

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2017/0246

BETWEEN:

BEAUMONT PARK LIMITED

Claimant

and

TECHNOLOGY DEVELOPMENT AND INVESTMENT LIMITED

Defendant

Appearances:

Mr. Damian Kelsick with Ms. Danni Maynard for the Claimant
Ms. Jean Dyer for the Defendant

2019: November 18-19
(Submissions filed on 21 January 2020)
2020: June 15

JUDGMENT

- [1] **VENTOSE, J.:** The Claimant company was incorporated in 2003 and is a developer of a resort on lands situated at Caines Estate in the parishes of St. Paul and St. John, Saint Christopher, comprising approximately 350 acres of land called Beaumont Park (the "**Beaumont Park Resort**"). On 9 December 2013, the Defendant, Strathmore Investments Limited ("**SIL**"), Bedford Investments Ltd ("**BIL**"), Mrs. Daislyn Sharpe, Mr. Michael Martin entered into a shareholders

agreement (the “**Shareholders Agreement**”). The Shareholders Agreement, in material part, provided that: (1) in consideration of the Defendant investing US\$600,000.00 in the Claimant, the Claimant would issue 600,000 shares to the Defendant (Clause 16.2); and (2) the Defendant agreed to fund further development of the Beaumont Park Resort by direct cash input when required to meet the agreed budget for the development of the Beaumont Park Resort (Clause 16.1). At the date of the Shareholders Agreement, the shareholding in the Claimant was as follows: (1) Defendant – 600,000 shares; (2) BIL – 200,000 shares; (3) SIL – 200,000 shares; (4) Mrs. Sharpe – 1 share; and (5) Mr. Martin – 1 share.

[2] By 2016, things were not well among the shareholders. BIL and Mr. Martin brought a claim on 29 February 2016 against the Claimant, the Defendant and Mr. Kryuchkov, among others (the “**BIL Claim**”), seeking various orders, including the following:

6. An Interim Order appointing a receiver/manager to manage the affairs of BPL until further Order of the Court to *inter alia*
 - f. receive all profits, debts and accounts receivables now or thereafter to become due to BPL on any account whatsoever”;
 - i. Take all reasonable steps to recover monies paid out contrary to [...] the Shareholders’ Agreement and its Variation including but not limited to ...
 - j. Collect from any party or third party any sum found to be due and owing to the company on the receipt of the accounts at clause 8 ...”
8. An Order that the Defendants shall within 21 days from the date of this Order provide to the receiver/manager a complete and detailed accounting for the period December 2013 to the date of the appointment of the receiver/manager or the judgment as the case may be, verified on affidavit of:-
 - a. The profits/losses, gains, and/or expenses made by [the Claimant] on the sale of lands and or condominiums, showing in detail the sales, income and expenses of the Resort;

- b. Any profits, gains, coupons or other form of enrichment which the Defendants by themselves or through their agents and/or servants or any person under their control, direction or supervision ... have realized from any monies unlawfully taken from the BPL or the Claimants' bi-annual dividends ...
 - 10. An Order that consequent upon the accounting referenced in clause 8 above, that the Defendants and/or the receiver/manager as the case may be, shall within 7 days from the production of the accounting, pay any monies found due and owing to the BPL;
 - 11. Further or in the alternative, an Order that the Claimants be granted leave to institute a derivative action in the name of and on behalf of BPL against the Second, Fourth and Fifth Defendants and/or any party found to be indebted to the company on the taking of the account under (8) above.
- [3] At the material time, Mr. Vitaly Kryuchkov was the President of the Claimant and was, also, the Chairman of the Board of Directors of the Claimant.
- [4] The Defendant and the Claimant followed suit soon thereafter by filing on 30 May 2016 a claim form seeking, among other things, the following reliefs against Mr. Martin, Mr. Arthur Sharpe, Mrs. Sharpe, BIL and SIL: (1) damages for fraudulent misrepresentation; (2) damages for breach of warranty contained in the Shareholders Agreement; and (3) a declaration that the Shareholders Agreement was invalid for want of consideration (the "**TDI/BPL Claim**").
- [5] SIL was not to be left out of the action for it too filed on 8 July 2016 a claim form seeking various reliefs against the Defendant, Mr. Kryuchkov and the Claimant, among others (the "**SIL Claim**").
- [6] The parties to the BIL Claim and the SIL Claim agreed to pursue court-connected mediation. The mediation was successful and the parties, on 11 February 2017, entered into a compromise and settlement agreement (the "**CSA**"). The parties to the CSA were the Claimant, SIL, BIL, the Defendant, Mr. Kryuchkov, Mr. Sharpe, Mrs. Sharpe and Mr. Martin. The CSA expressly mentions in the preamble the three disputes between the parties as comprising: the BIL Claim, the TDI/BPL Claim and the SIL Claim (Preamble 3). Preamble 4 states that the parties have agreed to settle all three claims (the "**Three Claims**") upon the terms and

