Appeal Rules (CAR) empowers the Court to stay the judgement pending the outcome of the appeal.
>
> ii. The [applicant] believes his constitutional rights were breached, when it[sic] was not allowed to defend itself[sic] nor participate fully, at the assessment of Damages Hearing, which caused the said judgment to be entered against it[sic] by the conflicting and inconsistency[sic] decisions of Jackson-Haisley, J. which prejudiced the [applicant].
>
> iii. That Jackson-Haisley, J erred by making an unlawful award to the [respondents].
>
> iv. That Jackson-Haisley, J. was biased in her selection and application of information from the contracts signed between the parties.
>
> v. That there are critical and fundamental evidence, such as receipt and other new evidence such as a current valuation report, that was omitted or wasn't allowed because of the restriction imposed on the [applicant] at the assessment of damages trial hearing.
>
> vi. The [applicant] has good reasons and prospect for success to this appeal against the decision of the [learned] judge.
>
> vii. The [respondents] would not be prejudiced as this application is a part of the Court's process."

[4] In support of this notice of application, the applicant filed affidavits on 21, 22 and 26 November 2019. Mr Craig Carter, who also appeared as counsel for the respondents, on 21 November 2019 swore to and filed an affidavit in response to the notice of application on behalf of the respondents.

Background

[5] The applicant, Mr Gregory Duncan, is a land developer. In 2013, he purchased lot 3 Sandhurst Place, Kingston 6, in the parish of Saint Andrew. This lot is adjacent to lot 5 Sandhurst Place, being land comprised in the Certificate of Title registered at Volume 436 Folio 55 of the Register Book of Titles, which is owned by the respondents. The applicant and the respondents entered into agreements which included the respondents' sale of lot 5 Sandhurst Place to the applicant. The applicant was developing a townhouse complex on lot 3 Sandhurst. His proposed purchase of lot 5 was to allow for the expansion of the development.

[6] The parties entered into a sale agreement dated 31 July 2013 for lot 5 Sandhurst Place ("the July 2013 agreement") with an agreed sale price of $23,600,000.00. The applicant was required to, among other things, make payments directly to the Jamaica National Building Society in settlement of the respondents' mortgage. A deposit of $2,242,000.00 was paid by the applicant.

[7] In addition, one of the special conditions of the agreement for sale provided that the agreement was subject to and contingent upon a collateral agreement to be executed by the parties for the transfer of a completed four-bedroom townhouse in phase two of

the development. The collateral agreement was executed by the parties; however it appears that it was not dated. Neither the July 2013 agreement nor the collateral agreement ascribed a value to the townhouse.

[8] The parties then executed a second agreement for sale dated 2 August 2013 ("the August 2013 agreement"). This agreement provided for the applicant to sell the respondents a lot in the development. Consideration was expressed to be $20,000,000.00 "for the purpose of Stamp Duty and Transfer Tax only. In partial exchange for the transfer of ALL that parcel of land at 5 Sandhurst Place". However, this agreement was not stamped pursuant to the requirements of section 36 of the Stamp Act.

[9] Apart from making the deposit as required, pursuant to the July 2013 agreement, the applicant made some payments which, on the receipts, were described as being "for the use of 5 Sandhurst Place". The applicant, however, failed to pay the balance of the purchase price and to complete the sale within the requisite time. By letter dated 29 November 2013, the respondents' attorneys-at-law served on the applicant, a notice making the time of essence to complete the transaction, as he was still unable to meet the requirements of the sale agreement. Thereafter, by letter dated 27 January 2014, the respondents' attorneys-at-law advised the applicant that the sale was cancelled, on the grounds of the applicant's failure to complete the transaction or to provide a letter of undertaking for the balance of the purchase price. The attorneys-at-law also wrote; "[f]urther you have demolished a significant portion of our client's property and are hereby liable for Court action". According to the correspondence in the court's record, the

deposit made by the applicant had been previously returned to him by letter dated 5 July 2013. However, the agreement for sale on which reliance is primarily placed is dated 31 July 2013. The documents on the record are not clear in this regard.

[10] The applicant had not completed the development and had not transferred the unit to the respondents. The respondents, on 14 March 2014, initiated legal proceedings against the applicant by way of claim form seeking damages for breach of contract and for destruction of property, or in the alternative specific performance. As the pleadings will become important in the consideration of the matter, the main paragraphs in the particulars of claim filed on 14 March 2014 ("the March 2014 particulars") are outlined below:

> "4. That on or around the 31st of July 2013 the above parties entered into an Agreement for Sale in respect of a property located at Lot No. 9A Block B Sandhurst in the parish of Saint Andrew registered at Volume 436 Folio 55 of the Register Book of Titles (hereinafter referred to as the subject property) for the value and or consideration of Twenty Three Million and Six Hundred Thousand Dollars ($23,600,000.00).
>
> 5. That the [applicant] made a deposit on the subject property of Two million Two Hundred and Forty Two Thousand Dollars ($2,242,000.00), however he has failed to provide a Letter of Commitment as to the completion of the sale transaction.
>
> 6. That the [applicant] was given permission to use the premises in August of 2013 to store building materials, however he proceeded to demolish the premises and the [respondents] have been deprived of the use and occupation of the subject property since August, 2013.
>
> 7. The [applicant] acted in breach of the said contract by causing significant damage to various sections of the subject property and areas surrounding it, by removing the fence, all

doors, windows, the roof and other fixtures causing damage to the walls of the building in September, 2013.

