

EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
ST CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE

CLAIM NO SKBHCV2015/0167

BETWEEN:

CC&F INC

Applicant /Claimant

and

[1] MANOR INTERNATIONAL INC

[2] DOCHE AND DOCHE INC

[3] VICTOR DOCHE

[4] RAFIK DOCHE

[5] DENIS CHAREST

Respondents

Appearances

Ms. Jerri-lee Bussue holding for Mrs. Dahlia Joseph-Rowe for the Applicant
and 5th Respondent

Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the Respondents
Instructed by Ms. Rénal Edwards

.....
2017: August 10; 11;
2018: June 21
.....

RULING

Introductory

[1] **LANNS, J, [AG]:** This is a ruling on a preliminary objection raised by counsel for the second, third and fourth named respondents as to whether or not the court has jurisdiction to entertain an application by the applicant for a receivership order in circumstances where (1) there is an existing

consent order, portions of which have not been complied with (2) the consent order stayed further proceedings except for enforcement purposes; and (3) the consent order grants liberty to apply to the court for the determination of any matter or issue that arises between the parties in their carrying out the terms of the order. The application is said to be made under paragraph 14 of the consent order. However, in the written and oral submissions, counsel for the applicants sought to reference the Eastern Caribbean Supreme Court (Saint Christopher and Nevis and Anguilla) Act No 17 of 1975, section 24 (1) which gives the court discretion to appoint a receiver by an interlocutory order if the court considers it to be just and convenient to do so.

Relevant Background Facts

(a) The parties

- [2] The applicant, CC&F Inc. is a limited liability company incorporated under the laws of Saint Christopher and Nevis.
- [3] The first named respondent, Manor International Inc. (Manor) is a limited liability company incorporated under the laws of Saint Christopher and Nevis. It carries on the business of land development and construction, and the marketing and sale of residential and commercial properties in Saint Kitts and Nevis. CC&F is a shareholder and member of Manor.
- [4] The second named respondent Doche and Doche Inc. (D&D) is a limited liability company incorporated under the laws of St. Kitts and Nevis. It carries on the business of construction development and real estate in St. Kitts.
- [5] The third and fourth named respondents, Victor Doche (VD) and Rafik Doche (RD) are directors and shareholders of D&D.
- [6] The fifth named respondent, Denis Charest (DC) is the President of Manor, and a shareholder of CC&F.
- [7] VD is the Vice President of Manor, and RD is the Secretary and Treasurer of Manor.

- [8] Each of the parties in these proceedings is a party to a Shareholders Agreement dated 10th April 2012 which Agreement sets out “the terms upon which Manor shall repay certain advances made to it by each of the parties”.
- [9] CC&F (represented by DC) has a 60% shareholding in Manor and D&D has a 40% shareholding in Manor.
- [10] Notwithstanding the 60% shareholding of CC&F in Manor, CC&F and D&D have equal voting rights. That is how the parties in their wisdom chose to set up their business.
- [11] Given the dynamics of the capacities in which the parties sit, their appointments and the offices they hold, the voting rights agreed, one might wonder why are the parties here. At the same time, one may not be surprised that a dispute has arisen between them, or whether it is a dispute in which the court should become involved as a tie breaker between shareholders who went to court to resolve their issues and sought to resolve them in a consent order.

The Pending Amended Notice of Application by CC&F filed on 3rd May 2017

- [12] On the 3rd May 2017, CC&F filed an amended notice application¹ seeking various orders including (1) an order that Charles W.A. Walwyn and Jefferson E. Hunte of Grant Thornton, Antigua, and Grant Thornton, St. Kitts be appointed as interim Receivers of Manor until judgment or further order; (2) an order that the interim Receivers undertake an accounting in relation to Manor and provide a report to the court as soon as reasonably practicable thereafter; (3) an order suspending the powers of the Directors of Manor with immediate effect until judgment or further order of the court.

