NMLS

IN THE SUPREME COURT OF JUDICATUR OF JAMAICA

CLAIM NO. HCV 2416/2003

BETWEEN	CAN-CARA DEVELOPMENT LTD	CLAIMANT
AND	MAGIL CONSTRUCTION JAMAICA LTD	DEFENDANT

John Vassell instructed by DunnCox for the defendant.

Dr. Barnett and Philip Malcolm for the claimant.

Heard: 23rd February and 10th May 2004 and 18th March 2005

Campbell J.

Background:

Can-Cara Development Ltd. (Can-Cara) entered into a Joint Venture Agreement with the Ministry of Housing, to build approximately six hundred houses and provide forty-three service lots, together with all necessary infrastructural works on approximately ninety-nine acres of land at White Water, St. Catherine. Can-Cara was also obliged to ensure the grant of all approvals required by government departments and agencies and to cause all surveys to be carried out, obtain all planning approvals and prepare all buildings plans for approval by the St. Catherine Parish Council. This agreement was dated May 24, 1996.

On September 24, 1999, Can-Cara and Magil Construction Jamaica Ltd. (Magil) entered into a Co-Development Agreement, in which Magil would substantially perform the obligations of Can-Cara under the Joint-Venture Agreement, i.e., the construction of the 600 houses and infrastructural works. In addition, Magil would be solely responsible for all arrangements for financing for the development and would be solely liable to

provide all documentation guarantees and commitment fees payable to satisfy the requirements of the financier.

On the other hand, Can-Cara would be responsible for marketing of the units and the securing of the relevant governmental approvals. Magil would pay Can-Cara the sum of $200,000.00 for each of the 600 dwelling houses sold.

On the 12th December 2003, Can-Cara filed a Claim Form in which it was alleged that Magil owes Can-Cara, as at July 24, 2003, the sum of $60,761,812.19. The dispute was referred to arbitration pursuant to the Co-Development Agreement. On the 23rd December 2003, Magil was granted a stay of proceedings pending the outcome of the arbitral hearings, or until further orders of the Court.

Can-Cara now seeks a freezing Order to prevent Magil from;

(a) "disposing of or dealing with any assets within the possession or control of Magil which are either former assets of the Co-Development Agreement or the proceeds of sale of houses or which consist of the proceeds or sums thereby realized by any charge on or dealing with any assets or property which were subject to the Co-Development Agreement or which represent any proceeds of sale of such assets."

(b) "The defendant does and is hereby required to pay the proceeds of sale of houses in the development or such assets in an escrow account in the name of the attorneys-at- law for the claimant and the defendant, or failing which, that such amounts be paid into court pending the determination of this action."

The grounds on which the applicant seeks the Order are; inter alia,

(A) In this action the Claimant seeks to recover the sum of $168,038,107.64 from the Defendant, which includes the sum of $105,740,107.60 claimed by the Claimant in the pending arbitration proceedings instituted on March 7, 2003.

(B) The arbitration proceedings have been making slow progress and no date for the hearing to commence has been fixed.

(C) The Defendant is a limited liability company incorporated in Jamaica but according to the records of the Registrar of Companies, the Defendant has three (3) shareholders – two (2) local nominee shareholders holding one (1) share each and the majority shareholder, Mr. Josehp Gutstadt, a foreign national, who holds one hundred and ninety eight shares (198) shares. In addition, the two (2) Directors, Mr. Joseph Gutstadt, and Mr. Claude Dupre, are both foreign nationals.

(D) The Claimant has reasonable grounds for believing that the Defendant will remove its assets from the jurisdiction and/or dissipate the funds referred to in paragraph 37 of the Claim Form filed herein.

(E) The arbitrator has no legal power or jurisdiction to make a binding order for the preservation of property or assets or any order in the nature of injunctive relief or other relevant interim relief.

(F) That in addition to the matters which are in issue before the arbitrator, the Claimant has made the following additional claims in this action:

(i) Breach of the Co-Development Agreement by the Defendant in failing to pay the Claimant the commission due on the sale of seventeen (17) houses, for which the Claimant seeks damages in the sum of $3,468,000.00.

