IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV01304

BETWEEN	PAN CARIBBEAN MINERALS INC.	CLAIMANT
AND	CLARENDON CONSOLIDATED MINERALS LIMITED	DEFENDANT

Mr. Michael Hylton, Q.C. and Ms. Georgia Gibson-Henlin for the claimant.

Mr. John Vassell, Q.C., Ms. Colleen Weise and Ms. Mais-Cox instructed by Dunn Cox for the defendant.

Heard 1st June 2009 and 6th October 2010

Campbell, J.

(1) The claimant is a Canadian mineral resource company engaged in the acquisition and exploration of gold, silver and copper deposits in Jamaica. The defendants were the owners of Special Exclusive Licences No.553 and 538 known as Brown's Hall, Bellas Gate, respectively. The parties entered into an Acquisition Agreement on the 22nd February 2008 by which the defendant agreed to acquire from the defendant solely and exclusively all of the defendant's rights, title and interest in the Licence in exchange for a total of CAD$150,000.00 and 4,000,000 public listed common shares.

(2) On the 18th March 2010, the claimant filed a claim form and particulars in which it was alleged that;

(a) That the claimant has fulfilled all of its obligations under the Acquisition Agreement.

(b) The defendant has waived any right to insist on receiving publicly listed common shares or to rely on conditions precedent 9.1.4 and 9.1.5 of the Acquisition Agreement. Alternatively, the claimant contends that the conditions precedent and in particular 9.1.4 and 9.1.5 have been waived by the parties.

(c) The claimant seeks specific performance, a declaration that the contract is frustrated and an injunction restraining the defendant from disposing of the interest of the claimant in the licences.

(3) On the 8th May 2009, a Defence and Counterclaim was filed in which it was denied that the contract is frustrated, there being no supervening event which had occurred since the formation of the Acquisition Agreement and which had the effect of radically changing the obligations of the parties as was originally contemplated by the Acquisition Agreement. It was further contended that the claimant must not have been at fault in the non-performance of the contract, for frustration to apply and that the claimant affirmed its own default by the payment of a penalty fee pursuant to paragraph 10. The claimant did not complete the Public Offering and/or list its Common Shares on the TSK or TSK Venture Exchange by 1st September 2008 to February 2009 as provided for by Section 10 of the Acquisition Agreement, neither did it issue the defendant 4,000,000 of its treasury common shares. The defendant claims it was then at liberty to represent that the claimant no longer had any interest in the Licences.
The defendant counterclaimed maintaining that it was precluded from dealing with the Licences which were due to expire on the 29th November 2009 and 17th March 2010.

(4) The claimant's notice of application for an injunction dated 16th March 2009, sought to restrain the defendants/servants and/or agents from terminating, selling, transferring or otherwise dealing with the claimant's interest in the Special Exclusive Prospecting Licence as for a period of 28 days and a date be fixed to hear the matter. On the 18th March 2009, Mr. Justice Williams heard the ex-parte application, and granted the orders sought. On the 14th April 2009, the interim injunction was further extended until 11th May 2009. On the 11th May 2009, the defendant filed a notice asking for the discharge of the injunction granted ex-parte before Justice Williams, on that same day before Justice Beswick, on an inter partes hearing, the interim injunction granted

was extended to the 1st June 2009. On the 22nd May 2009, an application was filed seeking a declaration that the Acquisition Agreement was terminated on the 22nd day of February 2009 and an order that the claimant submit a written notice to the Commissioner of Mines to note the termination of its interest.

Claimant's Application for an interlocutory injunction

(5) Mr. Hylton, Q.C, for the claimant, submitted that there were serious questions to be tried, and argued that the trial judge will have to resolve conflicts of evidence and resolve difficult questions of law. He says that there are disputed facts, and says that Mr. Wood, the defendant's witness, has challenged the claimant's account of what was said during telephone conversations. Mr. Wood, he says, has accused the claimant's witness of making "inaccurate assertions" and of giving "misleading" evidence." These issues, Mr. Hylton submitted, cannot be resolved without cross-examination. He relied on **Chin v Chin**, Privy Council no. 61/1999, delivered 12th February 2001 and **Western Broadcasting Services v Edward Seaga**, Privy Council Appeal no. 34/2005, delivered March 29, 2007. In **Western Broadcasting Services**, no cross-examination was ordered of deponents. The court held that "given the divergence between the affidavit evidence filed on each side, it was unfair and prejudicial to the appellant for the judge to proceed to decide the matter on affidavit, while declining to receive oral evidence." The same point was made in Chin, submitted Mr. Hylton.