(a) Grounds of the Application

- [13] In summary, the grounds of the application are:

1. The parties entered into a consent order dated 3rd February 2016 which provided that RD and DC shall act in the best interest of Manor and corporate fully to, among other things, ensure that the debts and other contractual obligations of Manor are paid and fulfilled.

¹ Original notice of application was filed on the 24th March 2017

2. Paragraph 9 of the consent order provides for Rene Fafard to be employed by Manor on terms to be agreed upon by the Board of Directors to complete the construction of Buildings 5 and 6 of Manor by the Sea Condominium Project, and that the parties take all necessary action to facilitate the completion of the said construction. The consent order also provided that a meeting of the Board of Directors be convened to take certain actions but the Board Meeting was never held;
3. There is an ongoing dispute and a total breakdown of relationship between the two directors of Manor; in consequence of which, the terms of the consent order requiring consensus has not been complied with, to the detriment of Manor.²
4. Given the breakdown of the relationship between the two directors, it is in the best interest of Manor that interim Receivers be appointed to manage the affairs of Manor pending the resolution of the dispute between the parties;
5. The directors cannot agree on the appointment of a lawyer for Manor, and therefore none has been appointed in accordance with the consent order. It would be in the best interest of Manor for an independent party to be authorised to appoint an attorney-at-law to represent the interests of Manor;
6. Section 14 of the consent order provides that all further proceedings in the matter be stayed except for carrying out the purposes of the order including enforcement. Section 14 also provides for liberty to apply to the court for the determination of any matter or issue that arises between the parties in their carrying out the terms of the order.
7. The matters raised on the application fall within the category of matters and issues that arise between the parties in their carrying out of the terms of the consent order.
8. Manor has suffered loss as a result of the deadlock between the directors and will continue to suffer if interim Receivers are not appointed to take charge of and manage its affairs.

² These alleged detriments are particularised in seven sub-paragraphs.

(b) Supporting Affidavits

[14] There are five affidavits in support of the application:

- (i) The affidavit of DC filed on 24th March 2017;
- (ii) The first affidavit of Falanda Adams filed on 3rd May 2017;
- (iii) The second affidavit of Falanda Adams filed on 5th May 2017;
- (iv) The second Affidavit of DC filed on the 19th June 2017³ and re-sworn on the 10th August 2017; and
- (v) The third affidavit of DC filed on 30th June 2017.

(c) Answering Affidavits

- (i) The affidavit of RD filed on 5th May 2017;
- (ii) The second affidavit of RD filed on 23rd June 2017;
- (iii) The affidavit of Cuthbert Wilkes filed on 19th June 2017; and
- (iv) The affidavit of Frederick LaChance filed on 30th June 2017.

[15] Prior to the presentation of the arguments, Mr Anthony indicated to the court that in addition to the answering affidavits listed above, he wished, during his oral arguments, to make reference to the Fixed Date Claim Form filed on the 20th July 2015, the supporting affidavit of DC, and documents exhibited thereto, and the affidavit of RD filed on 25th August 2015, pursuant to the terms of an *ex parte* order made on the 12th August 2015.

The History of the Pending Application

(a) The Fixed Date Claim

[16] On the 20th July 2015, CC&F filed a fixed date claim against the defendants seeking fifteen orders under the Companies Act sections 142 and 144, including (a) an order that the powers of the directors of Manor be suspended until rescinded by order made on a further application made to the court; (b) that an interim Receiver/Manager be appointed to manage the affairs of Manor until further order by the court; (c) that the Receiver/Manager be authorised to collect from any party

³ This affidavit was re-sworn and refiled on the 10th August 2017, after Mr Anthony pointed out certain irregularities in the jurat and in the rules pertaining to affidavits sworn outside the jurisdiction, among other things.

including D&D, VD and RD all documents belonging to Manor; (d) that D&D, VD and RD do within 14 days turn over to the Receiver/Manager all documents in their respective possessions, custody or control.