conditions as set out in the CSA. The CSA mandated that the Defendant shall transfer 200,000 of its shares in the Claimant to SIL and shall transfer 200,000 of its shares in the Claimant to BIL (Clause 1). The Shareholders Agreement was terminated with immediate effect and all parties to it were discharged from performance of all outstanding obligations thereunder. SIL was to discontinue the SIL Claim with prejudice (Clause 12). BIL and Mr. Martin were to discontinue the BIL Claim with prejudice (Clause 13). The Claimant and Defendant were to discontinue the TDI/BPL Claim with prejudice (Clause 14). Mr. Kryuchkov, Mr. Martin, directors, and Mr. Sharpe, alternate director, of the Claimant, signed the CSA on behalf of the Claimant. Mr. Kryuchkov also resigned as President, and Chairman of the Board of Directors, of the Claimant.

- [7] The Claimant filed a claim form on 28 August 2017 seeking the following reliefs against the Defendant: (1) an order that the Defendant pay the Claimant the sum of US\$3,118,357.81 and/or account to the Claimant for the said and/or such sums expended by the Claimant on the instructions of Mr. Kryuchkov for the benefit of the Defendant and that the Defendant pays to the Claimant all monies found due on such accounting; and (2) an order that the Defendant pay the Claimant the said sum of US\$84,042.03 and/or account to the Claimant for the said and/or such other sums paid by the Claimant to the Defendant in purported reimbursement by the Claimant to the Defendant of 50% of the Defendant's legal fees paid to its Attorneys-at-Law and that the Defendant pays to the Claimant all monies due on such an accounting.
- [8] The Claimant alleges that the sum of US\$3,118,357.81 were advances to the Defendant by the Claimant to discharge the obligations of the Defendant incurred pursuant to the provisions of the Shareholders Agreement by which the Defendant was to fund further development of the Beaumont Park Resort from the date of the Shareholders Agreement by direct cash input as and when required to meet the agreed budget for the development of the Beaumont Park Resort (the "**Sums Advanced**"). The Claimant also alleges that the Defendant who was: (1) a defendant in the BIL and SIL Claims; and (2) a claimant in the TDI/BPL Claim

caused the Claimant to pay the Defendant the sum US\$84,042.03 as reimbursement of legal fees incurred by the Defendant in connection with the Three Claims (the “Legal Fees”).

The Sums Advanced

- [9] In view of the evidence adduced at trial, it cannot seriously be disputed that the Sums Advanced were paid from the funds of the Claimant to cover the Defendant’s obligation under the Shareholders Agreement. The evidence of Ms. Reid, the Chief Financial Officer of the Claimant at the material time, was that she received instructions from Mr. Kryuchkov to make the payments from the funds of the Claimant with future reimbursement to be made by the Defendant. This is supported by the evidence in the many emails sent by Mr. Kryuchkov to Ms. Reid with instructions to pay the monies from the funds of the Claimant followed by statements such as: “with the following compensation from [the Defendant]” or “with future compensation from [the Defendant]” or such similar expressions. The court has not doubt that Mr. Kryuchkov knew these were amounts the Defendant had to reimburse the Claimant as the emails to Mr. Kryuchkov from Ms. Reid on multiple occasions attached a document entitled, “Reimbursables 2014” or “TDI Receivables 2015”. In addition, the Balance Sheet of the Claimant for 2016 sent to Mr. Kryuchkov via email on 19 January 2017 showed that, at 3 December 2016, the balance due by the Defendant to the Claimant was the sum of US\$3,107,995.44.
- [10] At trial, Mr. Kryuchkov insisted that these amounts were dividends, but he did not properly explain how such payments can amount to dividends. The court does not accept his evidence on this point. Mr. Kryuchkov does not deny the payments were made but stated in evidence that these payments were payments properly made by the Claimant. The court does not accept this evidence because there were many examples in the email correspondence where Mr. Kryuchkov gave express instructions to Ms. Reid to that some payments were to the account of the Claimant and others to the Defendant. If all the payments were properly those of the Claimant, there would be no reason for Mr. Kryuchkov to instruct Ms. Reid via