(6) Mr. Hylton further submitted that an even more fundamental difficulty was the correct interpretation of certain provisions of the Acquisition Agreement. He argued that the claimant's arguments that section 9.1 of the Acquisition Agreement spelt out certain conditions precedent to the completion of the Agreement. However, the Agreement ordered that the claimant make final payment "at the closing (as hereinafter defined) or on or before the Listing Date. Counsel posed

the question, "what if the parties agree to accept final payment in circumstances inconsistent with that stated definition. The claimants say that this amounts to a waiver of the condition precedent on the part of the defendant. The defendant deny any such waiver. It was submitted that if the claimant was able to demonstrate a failure of the best effort obligations, the principal obligations under the act would not take place, the obligor would be liable to damages. He relied on the principle as summarized in Chitty on Contracts, 13th Ed. Vol. 1 para. 2-155, inter alia;

> "A fourth possibility is that, before the event occurs, the main obligations do not accrue but one of the parties undertakes to use reasonable efforts to bring the event about (without absolutely undertaking that his efforts will succeed) ..... but if the party who should have made reasonable efforts has failed to do so, he will be liable in damages: unless he can show that any such efforts which he should have made would (if made) have necessarily been unsuccessful. In such cases, the requisite approval or consent must be sought: but the main obligations do not accrue until the approval or consent is given, and it is refused; the principal obligation will not take effect."

(7) Mr. Hylton further submitted that the matter of the construction of the Acquisition Agreement would require the consideration of the "full matrix of fact" which was the approach of the **Court of Appeal, in Goblin Hill Hotels Limited John Thompson, SCCA 57/2007**, delivered 19th December 2008. Morrison JA, named **Investors Compensation Scheme Ltd. v West Bromwich Building Society** as the leading modern authority on the interpretation of documents, said no contracts are made in a vacuum; there is always a setting in which they have to be placed . . . in a commercial contract, it is right that the court knows the commercial purpose of the contract, and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. According to Mr. Hylton, those matters will call for detailed argument and mature consideration.

(8) It was argued for the defendants that none of the conditions precedent has been met. There has been no Minister's consent to a transfer of the claimant's rights in the licences to the

defendant. In respect of the public offering envisaged in the Acquisition Agreement, Audets affidavit of 16th March 2009 stated that is no longer possible. In respect of the listing of the claimant's shares in the Exchange, the claimant has withdrawn the listing application. That a construction of the Agreement and/or discussions, which obliged the defendant to hand over to the claimant transfer of licences, is unsupportable and commercially implausible.

(9) Mr. Vassal submitted, even if disputes were resolved in the claimant's favour, the claimant would still have not demonstrated that there was a subsisting enforceable Agreement at the date of the application for interlocutory injunction for which there is a reasonable prospect of obtaining specific performance at trial. Further, if the claimant cannot raise funds through an IPO, it could not get specific performance, the principle of mutuality would be applicable. The court will not force one side to perform its obligations where as matters stand at trial, the other side is unable or unwilling to perform his obligations.

(10) In advancing the argument that there are no serious issues to be tried in relation to the 4,000,000 shares, the question was posed, why would the Agreement tie the issue of the shares to the listing date if they were not required to be listed shares? The claimant has paid a penalty pursuant to clause 10 of the Agreement, which is to be paid if the claimant is incapable of completing the IPO and the listing of the shares by 1st September 2008. The claimant has stated that its "acquisition rights" would go into default as of 22nd February 2009.

(11) In **American Cyanamid Co. v Ethicon Ltd.**, a decision of the House of Lords underscored the court's function in an application for interlocutory injunction, it indicated that 'one of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that "it aided the court in doing that which was its

great object, abstaining from expressing any opinion upon the merits of the case until the hearing, so, unless the material available to the court at the hearing of the application....fails to disclose that the plaintiff has any real prospect of succeeding in his claim ....."