8. Damages to the subject property due to the [applicant's] reckless conduct has prevented the [respondents] from using the subject property, and the [applicant] has failed and or neglected to complete the Sale Agreement.

9. By reason of the matters aforesaid, the [respondents] have been put to considerable inconvenience, suffered loss, damage and incurred great expense.

10. The [respondents] are seeking in the alternative Specific Performance of the above contract requiring the [applicant] to Complete [sic] the Sale.

PARTICULARS OF SPECIAL DAMAGES

	$
i.) Damages for Breach of Contract & Destruction of Property	26,000,000.00
ii.) Loss of use of Premises from August, 2013 to present time @$250,000.00 per month and continuing	1,500,000.00
TOTAL	27,500,000.00"

[11] At the prayer of these particulars of claim, the respondents claimed the sum of $27,500,000.00, interest, costs and further and/or other relief. In the alternative, the respondents claimed an order for specific performance requiring the applicant to complete the agreement for sale and an order that the applicant restore the building and premises to the value and condition in which he found them. The respondents attached to the

particulars of claim the July 2013 agreement, the title for lot 5 Sandhurst and a June 2012 valuation report for the premises.

[12] In response to the claim, the applicant filed a defence on 24 April 2014, in which he outlined essentially that he was ready, willing and able to complete the purchase of the said property. Attempts were made to have the matter go to mediation, but these attempts proved futile. Eventually, the applicant's defence was struck out on 20 January 2015 and judgment entered for the respondents in the sum of $20,833,739.00 for damage to property and loss of use from October 2013 to January 2015. The applicant then applied to set aside the order on 4 February 2015. The application was heard on 24 March 2015. The court ruled that the judgment should stand but that the award made should be set aside. The court also ordered that the matter proceed to an assessment of damages hearing.

[13] On 8 March 2018 the respondents filed an amended particulars of claim ("the March 2018 amended particulars"). The main changes are outlined below with the underlining as it appears in the document:

> "9. <u>That on or around the 2nd day of August 2013 the above parties entered into a second and/or collateral Agreement for Sale in respect of a property located at Unit #4 of Lot 9B Block B Sandhurst in the parish of St. Andrew registered at Volume 1184 Folio 751 of the Register Book of Titles at a value of $20,000,000.00 for the purposes of Stamp Duty and Transfer Tax only in partial exchange for and conditional upon the transfer of all that parcel of land at 5 Sandhurst Place registered at Volume 436 Folio 55.</u>

10. That by failing to complete the Sale Agreement of July 31, 2013, the [applicant] in consequence also failed to honour the second and/or collateral Agreement for sale.

…

PARTICULARS OF SPECIAL DAMAGES

i. Loss of Use of Premises from August 2013 to present	$6,097,881.72
ii. Interest and costs on Mortgage account due from August 2013 to present	$11,660,935.01
Total	$17,758,816.73"

[14] The respondents then claimed special damages in the sum of $17,758,816.73 and damages for breach of contract and destruction of property. The orders sought in the alternative remained the same. However, additional documents were attached to the March 2018 amended particulars. These included the August 2013 agreement, mortgage statements as at 30 November 2017, statement of rental incurred, lease agreement and rental receipts for the respondents' residence at 38 Charlemont Drive, Kingston 6 and an engineer's report for lot 5 Sandhurst Place.

[15] Jackson-Haisley J heard the assessment of damages on 26, 27 February and 12 April 2019, and on 14 May 2019 made the decision being challenged. The applicant, on 18 July 2019, by way of the further amended notice and grounds of appeal has challenged

the orders made by the learned judge. The applicant, on 21 November 2019, also filed the amended relisted notice of application, which is currently before the court for consideration.

[16] On 27 November 2019, I heard the application for a stay of execution of the orders of Jackson-Haisley J. At the end of the hearing I promised that the decision would be given as soon as possible. In fulfilment of this promise, I now give the decision and reasons. I have taken special care to outline the submissions made by the applicant in relative detail in light of the fact that he was not represented by an attorney-at-law at the hearing and so argued the matter himself. As one of the complaints being made by the applicant is that he was not allowed to give evidence at the assessment of damages hearing, I have taken into account the fact that some of the evidence outlined in the applicant's affidavits, in particular, were not before the learned judge at the hearing.

The applicant's submissions

[17] The applicant indicated that the case before the court concerns a joint venture agreement among the parties, in relation to two properties adjacent to each other. It was agreed by the parties that the approved lot 3 Sandhurst Place drawings were to be redesigned to reconfigure the layout of the four townhouses within phase 1 of lot 3, as the main drive way entrance was shared between lots 3 and 5 Sandhurst Place, and the units were to now face the internal driveway.