(ii) Breach of the Co-Development Agreement and/or negligence by the Defendant as a result of structural failures which have occurred in certain sections of the main storm water drain constructed by the Defendant at the Development, for which the Claimant seeks damages in the sum of $53,000,000.00.

Howard Malcolm, Attorney-at-law for the claimant, in an affidavit of urgency in support of the application, deponed inter alia;

(4) The Claimant has alleged that to the best of its knowledge and information, the Defendant's portion of the remaining sale proceeds from houses in the White Water Meadows Development is the only substantial liquid asset which the Defendant owns in Jamaica.

(5) The Claimant has reasonable grounds for believing that the Defendant will remove its assets referred to in paragraph 4 and 5 above from the jurisdiction and/or dissipates the funds.

Mr. Junior C. Lincoln, in an affidavit, sworn to on the 12th December 2003 deponed, inter alia:

At para 5;

> Magil's Directors, Mr. Joseph Gustadt and Mr. Claude Dupre are both foreign nationals who conduct their business activities in Jamaica under the grants of work permits by the Ministry of Labour and Social Security.

And at para 6;

> In conducting business in Jamaica since its incorporation, Magil has not invested significantly in any fixed assets which normally would be expected in instances of projected long term local engagements.

Mr. Joseph Gutstadt, in an affidavit in opposition lists in paragraph 3, his involvement in the West Cumberland Housing Project, which was a 985 two-bedroom housing development undertaken by Gore Development Co. Ltd. in Portmore, between 1997 and 1999 and in the disputed project of White Water Meadows Scheme. He also depones to his involvement as financier and contractor to Magil Palms Development, a 458 housing development at Sydenham, St. Catherine, and asserts that he has already injected $100,000,000 by way of loan to this project. He mentions also other Magil projects on the horizon, including a three billion dollar project in Portmore. He depones to having a permanent staff of over 16 and a construction staff of over 150 workers and claims to have been at his present location since 1999.

Gutstadt claims that up to the end of the Project, Magil will be owed substantial sums. He lists at paragraph 7, physical assets in Jamaica up to an amount of $158,000,000. He also claims that a substantial part of the financing was provided by Magil overseas entities to an amount of US$1,500,000.00, and states that it was an

overstatement to assert as Lincoln did that Can-Cara underwrote the loans acquired locally.

The Law – a good arguable case.

There was no contention that the arbitration proceedings did not prevent the exercise of the Courts inherent jurisdiction to issue interlocutory proceedings.

An applicant for Mareva Injunction must satisfy the Court firstly that its case reaches the standard of a good arguable case, secondly, the defendant has sufficient assets within the jurisdiction, thirdly, there is a risk of dissipation of the assets prior to the trial of the action.

The defendant has argued that Can-Cara has failed to satisfy the first hurdle that the applicant has a good arguable case, and it was not sufficient to put pleadings in affidavit together with an agreement and claim that amounts to a good arguable case. The Court should not attempt to decide difficult questions of law which call for extensive argument and profound deliberations. The approach promulgated in the American Cyanamid case is relevant to the grant of the Mareva with this distinction that the test is one of a 'good arguable case' as compared to the test " that there is a serious question to be tried" applicable to injunctions. This recognizes that a stronger case is necessary because of the more potent relief secured by the Mareva Injunction.

The Court should be given some material on which it could arrive at its own decision of the relative strength of the cases. Can-Cara has attempted to demonstrate its good arguable case by the exhibit of the agreements which oblige payments be made to Can-Cara on the occurrence of certain events. Matters of the division of labour under the Co-Development Agreement is of no relevance. Neither is it relevant for the Court to

consider the adequacy of the consideration for the acts that are to be performed by Can-Cara.

In "The NIEDERSACHEN" (1983) Vol. 2 600, Lord Mustil at page 605, said;

> "I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50 percent chance of success."