email with such statements as: "with the following compensation from [the Defendant]" or "with future compensation from [the Defendant]". The court accepts that some of the emails did not contain direct instructions from Mr. Kryuchkov like those just mentioned, but it was not unreasonable, given the pattern of instructions in relation to the payments, that Ms. Reid would act in the usual manner. The court also does not accept that Ms. Reid posted the Sums Advanced in the accounts receivables ledger of the Claimant because of her "review and understanding" of the Shareholders Agreement. The court finds that as a fact her doing so was based on the direct instructions of Mr. Kryuchkov and the pattern of dealing with those payments in light of those direct instructions. Moreover, this would be a commonsense way of recording transactions that, of necessity, had to be recorded as a debt due to the Claimant from the Defendant in the financial statements of the Claimant.

- [11] Mr. Kryuchkov gave evidence that he did not instruct Ms. Reid to include the Sums Advanced as "accounts receivables" in the financial statements of the Claimant. He also gave evidence that Ms. Reid did so because of her reading and understanding of the Shareholders Agreement. This is not an adequate or sufficient answer to why the payments were made by the Claimant in the first place. Once Ms. Reid received specific instructions from Mr. Kryuchkov to make the payments, essentially on behalf of the Defendant, using funds of the Claimant with a future payment by the Defendant, these had to be reflected somehow in the accounts of the Claimant. Mr. Kryuchkov did not suggest at trial that these had to be "off book" transactions. Ms. Reid acted properly and appropriately in recording the Sums Advanced as accounts receivables in the financial statements of the Claimant. The court finds that Mr. Kryuchkov was plainly aware of what they were and why they were included in the financial statements of the Claimant. In any event, even if Mr. Kryuchkov did not originally sanction the way in which the Sums Advanced were recorded in the financial statements of the Claimant, he did not object to this course of action which continued for many years with his express knowledge or implicit consent.

- [12] The court accepts that there was no loan agreement in respect of the Sums Advanced. Moreover, the court wishes to state that the basis of the Defendant's liability to repay the Claimant the Sums Advanced is not based solely on the fact that the Sums Advanced were recorded in the accounts receivables section of the Claimant's financial statements. This is merely the evidence of the amount of money that was in fact paid by the Claimant on behalf of the Defendant. If the Sums Advanced were "off book" transactions and not recorded in the financial statements of the Claimant, the obligation by the Defendant to repay the Claimant the Sums Advanced would still exist.
- [13] In all the circumstances and based on the evidence in this case, the court finds that the Claimant has established that the Defendant is liable to pay the funds properly recorded in the accounts receivables ledger of the Claimant in the name of the Defendant.

The Legal Fees

- [14] The parties do not dispute that the Claimant paid the Legal Fees. However, the Claimant submits that, at the time Mr. Kryuchkov directed the Claimant to pay the Legal Fees, he was a director of both the Claimant and the Defendant, owing duties to both. The Claimant further submits that, in his capacity as director of the Claimant, it was the duty of Mr. Kryuchkov to ensure that: (a) his interests as owner of the Defendant did not conflict with his duty to the Claimant; and (b) the funds of the Claimant were not spent for unauthorized purposes. The Claimant contends that the Defendant had an interest in having as much of its legal fees as possible discharged by the Claimant and that the Claimant had an interest in ensuring that it paid no more legal fees than it had to. The Defendant submits that the Claimant was a party to the Three Claims and got the benefit of the legal services provided.
- [15] The evidence of the Defendant that the Legal Fees were paid in respect of the Three Claims were not undermined during cross-examination. It is a very material consideration that the Claimant was represented by counsel in the Three Claims for which legal fees were incurred. The Claimant has not provided any evidence to suggest that the apportionment of the Legal Fees by Mr. Kryuchkov between the

Claimant and Defendant was unreasonable or not proportionate based on the actual services rendered. The court, therefore, finds that the Claimant has not proven on the balance of probabilities that it is entitled to an order that the Defendant pay the Claimant the sum representing the Legal Fees.