- [17] The statement of claim is lengthy consisting of 42 paragraphs of 39 pages. Paragraphs 1 to 8 set out the identity of the parties. Paragraphs 9 to 27 refer to and discuss a Shareholders Agreement, the responsibilities of the parties set out therein, the claimant's management of the construction and factory operations of Manor, the issue of profits, the management of the sales operations by D&D, and salaries that were supposed to be paid out,
- [18] Paragraph 28, speaks to Manor's construction of 57 units, the sale of some of those units, uncertainty as to how many units sold, the failure of RD and VD to provide documentation to verify the number of sales.
- [19] Paragraph 29 speaks to difficulties experienced by Manor in finding a place from which to operate.
- [20] Paragraph 30, alleges that during 2009 monies from DC were transferred through St. Christopher Club Ltd for the benefit of Manor, and Manor commenced operations with responsibilities allocated between RD and VD for sales and marketing.
- [21] Paragraphs 31 and 32 allege non-delivery of accounts and minute books. It is said that accounts were to be prepared by Irving Boncamper; that DC had been requesting from VD and RD such accounts and minute books, and they were never produced to CC&F nor DC. Reference is made to a letter of intent 'which was not adhered to'.
- [22] Paragraphs 33 to 37 allege breaches of fiduciary duty to Manor on the part of RD and VD, and it sets out instances and examples of the alleged breaches, examples being (i) that in 2013 CC&F became aware of sales of Manor's condominiums units, and fees paid out to CC&F and DC which had not been approved by DC; (ii) the unauthorised sale of unit #7004, and fees, and commissions paid out to RD, VD, Remax and family members.

[23] Paragraph 38 alleges that Manor's affairs are being conducted in a manner which is unfairly prejudicial to the interests of CC&F as a shareholder and member of Manor. The particulars of the allegation of unfair prejudice are set out under the following headings

1. Failure to provide information;
2. Failure to produce accounts;
3. Payment of unauthorised commissions/misappropriation of company assets;
4. Exclusion from management;
5. Diversions of company opportunities;
6. Misuse of company assets;
7. Mismanagement of company's business and affairs.

[24] Paragraph 39 alleges (a) that Manor's operations have come to a halt and it has been personally forced to incur payment of its expenses to the amount of US\$134,557.92; (b) that RD and VD are unable to agree as to the continued management of Manor due to DC's insistence that RD and VD fully disclose all relevant information and documentation in relation to sales of Manor's condominium units.

[25] Paragraphs 40 to 41 allege breach of trust and breach of implied duties and obligations under the Shareholders Agreement. It also alleges dishonesty on the part of VD and RD.

[26] Paragraph 42 repeats the allegation of unfair prejudice and goes on to plead frustration in obtaining proper accounts of Manor. It says there is no true picture of the present financial status of Manor. It complains that CC&F has been excluded from playing an effective role in the management of Manor and has not been able to obtain accrued benefits from Manor in accordance with the provisions of the Shareholders Agreement. It is said that the true value of Manor is unknown to CC&F, and thus CC&F is adversely affected by improper payments being made by VD and RD from funds belonging to Manor, resulting in prejudice to CC&F as a shareholder by devaluing its investment held in Manor; jeopardizing Manor's ability to continue as a going concern, and ultimately jeopardizing return on investment to CC&F.

(b) Without Notice Application

[27] On the 12th day of August 2015, on a without notice application filed on the 6th August 2015 by CC&F, Ellis, J (via teleconference BVI/St Kitts) made an order mandating D&D, VD and RD to do certain specified things relevant to preserving, managing, maintaining and safeguarding the affairs of Manor. Additionally, D&D, RD and VD were restrained and enjoined from concealing, destroying, mutilating, altering, erasing, damaging or dissipating specific documents listed in sub-paragraphs (i) to (x) of paragraph 3 of the order.