[18] The applicant highlighted that, to facilitate this reconfiguration, the respondents were to have sought to modify a certain restrictive covenant on lot 5. There were ongoing

discussions in this regard. The applicant claims, however, that the respondents only filed a fixed date claim form to procure the modification of the restrictive covenant on 14 March 2014 in the Supreme Court. The applicant contended that the restrictive covenant on lot 5 interrupted and halted the agreements, in that, it extended the period of completion of the construction. Further, only one unit of the intended four could have been erected on phase 2 of the development which would have involved lot 5. In addition, phase one lot 3 underwent a tremendous scale restriction which resulted in the units being less marketable due to issues such as parking and turning limitations.

[19] The applicant argued that, at the time of the assessment of damages hearing, he had wanted an opportunity to produce evidence and to have a fair say, which is allowed by the law. He complained that he was prevented from giving evidence during the hearing. The applicant indicated that at the time of the assessment of hearing he was represented by an attorney-at-law who had made an application seeking permission to challenge the judgment entered against him and to present evidence. However, this was not allowed. The applicant noted that the judgment which he had sought to challenge was the one which had led to the assessment of damages hearing.

[20] In light of the fact that the applicant was representing himself at the application, and, upon my enquiry, indicated that he did not know the principles upon which applications for stay of execution are determined, I outlined the principles to him so that he could take them into account in the making of his submissions. I explained that the

court will consider whether there is some merit in the appeal and whether the grant or refusal of a stay is the order that is likely to produce less injustice between the parties.

[21] The applicant proceeded to examine each ground of appeal, as outlined in the further amended notice and grounds of appeal filed 18 July 2019. He argued that the appeal has merit.

Ground (a) – That the [applicant] will rely on its affidavit in support of application for court orders for the stay of execution of order of Jackson-Haisley J in support of this application

[22] The applicant conceded that this was not a ground of appeal and then went on to address the other grounds of appeal. Grounds (b) and (c) were considered together.

Ground (b) – That in the interest of finality the [applicant] will compromise and accept the correct application as in the case of Laird v Pim where Parke B at page 854 set out principle to be applied in relation to remedies for the following reasons:

> **i. the contract would have been performed and as sought by the respondent's alternative orders. Their benefit would be $20,000,000.00 plus $23,600,000.00 from which they must repay the balance of mortgage due to Jamaica National Building Society in respect to Volume 436 Folio 55 before the said free and clear title is handed over to the [applicant]. The $43,600,000.00 should also less $2,242,000.00 cost of transfer already paid.**
>
> **ii. Phase two (2) of the development could now be completed and the restricted parking, landscaping and turning radius constriction within phase one (1) lot 3 would be alleviated.**

Ground (c) – That the Jackson-Haisley J decision in error double compensated the respondents, by awarding them the land and its value, which is in total contravention with the remedy intended as in the case of Laird v Pim, which states:

> "**i. The measure of damages, in action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase – money, in consequence of the non-performance of the contract? It is clear he <u>cannot</u> have the land and its value too."**

[23] In grounds (b) and (c), the applicant contends that the award of the learned judge was unjust. The applicant argued that the learned judge gave the respondents "money as well as what they had claimed they lost" and so they were "double compensated" by the award. The applicant referred to paragraphs [27] and [28] of the judgment at which the learned judge stated:

> "If the contract had been performed then the Claimant would have stood to gain the proceeds of the sale of their property which based on the Agreement for Sale was the sum of $23,600,000.00. They would also have stood to gain a four bedroom, three bathroom townhouse valued at $20,000,000. based on the evidence by Mr. Palmer which I accept.
>
> This figure when arrived at must then be reduced by the value of the property at the time of the loss of the bargain. The Valuation Report is an exhibit and it reflects a market value of between 26,000,000.00 and 28,000,000.00. I am prepared to find the average and assign a value of 27 million to the house. When this is deducted from the total, the sum of $16,600,000.00 is arrived at. That would represent the loss of bargain."

[24] The applicant submitted that the learned judge correctly used the $20,000,000.00 figure from the August 2013 agreement, which was the value in exchange for the respondents' lot. However, what the learned judge did at paragraph [28] of the judgment was unjust, because in effect she returned the property to the respondents. He argued that the applicant would have been required to give everything that was promised, and

in turn has got nothing. He reiterated that although the agreement required an exchange, the respondents wanted to keep everything. The award made by the learned judge, the applicant contended, was therefore a double compensation as she awarded the property, its value as well as damages for loss of bargain.

[25] The applicant argued that although the respondents sued for a breach of contract, he was not in breach, as he had completed the unit as required by the August 2013 agreement, and had offered it to the respondents. It was the respondents who had rejected the completed unit. The applicant drew the court's attention to a picture of what appeared to be a completed development on the left of the premises, illustrating the respondents' land on the right. This illustration was utilized to bolster his point, that it was not true that he had not done what he ought to have done. Of course, as indicated earlier, in due course, consideration will have to be given as to whether this evidence was presented before the learned trial judge at the assessment of damages hearing.