[16] The court also accepts the Defendant's submission that the Claimant, by entering into the CSA, is estopped and precluded through its conduct (in compromising the proceedings in respect of which the Legal Fees were incurred) from advancing its claim for repayment of the Legal Fees. Through the execution of the CSA, the Claimant's directors, who were clothed with authority to exercise its powers, adopted and ratified the acts of which the Claimant now complains. The court also agrees with the submission of Counsel for the Defendant that, first, the negotiation, execution and consummation of the CSA by the Claimant's directors amounts to a complete ratification of the filing of: (i) the TDI/BPL claim; and (ii) the defences which were filed on BPL's behalf; and, second, it is no longer open to the Claimant to object on the ground that the proceedings/defences thus ratified and adopted by the Claimant's directors were done without proper authority.

[17] The authorities make it clear that a company, through its authorized officers, can ratify any action taken without authority in proceedings in which the company is named. As mentioned above, the Claimant was a defendant in the BIL and SIL Claims and was a claimant in the TDI/BPL Claim. The directors of the Claimant executed the CSA and in so doing they ratified any alleged defect that might have existed in relation the Claimant being a party to the TDI/BPL Claim or filing defences in the BIL and SIL Claims. This, in the view of the court, amounts to a complete ratification of the actions of which the Claimant now complains. The Claimant has not shown that it was unreasonable in the circumstances for the Claimant to pay one half of the legal fees incurred in defending the BIL and SIL Claims and in bringing the TDI/BML Claims.

The Compromise and Settlement Agreement

[18] Having found that the Defendant is liable to repay the Claimant the sum represented by the Sums Advanced, it is now necessary to determine whether the

any of the Clauses in the CSA provides the Defendant with the complete defence to the claim for repayment of the Sums Advanced. The Claimant and the Defendant are both parties to the CSA. Both of them agreed to the terms of the CSA and are thereby bound by its terms, including clauses 17-19 which are as follows:

17. TDI and BPL hereby RELEASE AND DISCHARGE the Defendants to the TDI/BPL Claim, and their servants, agents, employees and successors in title, from any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL.

18. BIL and Michael hereby RELEASE AND DISCHARGE the Defendants to the BIL/Michael Claim, and their servants, agents, employees and successors in title, item any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL.

19. SIL hereby RELEASES AND DISCHARGES the Defendants to the SIL Claim, and their servants, agents, employees and successors in title from any and all actions suits causes of action claims and demands whatsoever comprised in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL.

[19] Clause 9 also provides that:

"The Shareholder Agreement is terminated with immediate effect and all parties thereto are discharged from the performance of all outstanding obligations thereunder."

[20] Counsel for the Claimant is correct in submitting that Clauses 9 and 17-19 provide as follows: (a) the Defendant is discharged from its outstanding (i.e. unperformed) obligations under the Shareholders Agreement; (b) the Claimant and Defendant release the defendants to the TDI/BPL Claim from all claims in the TDI/BPL Claim, other claims that existed or could have existed "by reason of the Defendants shareholding or directorship, or the holding of any office, in [the Claimant]"; and (c) SIL and BIL respectively release the defendants in the SIL Claim and BIL Claim

from all claims in the SIL Claim and BIL Claim, other claims that existed or could have existed "by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL".

[21] The question that now arises is whether any of Clauses 17-19 of the CSA prevent the Claimant from maintaining the instant claim. The words "or otherwise" in Clauses 17-19 mean "other claims" separate and apart from the Three Claims. The court agrees with the submission of Counsel for the Claimant that the releases in Clauses 18-19 cover claims included in the BIL Claim and SIL Claim; and **other claims that existed or could have existed** *"by reason of the Defendants shareholding or directorship, or the holding of any office, in [the Claimant]"*.

[22] In other words, the issues are whether the instant claim: (a) is the same as the BIL Claim and SIL Claim; or (b) is a another claim that existed or could have existed by reason of the Defendant's shareholding or directorship, or the holding of any office, in the Claimant.

Is the Instant Claim the same as the BIL Claim or the SIL Claim?