[28] Paragraphs 4 and 5 of the order of Ellis J. were in the following terms:

“(4) All other aspects of the Without Notice Application filed on 6th August 2015 are set for interpartes hearing on 31st January 2015 and the Without Notice Application, Affidavits in Support and Certificate of Exhibits are to be served on the Respondents/Defendants by close of business on today’s date.”

“(5) Liberty to apply.”

[29] The interpartes hearing eventually came on before Carter J. on the 3rd January 2016, in the presence of Mr. Arudranauth Gossai with Mrs. Sherry-Ann Liburd-Charles for the Applicant/Claimant and the 5th Respondent DC; Mr. Sylvester Anthony with Ms. Renal Edwards for the 2nd, 3rd and 4th Respondents, D&D, VD, RD (the D&D Group); and Mr. Adrian Scantlebury for the 1st Respondent, Manor.

[30] On the date of the hearing, the parties entered into a consent order in the following terms:

“CONSENT ORDER”

“... IT IS HEREBY ORDERED AS FOLLOWS:

1. Mr. Franklyn Maitland (“the Auditor”) to continue his appointment as the Auditor of the First-named Respondent (“Manor”) and to complete the audit of the accounts of Manor, said audit to be completed as soon as possible, and in any event within sixty (60) days after submission to the Auditor by the parties of all documents requested or to be requested by the Auditor and in possession custody or control of that party, including all documents referred to in paragraph 5 below, and without prejudice to the foregoing the following documents.

I. any additional sales agreements and sales contracts applicable or related to the Manor By The Sea condominium or any Manor By The Sea condominium units;

- II. agreements, if any, between or with any party or parties which provide for, or which include any provision relating to the payment of any sales commission, marketing fees, finder's fees or other related fees or commissions on the marketing or sale of any Manor By The Sea condominium units;
 - III. any additional bank credit advices, incoming wire transfer forms and large transaction reporting forms related to the receipt of funds generated by the sale of any Manor By The Sea condominium units;
 - IV. any additional bank statements for all accounts into which funds generated by the sale of any Manor By The Sea condominium units were paid;
 - V. any bank statements for any accounts into which funds wired or provided by the Fifth-named Respondents("DC"), or by Placement Denis Charest Inc. ("PDC") or by the Claimant ("CC&F"), to or for the benefit of Manor, were received.
 - VI. Any additional cheques representing payments made by Manor, or by The St. Christopher Club Limited for and on behalf of Manor together with all supporting invoices.
 - VII. A list of all sales commissions, marketing fees, finder's fees or any fees or payments made to Remax, and/or to the Third-named Respondents ("VD") and/or to Fourth-named Respondent("RD") and/or to "DC" and/or to Julie Couillard and/or to Corrine Doche and/or to Natasha Doche and/or to Alexander Doche, in anyway related to the marketing or sale of any Manor By The Sea Condominiums units; and
 - VIII. Any bank statement for St. Christopher Club Limited bank accounts showing all funds received by The St. Christopher Club Limited on behalf of Manor, and all payments of fund made for and on behalf of Manor, together with all applicable credit advices, cheques and invoices.
2. That without prejudice to the generality of the audit, that the aforementioned audit shall include and address the following issues:
- I. The sale of the Manor By The Sea condominiums units and the income generated; into which account and at which bank(s) the monies received for each unit sold were deposited and on what dates; the price of each unit sold and the expenses applicable to each unit sold; the sales commissions, marketing fees and finder's fees or other related fees, paid on each unit sold;

to whom the sales commissions, marketing fees and finder's fees or other related fees, and the other closing expenses were paid on each unit sold;