[26] The applicant then made reference to paragraphs [7], [26] and [29] of the learned judge's judgment, which state:

> "[7] At the Assessment of Damages hearing, counsel for the [applicant] sought an adjournment on the basis that they intended to challenge the Judgment. The adjournment was denied and the matter proceeded. The [applicant] participated in the proceedings and was represented by counsel who actively participated. The 1st [respondent] Mr. Orville Palmer's witness statement was accepted as his evidence in-chief. He gave further evidence that the [applicant] was in the process of building a development on the neighbouring premises which adjoined his property and that the [applicant] offered to purchase his property to extend his development and they entered into a contract for the sale

of the property. The [respondent] adduced into evidence several documents that supported his claim to include the Agreement for Sale, Lease Agreements and Rent Receipts and a Valuation report dated June 2012 prepared by Allison Pitter and Co., Chartered (Valuation) Surveyors. This report ascribed an open market value of $26,000,000.00-$28,000,000.00 to the property.

…

[26] I agree with the submissions advanced on behalf of the [respondents] that in order to arrive at a sum for General Damages the court would have to take into account the loss of bargain. This is in keeping with the principles laid down by G.H. Treitel in the text the Law of Contract, 1991 where in discussing loss of bargain the following is said at pages 830-31:

> 'the basic object of damages for breach of contract is to put the plaintiff "so far as money can do it….in the same situation….as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain, that his expectations arising out of or created by the contract are protected. This protection of the plaintiff's expectation must be contrasted with the principle on which damages are awarded in tort…..'

…

[29] The [respondents'] claim also extended to the damages for the destruction and damage done to the property and its surroundings. Counsel for the [respondents] relied on the case of **Laird v Pim** (supra) where Parke B at page 854 set out principles to be applied in relation to remedies:

> 'The measure of damages, in action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence

> of the non-performance of the contract? It is clear he cannot have the land and its value too.'"

The applicant reiterated that it is clear that the respondents cannot have the land and its value too. As such, the learned judge, double compensated the respondents.

Ground (d) – <u>That the land is at all material time the exchange for the bargain, if the respondents have the land there was no exchange and suffered no loss.</u> Given the land current value in keeping with the principles laid down by G.H. Treitel in the text the Law of Contract, 1991 where in discussing Loss of bargain the following is said at pages 830 – 31:

> **i. "The basic object of damages for breach of contract is to put the plaintiff "so far as money can do it … in the same situation … as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain."**

[27] The applicant indicated that the issue in this ground of appeal is similar to that of double compensation. Therefore, he did not elaborate further on this ground.

Ground (e) – That if the compromised position is not accepted by the court, then the [applicant] ask that this matter no longer proceed on how it was concluded by Jackson-Haisley J but as presented by the [applicant] in its Affidavit and or that pursuant to Form A1 (page) 45 and Rule 2.2 of the Court of Appeal Rules (CAR 2002)

[28] The applicant submitted that he basically wishes for a fair application of the law as intended in the case of **Laird v Pim.** The applicant emphasized that if the respondents have the land, there was no exchange and therefore they suffered no loss.

[29] The applicant also complained that the valuation report utilized in the assessment of damages was not current as it had been carried out in 2012 while the assessment of damages took place in 2019. He believes that in 2019 lot 5 Sandhurst Place had a much

higher value than that reflected in the 2012 valuation report and as a result the assessment was unfair.

Ground (f) – The [applicant] believes his constitutional rights were breached on February 26th, 27th and April 12th and May 14th 2019 by the decisions of Jackson-Haisley J

[30] The applicant argued that it was his constitutional right to fully participate in the assessment of damages hearing. He explained that he wanted to be called to the stand and give evidence but was not allowed to do so.

Ground (g) – That in the case herein the [applicant] states there is a defence to quantum open to the [applicant] on the Bain v Fothergill principle, which was not raised before the assessment judge and was not considered by her resulting in the respondent being awarded damages which it may otherwise have not been awarded had the [applicant] been allowed to fully participate

[31] The applicant argued that although he did not file any witness statements, several issues were raised by his then attorney-at-law. In particular, the applicant argued that he was relying on the case of **Bain v Fothergill**, which the learned judge failed to take into account although it was mentioned in his attorney-at-law's submissions.

Ground (h) – That Jackson-Haisley J decision is aberrant and should be set aside, see (Hadmor Production Ltd v Hamilton [1982] 1 All ER 1042, 1046 per Lord Diplock; see also Attorney General v McKay [2012] JMCA App 1, paras [19] and [20])

Ground (i) – The [applicant] has good reasons and prospect for success to this appeal aided by paragraph 168, 169, 174, 176 and 180 of the judgment of The Hon Mr Justice Brooks JA, The Hon Ms Justice P Williams JA (Ag), The Hon Ms Justice Edwards JA (Ag). Between Al-Tec Inc Ltd v James Hogan, Renee Lattibudaire

[32] These two grounds were considered together. The applicant submitted that he was relying on the cases, as aforementioned, to bolster the point that the learned judge

did not properly exercise her discretion. The applicant submitted that whilst the learned judge referred to a correct legal principle, he disagreed with the manner in which she applied it as reflected at paragraph [28] of the judgment.