The facts that would allow the Court to realistically determine the merits of the applicant's case are to my mind woefully inadequate. The allegations that sums are outstanding are made; the provisions in the agreement under which the claims are made are exhibited. What, to my mind, is missing are the facts which would allow the Court to realistically from an assessment of the strength of the claim. To assess the merits, the Court has to be able to say to the standard required whether the claims are properly made.

The facts are insufficient for such an assessment to be made. Lets assume I am wrong in relation to my finding as to the dearth of evidence available to assess the merits of the applicant's case, I turn my attention to the question of the risk of dissipation.

The Risk of Dissipation

The onus that must be discharged by the claimant, is that of showing that the refusal of the injunction would involve a risk that an award in favour of the claimant would not be satisfied.

The fear of the risk of dissipation must be based on facts disclosed in the affidavit. The material must be persuasive to the Court. In the Canadian case of Chittel v Rothbart (1982) 39 or (2d) 513, the decision, after referring to Lord Denning's judgment in Third Chandris Shipping v Unimarine (1979) 2All ER 972, stated;

> "Turning finally to item (iv) of Lord Denning's guideline – the risk of removal of these assets before judgment – once again the material must be persuasive to the Court. The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact and in law."assets,

Carey J, in Wheelabrator Air Pollution Control at page 6 referred to Lord Dennings guidelines in this way;

> "In my view, what I derive from the guidelines suggested by Lord Denning MR and Lawton LJ in Third Chandris Shipping v Unimarine with respect to the information as to risk factor, is that the plaintiff must state the nature and extent of the defendant's business and the location of assets within the jurisdiction. There should also be stated grounds for believing that the assets will be removed before satisfying any judgment and it is not sufficient merely to assert a belief in the fear of removal. The fear must be determined on the basis of facts disclosed in the affidavit."

It was argued that the main thrust of the Can-Cara's case is the fact that Gustadht is a non-resident, who owns and controls Magil. On behalf of Magil, it was contended that the fact that the defendant is an oversea company is not decisive or significant in the grant of the Mareva Injunction. See the Third Chanders Shipping Corporation 1979 2 All ER 972, where at (iv) of the Guideline, Lord Denning said;

> "The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva Injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure invites comments. We often see in this court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its control, or its assets, or the charges on

> them. Nothing more than a name grasped from the air elusive as a Cheshire cat...if judgment or an award is made it may go unsatisfied...Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva Injunction granted against them."

The picture painted by Lord Denning does not coincide with the facts I have before me in relation to Magil. Magil has some 150 constructive workers, and permanent staff of 16. It has not been traversed before me that the company has projects in the pipeline amounting to over three billion dollars. Neither has it been traversed that there will be substantial funds owing to Magil at the end of the project. Nothing has been demonstrated before me to indicate that Magil is acting in any way "distinct from its usual or ordinary course of business." In contradistinction to disposing of assets in order to avoid a judgment, Magil has made significant investment in Jamaica involving the introduction of significant foreign exchange. In any event, Joint-Venture Agreements are a recognized form for the transfer of skill and expertise from a developed jurisdiction to a developing one. In the Jamaican context, the Joint-Venture partner is usually a foreigner. The contractual arrangements between the parties to this application, (although called a Co-Development Agreement), is structured along the lines of a Joint –Venture Arrangement. The local partners are required to obtain approvals from governmental agencies, municipal bodies with which they would have greater access than their foreign partner. The foreign partner brings "first world technology and expertise," thereby effecting a transfer of technology. The technology transfer in this arrangement would be the ability to construct expeditiously a large volume of housing units.

Mr. Gustadt affidavit, in opposition, demonstrates that Magil will maintain a balance that could satisfy any judgment on this claim. I cannot draw an adverse inference to Magil

based on its formation of Magil Palms Ltd. There are many reasons why such a company could be incorporated. It is being contended by Magil that its total claim had exceeded the amount presently being claimed by Can-Cara. This case is distinguishable from Wheelbrator Air Pollution, in that Magil has demonstrated the presence of substantial assets in the country. Magil has expressed an intention to remain and has embarked on other contracts. The credit worthiness of Magil has not been challenged.

I would refuse the application for the grant of freezing the Orders.

Cost to he defendant to be agreed or taxed.