[23] Counsel for the Defendant submits that, first, the negotiation, execution and consummation of the CSA amounts to complete ratification of: (a) the TDI/BPL Claim; and (b) the Claimant's defence of the BIL Claim and the SIL Claim even if they were filed in the first instance without proper authority as alleged. Second, it would be unjust to allow the Claimant to maintain the instant claim in circumstances where the Claimant (through its board of directors) led the Defendant to believe that it was settling the Three Claims and the Defendant in reliance on such representation by conduct in entering into the CSA acted to its detriment in releasing its claims against the other parties

[24] In the BIL Claim, BIL claimed various orders, some of which were mentioned above. In particular, BIL claimed: (1) an order that the affairs of the Claimant have been or are being conducted by the defendants and/or agents and/or servants under their control or direction in a manner which was or is unfairly prejudicial to

their interests as minority members of the Claimant; (2) an order requiring the shares of BIL in the Claimant be purchased by the defendants, including the Defendant, at a fair value to be determined by a competent expert on a pro rata basis unless such value is agreed by the parties; (3) an order that the defendants are in breach of the Shareholders Agreement; (4) an order for damages for breach of the Shareholders Agreement; (5) an interim order, among other things, suspending the powers of the directors of the Claimant; (6) an interim order appointing a receiver/manager to manage the affairs of the Claimant until further order of the court to do various things (see para. [3] above); (7) an order dispensing with security by the receiver/manager; (8) an order that the defendants provide within 21 days of the order the receiver/manager with a complete and detailed accounting for the period December 2013 to the date of the appointment of the receiver/manger, in respect of various things (see para. [3] above); (9) an order that further to the accounting in clause 8, that within 7 days from the production of the accounting the defendants and/or the receiver/manager as the case may be, pay any monies due and owing to BIL; (10) and (11) (see para. [3] above); (12) an order that the Mr. Kryuchkov and Ms. Pogoretskaya have acted or are acting in breach of their fiduciary duties to the Claimant and BIL; and (13) an order that all decisions made or actions taken by the Claimant or its directors in breach of the Companies Act, CAP 21.03 of the Revised Laws of Saint Christopher and Nevis, the Claimant's Memorandum and Articles of Association, and or without the unanimous agreement of the shareholders as required by the Shareholders Agreement be declared null and void *ab initio*.

- [25] Counsel for the Defendant submits that the basis of the BIL Claim was essentially that: (a) the Claimant's dividends or profits were being misappropriated by the Defendant; and (b) various unauthorised payments were being made by the Defendant. BIL also complained that the Defendant and/or Mr. Kryuchkov had, without lawful cause, paid out **dividends** to the Defendant for the period 2014 to 2015 in the sum of US\$2,596,983.01. The same allegation was made in the SIL Claim. However, there is nothing in the instant claim stating expressly or impliedly the Claimant is seeking a refund or repayment of any *dividends* from the

Defendant. It cannot be said that **dividends** are the *same* as the Sums Advanced. Even if, as the Defendant states, that the dividends referred to in the BIL Claim are the same as the Sums Advanced in the instant claim, there is nothing in the statement of claim in the BIL Claim remotely suggesting that the dividends referred to were in respect of or related to in any way the Sums Advanced.

[26] Counsel for the Defendant submits that, in the BIL Claim, it was alleged that, first, the Claimant's dividends or profits were being misappropriated by the Defendant and that various unauthorised payments were being made by the Defendant. Second, BIL also complained that the Defendant and/or Mr. Kryuchkov had, without lawful cause, paid out dividends to the Defendant for the period 2014 to 2015 in the sum of US\$2,596,983.01. Counsel for the Defendant also submits that the issues raised in the BIL Claim and the SIL Claim are the same or substantially the same as those raised in the instant claim. Third, in both the SIL Claim and the BIL Claim the funds which were allegedly misappropriated were called "dividends" whereas the claim has been somewhat reformulated and the misappropriated funds are now called "advances".

[27] Having read the statement of claim in the BIL Claim and SIL Claim, the court is of the view that there is nothing contained therein to suggest that the reference to dividends refers to anything remotely related to, or in fact are, the Sums Advanced. That was simply not the issue in both the BIL Claim and the SIL Claim. In neither the BIL Claim nor the SIL Claim were there any references to facts or any averments made in respect to the Sums Advanced. The subject matter of the instant claim is not identical or similar to the subject matter in both the BIL Claim and the SIL Claim. Counsel for the Defendant focusses on the remedies in the BIL Claim in particular to submit that the Claimant is misusing and abusing the process of this court by: (a) bringing the instant claim on the same or substantially the same facts in circumstances where the previous claims were compromised and discontinued with prejudice; and (b) seeking to raise before the court issues which have been raised before in the BIL Claim and the SIL Claim.

