7-02-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Hon Mr Justice Andrew J. Jones QC
14th January and 7th February 2011 in open court

Cause FSD No.247 of 2010

IN THE MATTER OF THE COMPANIES LAW (2010 Revision)

AND IN THE MATTER OF CARIBBEAN ISLAND DEVELOPMENTS LTD

Appearances: Ms Nicola Moore of Priestleys for the Petitioners
Mr Ian Lambert of Bodden & Bodden for the Company

RULING

Factual Background

1. Caribbean Island Developments Ltd ("the Company") was incorporated and registered as an ordinary resident company on 29th June 2006 for the principal purpose of acquiring land at Colliers (Block 73A, parcels 29, 30, 31, 69 and 79) and developing a residential condominium to be known as *The Islands Resort and Residences* ("the Condominium"). Cheryl Casagrande and Virginia Larocco ("the Petitioners"), who are residents of Bedminister, New Jersey, entered into a contract with the Company on 8th January 2008 for the purchase of an apartment ("the Strata Lot") in the Condominium for a price of US$952,251 ("the Contract"). At the time that the Contract was executed, the Company had acquired the land and commenced site works, but construction of the Strata Lot had not commenced.

2. The essential terms of the Contract can be summarized as follows. The Company undertook to carry out construction of the Condominium in phases in a proper and workmanlike manner and strictly in accordance with the plans for which planning permission had been granted. The Petitioners paid a deposit of US$382,000, representing 40% of the purchase price. The balance of the purchase price is payable upon completion of the construction and registration of the Strata Lot. The Company undertook that it would complete the construction, register the Strata Lot and obtain a certificate of occupancy from the Central Planning Authority no later than 30th September 2010.

3. By Clause 3.2 the Petitioners were entitled to serve a notice terminating the Contract in the event that the Company failed to commence construction of the Strata Lot by 1st March 2008 or,

having commenced construction, failed to complete it and do the various other things required of it by 30th September 2010, whereupon the Company would become liable to repay the deposit together with interest at the contractually agreed rate. In an affidavit sworn on 14th January 2011, Mr Michael C. Beggs, the Company's chief executive officer, said that the Contract is one of about 33 contracts of sale entered into by the Company. He said that site work, by which I think he means the installation of the basic infrastructure, was commenced but had to be stopped in June 2008 because the Company was unable to obtain construction finance in spite of having received deposits from 33 purchasers. The Company failed to commence construction of the Strata Lot by 1st March 2008 and has still not commenced construction with the result that the Petitioners were entitled to serve notice of termination on 25th June 2010. The Company does not dispute that the Petitioners have terminated the Contract in accordance with its terms and that the sum of US$382,000 plus interest is presently due and owing to them.

The Winding Up Proceedings

4. On 7th September 2010 the Petitioners served upon the Company a statutory demand complying with the requirements of CWR Order 2, rule 2, by which the Company was required to repay the principal sum of US$382,000 and interest of US$42,380.24 (accrued up to 1st September 2010) within 21 days. The Company failed to pay and is therefore deemed (by section 93 of the Companies Law) to be insolvent. The Petitioners presented a winding up petition against the Company on the ground of insolvency on 11th November 2010.

5. The petition came on for hearing on 14th January 2011. Counsel for the Company would have sought an adjournment on the ground that it was negotiating with a third party investor with a view to recapitalizing the Company, thus enabling it to complete the development project. In the event I made an order that the hearing of the petition be adjourned for a different reason. It transpired that the Petitioners' attorneys had failed to advertise the petition in accordance with the requirements of CWR Order 3, rule 6. I directed that the hearing of the petition be adjourned until 7th February and that it be advertised twice in the *Caymanian Compass* on Wednesday 19th and Wednesday 26th January 2011.

6. When the matter came on for hearing today I was told by counsel for the Petitioners that the petition had not been advertised in accordance with my order for directions and that the parties had agreed that the petition be withdrawn on terms. I was told that advertisements were duly published on the correct dates but, as a result of an error on the part of the newspaper office, the hearing date was wrongly stated to be *1st February 2010.* How this error came about was not explained. Suffice it to say that newspapers must exercise care to ensure that legal notices are accurately printed because the publication of inaccurate notices could result in financial loss for which the newspaper could be made liable. Unfortunately, this error did not come to the attention of any of the attorneys involved for some time and an accurate notice was not published until Tuesday 2nd February.