[33] The applicant reiterated that there is a good prospect of success in the appeal. Additionally, he argued that an assessment of damages hearing is a trial by itself and the parties must be given a fair opportunity to present their case.

[34] In relation to the second limb of the test as to the order that is likely to produce less injustice between the parties, the applicant referred to his affidavit filed 26 November 2019 in which he stated that he paid a further deposit and made payments to the respondents, however the learned judge did not take these payments into consideration. Particular attention was drawn to paragraph 15, where he deponed:

> "On July 31, 2013 the first contract was signed in which clause (12) stipulated that Lot 5 was being sold to me as is … which is to say without the modification. The $2,242,600.00 was paid by the Appellant."

Further at paragraph 17:

> "Therefore the event which lead to the Respondents to so claim after the fact and by which they relied upon to cancel the entire contracts left us puzzled, especially at that time of unusual eventualities, our engagements with our attorney-at-law had ended."

[35] The applicant submitted that it would be just to grant the stay of execution, because if that is not done he would be prejudiced. He further submitted that the issue

of prejudice was addressed at paragraph 4 of the second affidavit of Gregory Duncan of filed 21 November 2019. Paragraph 4 states:

> "Therefore its unjust and unfair for the Respondents to be awarded everything to include paid deposits, further payments, General Damages, Special Damages, Cost and the land."

[36] The applicant highlighted that he was relying on seven grounds in his notice of application. One of the grounds, is that the respondents would not be prejudiced, as this application, as well as the appeal, are a part of the court's process which he is entitled to pursue. He also argued that the respondents will not be worse off if the application is granted.

The respondent's submissions

[37] Mr Carter made submissions on behalf of the respondents. Counsel submitted that there is no merit in the appeal. He argued that the main reason for the appeal is the applicant's complaint that he was not permitted to present evidence at the assessment of damages hearing. Essentially what the applicant was doing, he argued, was requesting that the court hear fresh evidence.

[38] Counsel noted that the applicant was present with an attorney-at-law at every hearing of the assessment of damages. The matter proceeded, cross examination was done by the applicant's counsel and, in addition, submissions were made on his behalf. While no witness statement was filed by the applicant for the assessment of damages hearing, the learned judge did not make any order preventing or restraining the applicant

from giving evidence. Counsel referred to paragraph 30 of the affidavit of Craig Carter filed 21 November 2019 on behalf of the respondents at which Mr Carter states:

> "That the Applicant has misled this Court by indicating that he was not permitted to fully participate by giving evidence in the Assessment of Damages, when he was present at every hearing of the Assessment and represented by Counsel. There was no Order from the Honourable Court below preventing the Applicant from giving evidence, it was he who failed to file witness statements and thereby limited himself from leading any and all available evidence, which he wished the Court to consider."

[39] Counsel further argued that double compensation did not occur. Submissions were made to the learned judge concerning the assessment of a loss of bargain. While the applicant has suggested that the learned judge awarded a sum of money as well as land, the learned judge did not do so. The respondents still own the land, as well as the building, which was destroyed.

[40] Counsel argued that at pargraph [26] of the learned judge's judgment, the issue of loss of bargain was explained. She stated:

> "I agree with the submissions advanced on behalf of the Claimants that in order to arrive at a sum for General Damages the court would have to take into account the loss of bargain. This is in keeping with the principles laid down by G.H. Treitel in the text the Law of Contract, 1991 where in discussing loss of bargain the following is said at pages 830-31:
>
> > 'the basic object of damages for breach of contract is to put the plaintiff "so far as money can do it….in the same situation….as if the contract has been performed. In other words, the plaintiff is entitled to be compensated for the loss of his bargain, that

> his expectations arising out of or created by the contract are protected. This protection of the plaintiff's expectation must be contrasted with the principle on which damages are awarded in tort….'"

[41] Further, at paragraph [27] of the learned judge's judgment, she outlined how the loss of bargain was calculated. She said:

> "If the contract had been performed then the Claimant would have stood to gain the proceeds of the sale of their property which based on the Agreement for Sale was the sum of $23,600,000.00. They would also have stood to gain a four bedroom, three bathroom townhouse valued at $20,000,000. based on the evidence by Mr. Palmer which I accept."

[42] Counsel therefore argued that the learned judge, in her calculation, assessed the expected value of the contract minus the value still in the hands of the respondents. The value of the contract was $23,600,000.00 for the property and $20,000,000.00 for the townhouse, which they ought to have received.

[43] Counsel then posited that if the respondents had been awarded $43,600,000.00 and had kept the property, that would have been double compensation, but since the respondents still own and possess the property, the value of the property was subtracted from the expected value or the benefit of the contract. The case law has indicated that that is the manner in which loss of bargain is to be calculated and as such, in his submission, there is no error on the part of the learned judge.

[44] In relation to the second limb concerning where the justice would lie, counsel contended that if there is no merit in the appeal, and a judgment is considered a thing

of value, then injustice would be faced by the respondents in the event that a stay of execution is ordered, as they would be deprived of the value to which they are entitled.