[28] The Defendant has not provided any evidence to suggest even remotely that the issue in respect of the Sums Advanced was the subject matter in either the BIL Claim or the SIL Claim. It is not sufficient to refer to the remedies that the claimants in the BIL Claim and SIL Claim might have been granted if successful at trial and which **might have** revealed the issue in respect the Sums Advanced, the subject matter of the instant claim. While the court accepts that, in the BIL Claim, BIL sought an order that the Mr. Kryuchkov and Ms. Pogoretskaya have acted or are acting in breach of their fiduciary duties to the Claimant and BIL, two points must be noted. First, the statement of claim which provided the particulars of the breach of fiduciary duties contained no reference to the Sums Advanced. Second, in any event, that was not a specific claim in respect of the Defendant.

[29] Having considered the scope of the BIL Claim and SIL Claim, there is nothing contained therein that is identical or similar to the claims in the instant claim.

Is the instant claim another claim that existed or could have existed by reason of the Defendant's shareholding or directorship, or the holding of any office, in the Claimant?

[30] Counsel for the Claimant submits that Clause 18 of the CSA is not applicable because the release is limited to claims included in the BIL Claim or other claims that existed or could have existed "*by reason of the Defendants shareholding or directorship, or the holding of any office, in BPL*". Counsel for the Claimant also submits that the instant claim was not included in the BIL Claim and did not arise by reason of the shareholding, directorship or holding of any other office in the Claimant but as a result of the Defendant's direction to the Claimant to advance funds to the Defendant.

[31] It is not disputed that prior to and at the time of the execution of the CSA, the Defendant: (a) was a shareholder of the Claimant and (b) held a seat on the board of directors of the Claimant with Mr. Kryuchkov as its nominee. Does the instant claim fall within the meaning of the words "in the said claim or otherwise now has or at any or but for the execution of this Compromise and Settlement Agreement could or might have had for or by reason of the Defendants shareholding or

directorship, or the holding of any office, in [the Claimant]". It is difficult to understand fully the meaning of these words. Counsel for the Claimant suggests that they mean "other claims that existed or could have existed 'by reason of the Defendants shareholding or directorship, or the holding of any office, in [the Claimant]" (the "**Other Claim**"). The Defendant did not dispute this meaning. For purposes of this analysis, the court will accept that the words bear this meaning. The issue then is essentially as follows: at the time of the execution of the CSA, could the Claimant have brought the instant claim?

- [32] The actions of Mr. Kryuchkov must be taken to be the actions of the Defendant acting as its nominee on the Board of Directors holding the offices of: (1) Chairman of the Board of Directors of the Claimant and (2) President of the Claimant. In either of those capacities, Mr. Kryuchkov caused the Claimant to pay the Sums Advanced on behalf of the Defendant. The Sums Advanced, as the Claimant accepts, was to fund the further development of the Beaumont Park Resort from the date of the Shareholders Agreement by direct cash input as and when required to meet the agreed budget for the development of the Beaumont Park Resort as set out in Appendix C to the Shareholders Agreement. The Sums Advanced were directly related to and were indeed paid to allow the Defendant to meet its obligations under the Shareholders Agreement. It cannot be disputed that the Defendant's obligations under the Shareholders Agreement was based directly on its **shareholding** in the Claimant.
- [33] Counsel for the Defendant submits that the inclusion of the Other Claim in Clauses 17-19 is consistent with the public policy of encouraging settlements and thereby putting an end to litigation and that discontinuance "with prejudice" could only have been understood as a dismissal which precluded the further pursuit of the claims against the Defendant brought on behalf of the Claimant. Counsel for the Defendant further submits that it must have been the intentions of the parties (which included the Claimant) that the CSA should apply to all claims that were then legally permissible which arose out of the Defendant's shareholding in the Claimant.

[34] The court is of the opinion that the direction given by Mr. Kryuchkov (a nominee director of the Claimant) for the Sums Advanced to be paid from the funds of the Claimant to discharge the obligations of the Defendant (a shareholder of the Claimant) under the Shareholders Agreement (such obligation arising from the Defendant's shareholding in the Claimant) falls squarely within the meaning of the words of the Other Claims found in Clauses 17-19 of the CSA. Consequently, the Claimant's claim is barred by virtue of Clauses 17-19 of the CSA.