(12) In Film Rover, Hoffman, J considered that a real prospect of success meant no more than that the case was 'as likely to fail as to succeed.' There is no dispute that the claimant has failed to perform the conditions. Was there a waiver on the part of the defendant? If so, what was the consideration for it? Mr. Hylton has not resisted the submission that a gratuitous waiver is not enforceable as a contract. I accept the submission that waiver, in the sense of estoppels, would not arise in this case. It is my view that the claimant's case has not shown that it has a real prospect of success.

(13) In case I am wrong on that point and the claimant succeeds at trial, would damages be an adequate remedy in those circumstances?

The court recognizes that the decision to grant or to refuse an injunction will cause some disadvantage to the unsuccessful party, which his success in the substantive matter would demonstrate he ought not to have suffered. (Per Lord Diplock in American Cynamid (cited above) at page 510 g). The relevant consideration is, is damages an adequate remedy, to the claimant?

In examining the question of the adequacy of damages in **London & Blackwell Railway Co. v Cross** (1886) 31 CH. D. 354 at 369; the very first principle of injunction law is that prima facie you do not obtain injunctions to restrain actionable wrongs for which damages are the proper remedy. It was further submitted by Mr. Hylton that "substantial work was done and significant expense incurred, and there was a uniqueness in the nature of the property. The geological

reports details the exploration potential which is significant involving diamond drilling. The presumption is that where the subject-matter is land, damages are not an adequate remedy. He relied on the judgment of Brooks, J. in **Tewani Limited v Kes Development Co. Ltd. and ARC Systems Limited**, where the judge said "The significance of the subject matter being real property, raises a presumption that damages are not adequate remedy, and no enquiry is ever made in that regard. The reason behind that principle is that each parcel of land is said to be "unique" and to have "a peculiar and special value." In Tewani, Brooks J. relied on **Verrall v Great Yarmouth Borough Council [1981] 1QB202 at pg. 220 B-C.**, for his view that it extended to land bought as part of a commercial venture. He found that in the circumstances damages were not an adequate remedy.

(14) The presumption raised by land being the subject-matter is rebuttable. In **Pride of Derby and Derbyshire Angling Association Ltd. v British Celanese Ltd.** [1953]1 CH 149. Evershed M.R. said at page 181;

> "It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and B intends to continue his wrong, then A is prima facie, entitled to a injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstances that damages are an adequate remedy for the wrong that he has suffered."

The licence has an ascertainable value based on the share offer that was contemplated. This is a commercial transaction, the expenditures incurred are assessable, as is the value of the licence. I am of the view that damages are an adequate remedy in this case.

(15) The adequacy of the damages is a primary consideration on the question of, in whose favour the balance of convenience lies. In **Olint Corporation v The National Commercial Bank Ltd**, the Privy Council Appeal No. 61 of 2008, held that, the basic principle is that the

courts should take whichever course seems likely to cause the least irremediable prejudice to one party or the other if it turns out that the injunction should not have been granted or withheld, as the case may be. This is an assessment in which, as Lord Diplock said in the American Cynamid case [1975] AC 396, 408;

> "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. Among the matters which the court may take into account are the prejudice that the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking: the likelihood of either party being able to satisfy such an award, and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the courts opinion of the relative strength of the parties' cases."

(16) It is alleged that the claimant, who is a Canadian Corporation, has not demonstrated its ability to satisfy its undertaking. James Wood, President of the defendant company in an affidavit dated the 5th May 2009, asserts that the motor vehicle in his possession is the only asset that he is aware of for the claimant. The inability of the claimant to successfully list and post for trading the common shares is cited. The defendant counters that it is prejudiced by not being able to further its plans for the exploration of the properties and this prevented from seeking alternate sources of investments. There is also the danger that the defendant could transfer or dispose of the interest in the licence to the prejudice of the claimant. However, what would be his loss if the defendant is able to compensate him. The subject-matter of this case involves the grant of licences to mine for minerals. The public interest may also be a consideration. In **Miller v Jackson** the claimant's home adjoined the Village Green. They sought an injunction to prevent a nuisance being committed by the defendant and members of a cricket club. The court of Appeal balanced the right of the claimant to the quiet enjoyment of his property against public

interest in cricket being played on the ground. Although damages would not entirely compensate the claimant, the Court refused the grant of the injunction. To restrain the ability of the defendant to seek an able investor goes contrary to the interest of the public. For all these reasons, I find the balance of convenience lies with the defendant. I would therefore discharge the injunction. The claimant's application is refused.