- II. The loans obtained from The Bank of Nevis Limited for which any of the lands contained Certificate of Title Book J3 Folio 449, Book O3 Folio 166, and Book K3 Folio 569, all of the Register of Titles for St. Christopher, were mortgaged to said bank as security, together with details of (i) into which account(s) those loan funds were initially credited to (ii) what precisely those funds were utilized for (iii) to whom payments were made out of those funds, (iv) by whom and from which accounts, these loans were repaid;
 - III. The amount and status of any loans advanced by CC&F and/or PDC and/or the Second-named Respondent ("D&D") and or St. Christopher Club Limited to Manor including any amounts due for repayments;
 - IV. The issue with the walls to be constructed by Manor for St. Christopher Club Limited ("SCC");
 - V. Any amounts due from Manor to CC&F and/or PDC and/or DC and/or D&D and/or RD and/or VD or from any one or more such parties to Manor;
 - VI. Amounts withdrawn by D&D, VD, RD, CC&F, DC from Manor and the status of such withdrawals;
 - VII. Whether any funds belonging to Manor were used by or for the benefit of any third party and whether there are any monies due from any third party to Manor or vice versa, and if so on what basis;
3. That consequent upon and at the conclusion of the audit referenced in paragraph 1 and 2 above that the Auditor do also set out a statement outlining what funds if any are due to Manor from CC&F and/or D&D and/or RD and/or VD and/or any other third party; or vice versa, and that any party so affected be entitled to file any objections to the audit report and final statement within 14 days after the completion and service of a copy of the audit report and final statement on that party. The auditor shall address such objections within 14 days of receipt and issue a decision, and where he considers it necessary, any adjustment to the audit report and final statement. If any party who has filed objections is dissatisfied with the decision of the auditor and/or the audit report and final statement, that party may apply to the court within 14 days of the auditor issuing his decision

for a determination of the particular issues final statement, raised in the objections, with a final statement to be determined by the court.

4. Manor be responsible for the payments of the services provides by the Auditor.
5. CC&F, DC, D&D, VD and RD do submit, within seven (7) days of the date of this Order, to Mr. Maitland all documents in their respective possession, custody and control, and referred to in paragraph 1 above and also the documents which were requested by Mr. Maitland in his letter dated 24th June, 2015. Further CC&F and DC do submit any further documentation relating to Manor's construction operations and D&D, RD, and VD do submit any further documentation relating to the marketing and sale of Manor's Condominium units, requested by Mr. Maitland within 7 calendar days of any such written request.
6. CC&F, D&D, RD, VD and DC be allowed unhindered access to the property/premises of Manor situated at Bird Rock and Frigate Bay for the purposes of carrying out their respective obligations under the Shareholders' Agreement.
7. All property and assets including but not limited to vehicles, equipment, machinery, tools, building materials, supplies, books, records and documents belonging to Manor and in the possession, custody or control, and/or in the names of CC&F, DC, D&D, VD, RD and/or SCC be returned to the premises of Manor situated at Bird Rock within 7 days of the date of this Order. All property and assets beneficially belonging to Manor shall be immediately transferred to Manor. Manor to pay all taxes, fees, custom duties, shipping, freight and port charges, and all other governmental charges in relation to all such transfers, where such payment is properly the lawful obligation of Manor.
8. No person/ entity to be allowed to use the property, condominium units, vehicles, employees, equipment, tools, materials, machinery and any other assets or resources of Manor except for the operations of Manor, unless a written agreement is entered into between Manor and such other persons/entity and approved by the Board of Directors of Manor as evidenced by a Board Resolution.

9. Rene Fafard be employed by Manor on the terms agreed upon by the board of directors to complete the construction of Buildings 5 and 6 of the Manor by The Sea Condominium project and that CC&F and D&D as shareholders in Manor, DC and RD as directors of Manor, VD as Vice President of Manor and Rene Fafard as signatory to the bank accounts of Manor cooperate fully, take all necessary action (in their respective capacities) pursuant to the Shareholders' Agreement, and Manor's Articles of Association, and consistent with the efficacy of operating a business, to facilitate the completion of the said construction.

10. RD and DC as the only two Directors of Manor shall act in the best interests of Manor and cooperate fully, including but not limited to the approval of contracts, approval of payments and signing of cheques, to ensure the completion, sale and delivery of all units of the Manor by the Sea condominium units and to ensure that all debts and other contractual obligations of Manor are paid and fulfilled.