[35] In **Barrett v Universal-Island Records Ltd. & Ors** [2006] EWHC 1009 (Ch) (15 May 2006), Lewison J. summarized the principles on the interpretation of settlement agreements emerging from the decision of the House of Lords in **Bank of Credit and Commerce International SA v Ali and others** [2002] 1 AC 251 (at [152]) as follows:

- i) There are no special rules for interpreting releases or compromise agreements: Lord Bingham of Cornhill at para 8; Lord Nicholls of Birkenhead at para 26;
- ii) There is no question of a document having a legal interpretation as distinct from an equitable interpretation: Lord Nicholls at para 24;
- iii) The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made: Lord Nicholls at para 26;
- iv) A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention: Lord Bingham at para 9;
- v) The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object may be that the release should extend to any claims which might later come to light. The parties want to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which

the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge is a risk the person giving the release took upon himself. It is against this very risk that the release is intended to protect the person in whose favour the release is made: Lord Nicholls at para 27;

- vi) However, this principle cannot be pressed too far. In the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware: Lord Bingham at para 10; Lord Nicholls at para 28.

[36] The court is of the opinion that the language of Clauses 17-18 relating to the Other Claim is sufficient to cover the instant claim. It matters not that the Claimant might not have been aware of issue relating to the Sums Advanced at the time of the execution of the CSA. What matters is that based on the court's interpretation the wording of the Other Claim is sufficient to cover the instant claim.

[37] As a result of this finding that there is express provision in the CSA that precludes the instant claim, it is not necessary for the court to consider the alternative grounds raised by Counsel for the Defendant, namely, that: (a) the instant claim has already (and/or could have) been litigated in the previous claims which involved the same parties; and (b) while the CSA does not include an express promise by the Claimant not to sue the Defendant, one can be reasonably implied from the context and surrounding circumstances that CSA (which ought not to be construed as a partial agreement) was intended to and did extinguish the instant claim.

[38] In any event, ground (a) is inconsistent with the finding that the instant claim and the BIL Claim and SIL Claims are not identical and the court seriously doubts that there are any facts, circumstances or the context surrounding the CSA that would give rise to any implication of a promise by the Claimant not to bring the instant claim against the Defendant.

The Counterclaim

[39] The Defendant also counterclaimed against the Claimant seeking a declaration that the CSA still remains in full force and is conclusive between the parties thereto on all matters arising in the BIL Claim and the SIL Claim and estops and precludes the Claimant from maintaining the instant claim. Based on the court's reasoning above, the Defendant is entitled that declaration.

[40] The Defendant also seeks an order requiring the Claimant and its servants and agents to perform their obligations under the CSA. The Defendant states that in breach of the CSA, the Claimant has failed to pay Mr. Kryuchkov and Ms. Viviana DaSilva the sums that are due to them under Clauses 2 and 5 of the CSA. Counsel for the Claimant submits that Mr. Kryuchkov was not served with the claim form and Ms. DaSilva is not a named party in these proceedings and therefore neither of them can at this stage make any counterclaim against the Claimant. This aspect of the counterclaim was not developed further as the matter progressed to and at trial. The submissions of Counsel for the Claimant that, in any event, privity of contract means such a claim cannot be sustained are unassailable and require no repetition here. That order is accordingly refused.

Prescribed Costs

[41] Since the claim for a specified sum, among other things, the value of the claim for the purposes of prescribed costs must that specified sum in accordance with CPR 65.5(1) and that amount is US\$3,202,399.84 (US\$3,118,357.81+US\$84,042.03). The court has not included the sum of US\$420,955.35 that was claimed against Mr. Kryuchkov, but which claim was subsequently discontinued because he was not served with the claim form. Since the counterclaim did not include a money claim, it is governed by CPR 65.5(2)(b).

Disposition

[42] For the reasons explained above, I make the following orders:

- (1) The claim is hereby dismissed.
- (2) Prescribed costs to be paid to the Defendant by the Claimant pursuant to CPR 65.5(1) within 28 days if not agreed. The value of the claim for this purpose is

US\$3,202, 399.84.

- (3) Judgment in favour of the Defendant on the counterclaim.
- (4) A Declaration is granted that the CSA remains in full force between the parties and estops and precludes the Claimant from maintaining the instant claim.
- (5) Prescribed costs to be paid to the Defendant by the Claimant pursuant to CPR 65.5(2)(b) within 28 days if not agreed. The value of the claim for this purpose is EC\$50,000.00.

Eddy D. Ventose
High Court Judge

By the Court

Registrar