(17) Although the discharge of the injunction settles that issue, arguments were addressed on the effect of less than full and frank disclosure on the part of the claimant. The defendant has complained of substantial non-disclosure on the part of the claimant in its ex-parte application for injunctive relief. It was argued that the court should discharge the exparte order and decline to grant further injunctive relief. It was submitted that the claimant had a "high duty" of disclosure in without notice applications. The Court heard the oft quoted passages from **R v Kensington Income Tax Commissioners** (1917) 1 KB 486. The Court of Appeal relied on these principles in **Jamculture Ltd. v Black River Upper Morass Development Co. Ltd.** 26 JLR 244,

(18) It was argued for the claimant that the Court's discretion may be exercised in favour of a party who made less than full and frank disclosure. The claimant did not admit to any material non disclosure but submitted that it is not every non-disclosure that will lead to a discharge of the injunction. In Brinks Mat Ltd. v Elcombe [1988) 3 ALL 188 at page 194, Balcombe L.J, said;

> This judge made rule cannot be allowed itself to be come an instrument of injustice. It is for this reason that there must be a discretion in the court to continue the injunction, or to grant a fresh injunction in its place, notwithstanding that there may have been non-disclosure when the original ex parte injunction was made."

The Court may take into its consideration the importance of the matters not disclosed, whether it was negligent or deliberate. In Jamaaculture Ltd., the Court held that;

> "In order to claim protection under the cover of innocence, the non-disclosure must have been innocently done: there must not have been any intention to deceive or mislead the court."

(19) There were several instances of non-disclosure enumerated, according to the defendant, which breached the claimant's obligation imposed,

> "for the protection and information of the defendant, to summarise his case and evidence in support of it by an affidavit or affidavits sworn before or immediately after the application ..... must identify the crucial points for and against the application. (Per Bingham J. Siporex Trade SA v Comdel Commodities {1986} 2 Lloyds Report 428 at 437."

Among the material non-disclosure attributed to the claimant is that the claimant paid the penalty of $10,000.00 as acknowledgment that it had defaulted in completing the Public Offer; that it had withdrawn its listing application for its shares. The claimant had not disclosed that he was requested to amend the Acquisition Agreement in order to avoid default and to maintain its joint-ownership of the Jamaican properties. The claimant while not admitting that the facts were not fairly stated in the affidavit supporting the application however, alleged that there was no averment by the defendant that it is suffering substantial injustice or prejudice as a result of the non-disclosure, and relied on the judgment of the Court of Appeal in **Sans Souci Limited v Vrl Services Limited** SSCA No 108 of 2004, where Harrison JA, said;

> "It is incumbent however on the applicant who wishes to have the order set aside to satisfy the court that he or she has suffered substantial injustice as a result of this non-disclosure."

The question of the materiality of the non-disclosed facts is important and a balance must be struck to prevent burdening the court with masses of document. Would the court considering the ex parte application, likely to be swayed from the adopted course, if the non-disclosed

material had been presented? It seems to me that it was open to the court to form the view that the payment by the claimant of a penalty was an admission of being in default. It was also likely that the court would be impressed that while hearing the matter on the 18th March 2009, the claimant failed to disclose that there was a 22nd February 2009 deadline and that it acknowledged that any interest it may have in the licences terminated on that deadline. The fact that the defendant had refused to agree to an amendment of the Acquisition Agreement to extend the deadline beyond that date was material to the issues before the court. There was nothing presented that the non disclosure was other than the result of inadvertence; that it was contrived and wilful. Although not persuaded that the Court of Appeal, in San Souci, was laying down an inflexible rule that on an application to discharge an order made in the light of material non-disclosure, some prejudice must be shown; there is here no assertion by the defendant that it suffered any detriment or prejudice as a result of the non disclosure. I would have been reluctant in the exercise of the Court's discretion to discharge the ex-parte order solely on the basis of material non-disclosure.

Cost to the defendants to be agreed or taxed.