7. CWR Order 3, rule 6(3) provides that the advertisement of a creditor's petition shall be advertised not less than 7 business days before the hearing date. The Petitioners' attorneys failed to comply with this requirement because the advertisements published on due date in accordance with my order for directions were inaccurate in that they specified a wrong hearing date and the only accurate advertisement was published out of time. However, it is reasonable to infer that anyone reading the inaccurate advertisement would have assumed that the hearing was to take place on 1st February *2011,* rather than 2010. The evidence of Sharla Barnes is that no one served notice of intention to appear at a hearing on Monday 1st February or communicated with her firm in response to the advertisements in any other way. So far as I am aware no one attended at court last Monday expecting to be heard on this petition. Furthermore, the evidence is that no one has responded in any way to any of these three advertisements and I think that I can properly infer that no one has been misled or inconvenienced by the publication of an inaccurate hearing date. For these reasons I think that I can properly exercise the discretion given to the Court by CWR Order 3, rule 6(1) by directing that no further advertisement is necessary.

Application to Withdraw the Petition

8. At today's hearing I was also informed by counsel for the Petitioners that her clients have agreed to withdraw their petition on the basis that they will assign the Contract to a company called B & B Protector Services Ltd and that *the Company* will pay (a) the principal sum of US$338,704.19, (b) interest of US$4,825.37 (calculated from 1st September 2010) and (c) the costs of the petition to the Petitioners. I was shown a draft deed of assignment which reflected that the consideration payable by the assignee would be *a peppercorn.* This transaction, as originally explained to the Court, obviously called for some further explanation. Mr Paul Simon, a transactional lawyer employed by Bodden & Bodden, the Company's attorneys, was called to give evidence about the matter.

9. Mr Simon said that an investor, who is wholly independent of the Company, has agreed in principle to provide funding to enable the Company to meet its obligations and complete its development. As part of this arrangement, which was not explained in any detail, the investor has agreed to take an assignment of the Contract in consideration for US$338,704.19 (being 80% of the total amount due to the Petitioners) plus interest of US$4,825.37 and a sum (yet to be determined) in respect of the Petitioners' costs of the petition. Mr Simon went on to say that his firm is acting for both the Company and the investor (who have presumably waived the conflict of interest). He said that the investor intends to incorporate and capitalize a new company for the purposes of taking the assignment of the Contract and carrying out whatever other transactions are contemplated between himself and the Company. However, Mr Simon said that there had been insufficient time in which to incorporate and capitalize the new company prior to the hearing and so it was agreed that the Contract should be assigned to B & B Protector Services Ltd as his nominee. Mr Simon said that B& B protector Services Ltd is a service company owned by the partners of Bodden & Bodden. He said that the partners of the

law firm are not acting as principals and do not have any financial interest in the matter and drew my attention to a clause in the draft assignment agreement which provides for the Contract to be further assigned. The Company will join in the assignment for the purposes of consenting to the assignment (as required under Clause 22 of the Contract), agreeing that the termination notice may be withdrawn and confirming that the Contract will be binding and enforceable in accordance with its terms as between the Company and the assignee. In summary, the evidence establishes that the Petitioners have agreed to sell their contract to an un-named third party who is intending to provide funding and make some investment in the Company. Counsel recognized the need to re-draft the assignment agreement so that it accurately reflects what has, according to Mr Simon's evidence, in fact been agreed. On this basis, the Court was asked to make an order allowing the petition to be withdrawn.

10. By presenting a creditor's winding up petition, the petitioner is invoking class rights. CWR Order 3, rule 7(3) therefore provides that if a creditor's petition has been advertised, any application to withdraw the petition must be made at the advertised hearing and in any such case the Court will consider making an order for substitution in accordance with rule 10. The evidence is that the Petitioners are one of about 33 purchasers who have entered into contracts with the Company for the purchase of apartments in the Condominium which has not been constructed. I was told by Counsel that these contracts are all in substantially the same form. He maintained that none of the other purchasers have served termination notices, although it was admitted that they are presently entitled to do so. On this basis the other purchasers must be characterized as prospective creditors who would be entitled under section 94(1)(b) to present winding up petitions of their own or be substituted in the petition already presented, whether or not they turn themselves into actual creditors by the simple mechanism of serving termination notices. In deciding whether or not to allow this petition to be withdrawn, I must take their interest into account. The hearing of the petition has been advertised in the *Caymanian Compass* on three occasions at approximately weekly intervals. Notwithstanding that the advertisements were defective and failed to comply with the Court's order for directions, I am satisfied that the advertising was sufficient to put the prospective creditors on notice of the petition. None have come forward and sought an order for substitution. In these circumstances I am satisfied that I can properly allow the Petitioners to withdraw their petition with no order for costs.

11. Order accordingly.

Monday 7th February 2011

The Hon. Mr Justice Andrew J. Jones QC

GRAND COURT CAYMAN ISLANDS