[45] Counsel also argued that the respondents are experiencing hardship because they are still paying mortgage for premises that were demolished by the applicant. This, counsel submitted, has affected their financial stability. Reference was made to paragraph 32 of the affidavit of Craig Carter in which it is stated:

> "That I am informed and verily believe that the Respondents are still paying for the mortgage of the premises subject of this Claim, which is uninhabitable due to the Applicant's demolition of same, when he was incapable of completing the parties' agreement and are also continuing to pay rent to house their family. Circumstances which continue to put their financial stability in Jeopardy of ruin."

[46] Counsel relied on the case of **United General Insurance Co v Marilyn Hamilton** [2018] JMCA App 5, in which Brooks JA, at paragraph [23], indicated that financial stability is an important factor in determining whether a court should grant a stay of execution. Brooks JA stated:

> "An important factor is that there is no indication that the payment of the judgment sum could jeopardize UGI's financial position."

[47] Counsel submitted that in this matter there is similarly no indication that payment of the judgment sum will jeopardize the applicant's position. The applicant asserted that the respondents would not suffer any prejudice but did not speak to prejudice to himself. If there is no hardship on his part, there is hardship being faced by the respondents. In light of this, counsel urged the court to refuse the application.

The applicant's response

[48] In response to the legal authority of **United General Insurance Co**, the applicant argued that, having looked at paragraph [7] of the case, it deals with an employment law issue which is different from the situation at hand. Therefore, the case was inapplicable.

The grounds of the application

[49] The grounds of the application are outlined at paragraph [3] of this judgment. A number of these grounds refer to matters also raised in the notice and grounds of appeal, such as the challenge to the lawfulness of the award for loss of bargain, the complaint that the applicant was not allowed to defend himself or participate fully in the assessment of damages hearing as well as the use of an outdated valuation report in the course of the proceedings. An additional ground of the application, however, was that the learned trial judge was "biased in her selection and application of information from the contracts signed between the parties".

Discussion and Analysis

[50] The case of **Kenneth Boswell v Selnor Developments Limited** [2017] JMCA App 30 is instructive in outlining the guiding principles as to whether this court should grant a stay of execution. These are that an applicant seeking to stay the execution of a decision should demonstrate that:

i. there is some merit in the appeal; and

ii. that the granting of a stay is the order that is likely to produce less injustice between the parties.

[51] In relation to the first limb, the applicant highlighted two main issues in arguing that there is merit in his appeal. These issues are as follows:

i. whether the applicant had a right to be heard during the assessment of damages hearing; and
ii. whether the award made by the learned judge "double compensated" the respondents.

Right to be heard during an assessment of damages hearing

[52] The applicant has argued that he was not allowed to give evidence and that his constitutional rights to fully participate in the assessment of damages hearing were therefore breached. There are two rules in the Civil Procedure Rules that speak to the participatory rights of the applicant where a default judgment has been entered. These are rules 12.13 (Defendant's rights following default judgment) and 16.2 (Assessment of damages after default judgment).

[53] Rule 12.13 states:

> "**Defendant's rights following default judgment**
>
> 12.13 Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are:
>
> (a) costs;

(b) the time of payment of any judgment debt;

(c) enforcement of the judgment; and

(d) an application under rule 12.10(2)."

[54] Rule 16.2 states:

"16.2 (1) An application for a default judgment to be entered under rule 12.10(1)(b), must state –

(a) whether or not the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the registry must fix a date for the assessment of damages and give the claimant not less than 14 days notice of the date, time and place fixed for the hearing.

(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The registry must then fix:

(a) The date for the hearing of the assessment;

(b) A date by which standard disclosure and inspection must take place;

(c) A date by which witness statements must be filed and exchanged; and

(d) A date by which a listing questionnaire must be filed."

[55] The restrictive application of rule 12.13 had been under scrutiny. The issue as to whether this rule was constitutional was eventually settled by this court in the recent case of **Al-Tec Inc Limited and James Hogan and others** [2019] JMCA Civ 9. At paragraphs [169], [177] and [179] of the judgment Edwards JA stated:

> "[169] In my view, the provisions in rule 12.13 of the CPR is disproportionate to the aim pursued. The danger associated with barring a defendant from fully participating at an assessment hearing (which is a trial in itself), is that it creates an avenue, that enables a claimant to make one sided submissions entirely untested. This is clearly not in the interests of justice. **The perpetual silence that the defendant must maintain on all issues relating to quantum, gives a claimant the unfettered opportunity to claim unreasonable and exorbitant sums, which, had the defendant been allowed to speak, evidence or submissions or both could be presented to the court, as to the reasons why a claimant is not entitled to the sums claimed**.
>
> **[177] Rule 16.2(4) indicates the anticipation of a greater level of participation than that which is being argued by the respondent is allowable under rule 12.13 of the CPR and it is therefore imperative that the CPR is amended accordingly.**
>
> …
>
> [179] … **It follows, therefore, that in finding that rule 12.13 of the CPR is indeed unconstitutional, and this means the appellant is at liberty to address the court on the issue of quantum and to present the authorities that support his argument that the respondents are not entitled to the sums being claimed as damages**." (Emphasis supplied)

[56] It is now clear that a defendant against whom a default judgment is entered is entitled to increased participation in an assessment of damages hearing. The scope of participation is related to quantum, including submissions in relation to the

reasonableness of an award. It is not clear why, in the instant case, the applicant did not file any witness statements ahead of the assessment of damages hearing. The respondents claim that the learned judge did not make any order preventing the applicant from doing so. There is no evidence that any other judge made such an order.

[57] At paragraph [7] of the judgment the learned judge indicated that the applicant was allowed to participate in the assessment of damages hearing and explained that:

> "At the Assessment of Damages hearing, counsel for the Defendant sought an adjournment on the basis that they intended to challenge the Judgment. The adjournment was denied and the matter proceeded. **The Defendant participated in the proceedings and was represented by counsel who actively participated**." (Emphasis supplied)

[58] Mr Craig Carter, in his affidavit filed 21 November 2019 on behalf of the respondents, also deponed:

> "29. **That the Applicant participated in the proceedings at the Assessment of Damages, he carried out cross-examination and also made submissions before the learned Judge in the Court below, which is evidenced from Paragraph 7 of the Judgment delivered in this matter on Assessment of Damages by the Honourable Mrs. Justice Jackson-Haisley**.
>
> 30. That the Applicant has misled this Court by indicating that he was not permitted to fully participate by giving evidence in the Assessment of Damages, when he was present at every hearing of the Assessment and represented by Counsel. There was no Order from the Honourable Court below, preventing the Applicant from giving evidence, it was he who failed to file witness statements and thereby limited himself from leading any and all available evidence, which he wished the Court to consider." (Emphasis supplied)

[59] I note the submissions of the applicant that his attorney-at-law sought permission to challenge the judgment entered against him and for him to produce evidence. A defendant against whom a default judgment has been entered is entitled to give evidence and make submissions, however, these would be limited to issues dealing with quantum and the reasonableness of an award. It appears however that the applicant was seeking to again challenge the issue of liability, having failed in a previous application. The assessment of damages hearing was not at an appropriate forum in which to do so.

[60] In light of the evidence before the court at this point, it does not appear that there is any merit in this ground of appeal as the applicant through his counsel, was able to conduct cross-examination as well as make submissions as to the quantum of damages.

Double compensation

[61] The total award made by the learned judge was $25,092,540.84 exclusive of interest. Under the head of general damages, she awarded the sum of $16,600,000.00 with 3% interest representing loss of bargain and under the head of special damages she awarded the sum of $8,492,540.84 with 3% interest, representing the replacement value and consequential damages (rental expenses).

[62] At paragraphs [27] and [28] of the judgment the learned judge examined the loss of bargain received by the respondents. The learned judge arrived at a figure of $16,600,00.00 after subtracting the agreed purchase price of $23,600,000.00, pursuant to the July 2013 sale agreement, from the total of the market value of the property, being

$27,000,000.00, added to the value of the townhouse which was to have been provided, $20,000,000 .00 as per the August 2013 agreement.

[63] The respondent had also claimed compensation for the damage caused to the property by the actions of the applicant. A structural engineer's report indicated that it would cost $17,125,000.00 to replace the structure on lot 5. The learned judge, at paragraph [27] of the judgment, had noted that the applicant had removed the roof, all doors, some of the floors, windows, grills, electrical and all kitchen and bathroom fixtures. However, the learned judge, at paragraph [30] of the judgment, concluded that she would be over compensating the respondents were she to make an award of $17,125,000.00. She outlined a number of reasons including the fact that the home was 75 years old and was made from timber. In addition, it was also the understanding of the respondents that the structure would have had to be destroyed. According to the evidence the entire home was not destroyed but only aspects of it. The learned judge made an award in respect of this head of the claim in the amount of $3,300,000.00, 20 percent of the replacement cost of the premises.

[64] Insofar as consequential damages were concerned, the respondents had claimed for mortgage expenses and rental paid for accommodation for their family. The learned judge refused to award a sum for the mortgage expenses on the basis that it was not claimed in the 2014 particulars of claim but instead only in the 2018 particulars of claim which had been filed after the default judgment had been entered against the applicant. The respondents adduced into evidence receipts evidencing rental amounts paid and, at

paragraph [31] of the judgment, the learned judge awarded a sum of $5,192,540.84 for this element of the claim. Although rent in of itself was not specifically pleaded in the particulars of claim, the learned judge said the head of loss of use of the premises would relate to rental costs.

[65] The applicant complains that the learned judge has "double compensated" the respondents, meaning that they have received more than the amount to which they are entitled. I believe that there is some merit in this ground of appeal and the assessment of damages will benefit from some review. One of the issues which may require some exploration is whether it was appropriate for the contents of the unstamped August 2013 agreement to be taken into account in the determination of the "loss of bargain". As counsel Craig Carter outlined in paragraph 9 of his affidavit filed on behalf of the respondents:

> "**A second Document was prepared** entitled Agreement for Sale **dated August 2, 2013**, which was for the transfer of the 4-bedroom townhouse from the Applicant to the Respondents herein, in furtherance of the Applicant's obligation under the Agreement for Sale Dated July 31, 2013, **however this document entitled Agreement for sale dated August 2, 2013 was never made enforceable under the law and is inadmissible in a Court as evidence of an Agreement for sale as it was never stamped, as such a suit could never have been maintained nor properly pursued on that document**." (Emphasis supplied)

[66] In contrast with the above assertion, the respondents have in fact relied on the August 2013 agreement, and referred to it in their 2018 particulars of claim. Importantly, judgment against the applicant had been entered on the basis of the 2014 particulars of

claim in which the sole agreement relied on was the July 2013 agreement. It is arguable that the learned judge may have fallen into error in referring to and relying on the August 2013 agreement in calculating damages for loss of bargain.

[67] The assessment of a loss of bargain is not always a simple exercise. The applicant's complaint that the respondents have been awarded everything, including the value of the $20,000,000.00 townhouse, while having provided nothing in exchange, contrary to what was contemplated in the "bargain", also merits closer examination.

[68] While the applicant has complained that payments that he made to the respondents were not taken into account by the learned judge, it is not clear whether that evidence was before her. In addition, with no other valuation report before her, the learned judge made use of the 2012 valuation report. The applicant may therefore face some challenges to successfully pursue these matters.

[69] While the applicant does not appear to be challenging the award made as compensation to assist with repair of the structure, the basis on which the learned judge discounted the cost of replacement by 80% is not clear. On the face of it, $3,300,000.00 does not appear adequate to replace the roof, all doors, some of the floors, windows, grills, electrical and all kitchen and bathroom fixtures. This is a matter which would also benefit from some review.

[70] In the circumstances I believe that there is some merit in the appeal.

Risk of injustice

[71] Phillips JA in the **Kenneth Boswell** case, in examining the proper approach to be adopted, recited at paragraph [48] the dicta of Phillips LJ in **Combi (Singapore) Pte Limited v Ramnath Sriram and Another** [1997] EWCA 2164, which states:

> "In my judgment the proper approach must be to make that order which best accords with the interest of justice. **If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered. Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.** This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. **But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice**." (Emphasis supplied)

[72] Recently, Brooks JA, at paragraphs [20] and [21] in the **United General Insurance Company** case, stated:

> "**Hammond Suddard Solicitors v Agrichem International Holdings Ltd** was relied on in the submissions of both Lord Gifford and Captain Beswick. In that case Clarke LJ opined, at paragraph [22], that:
>
> > '... Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that

> the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'

Lawrence-Beswick JA (Ag), as she then was, also relied on **Hammond Suddard in her judgment in Caribbean Cement Company Limited v Freight Management Limited** [2013] JMCA App 29. She said, at paragraph [16]:

> '[The] authorities show that in determining whether to grant or refuse an application for the stay of execution pending appeal, the court should consider (i) where the interests of justice lie and that (ii) the respondent should not be unduly deprived of the fruits of his successful litigation. Further, in determining where the interests of justice lie, consideration must be given to:
>
> > **(a) The applicant's prospect of success in the pending appeal.**
> >
> > **(b) The real risk of injustice to one or both parties in recovering or enforcing the judgment at the determination of the appeal.**
> >
> > **(c) The financial hardship to be suffered by the applicant if the judgment is enforced**.'

That assessment is gratefully accepted as being an accurate guide for conducting the present exercise." (Emphasis supplied)

[73] The applicant has contended that there is merit in his appeal. Whilst I agree that there may be some merit in the appeal, the applicant has not provided any evidence that he would suffer hardship, financial or otherwise, or that there will be, or there is a risk of, injustice to him if he is required to pay the judgment sum before the appeal is determined. While he has complained that the award is an "over compensation" to the respondents, that in and of itself, even if it is possibly true, is not proof of prejudice which he would suffer if required to make the payment to the respondents at this time.

[74] On the other hand, the respondents have demonstrated that they have suffered hardship and continue to do so. The affidavit evidence indicates that they have had to continue to pay rent to house their family since the house on lot 5 has been rendered uninhabitable. They also have to continue paying the mortgage for the premises.

[75] Upon a review of all the circumstances, it appears that even if the award made for loss of bargain were to be set aside, the respondents would, at the very least, be entitled to compensation to effect the repairs necessary to restore the property to its state prior to the "partial demolition" carried out by the applicant. As I indicated earlier, I believe that the cost to effect the repairs is likely to exceed $3,300,000.00.

[76] In all the circumstances I believe that the course of action which will cause the least injustice is to refuse the application for a stay of execution.

The way forward in this matter

[77] A notice dated 16 December 2019 has been issued by the registry to the parties indicating certain procedural steps which are required for the progress of the appeal. Both parties are urged to ensure compliance with same as a matter of urgency.

Order

[78] For the foregoing reasons, I make the following orders:

1. Application for a stay of execution is refused.
2. Costs to the respondents to be agreed or taxed.