11. The Board of Directors comprising DC and RD shall convene a meeting at a convenient location, whether within or outside St. Kitts within seven (7) days of the date of this Order to
 - I. approve the contract for employment of Rene Fafard;
 - II. review and approve the budget for completion of buildings 5 and 6 of the Manor by the Sea Condominiums project;
 - III. receive an update on sales of all condominium units;
 - IV. (subject, where necessary to the finalization of the audit) review and approve payments of debts and execution of contractual obligations of Manor including but not limited to (a) any debt owing by Manor to PDC and/or DC and/or CC&F and/or D&D and/or SCC; (b) the construction and/or completion of walls for SCC and (c) the payment of all arrears of rent in relation to the premises leased from the Development Bank of St. Kitts and Nevis;

and any other business determined by the Directors.

The Board of Directors of Manor shall at such meeting adopt the resolutions attached hereto as Schedule A.

12. All monies received from sales of Manor by the Sea condominium units shall continue to be deposited in the bank account of Manor held at The Bank of Nevis Limited and/or The Bank of Nova Scotia, Fort Street, Basseterre with notice of all deposits to be given to the Auditor.
13. Any further sales commission and/or marketing fees payable to Remax, or any entity or person associated with and/or related to Remax, to be held in escrow in Manor's account, until the Parties resolve all issues in relation to the payment of such sales commissions, and/or marketing fees. Payment out to Remax shall be subject to a determination of Remax's entitlement to such sales commissions. The parties shall in good faith attempt to resolve the issue of entitlement of Remax to charge sales commission on the sale of Manor condominium units. If the parties are unable to resolve the issue amicably, any one party may choose to submit the matter to mediation (via a mediator within the court mediation program) and the other party will be obliged to mediate the matter. If the parties are unable to resolve this issue via mediation, any party may apply to the court to resolve the issue.
14. All further proceedings in this matter be stayed except for the purpose of carrying the terms of the Order into effect including enforcement. For that purpose, the parties have liberty to apply to the Court. This shall include:
 - (a) liberty to apply to the court for the determination of any matter or issue that arises between the parties in their carrying out the terms of this Order:
 - (b) liberty to apply for any of the following remedies:
 - i. An order for payment by the Applicant/Claimant, Second-named Defendant/ Respondent, and/or the Third-named Respondent/Defendant and/or Fourth-named Respondent/Defendant and/or Fifth-named Respondent/Defendant, as the case may be, of any amount found to be due and owing to the Company by such Respondents(s)/Defendant(s) respectively, as the case may be pursuant to and upon the conclusion of the audit report and final statement, and, where applicable, after a final statement determined by the Court;
 - ii. An order for payment by the Company to the Applicant/Claimant, Second-named Defendant/ Respondent, and/or the Third-named Respondent/Defendant, and/or Fourth-named Respondent/Defendant, and/or Fifth-named Respondent/Defendant, as the case may be, of any amount found to be due and

owing to the Applicant/Claimant or such Respondent(s)/Defendant(s) respectively, as the case may be, pursuant to and upon the conclusion of the audit report and final statement, and, where applicable, after a final statement determined by the Court;

- iii. That upon completion of the audit report and final statement, and where applicable, upon the determination of a final statement by the Court, and where said final statement (as the case may be) shows that either the Second-named Respondent/Defendant, Third-named Respondent/Defendant, or Fourth-named Respondent/Defendant or any other party is indebted to or otherwise liable to the Company, that the Applicant/Claimant be authorized to institute a derivative action in the name of and on behalf of the Company against any such Defendant(s) or party.
- iv. That upon completion of the audit report and final statement, and where applicable, upon the determination of a final statement by the Court, and where said final statement (as the case may be) shows that either the Applicant/Claimant or the Fifth-named Respondent/Defendant or any other party is indebted to or otherwise liable to the Company, that the Second-named Respondent/Defendant, be authorized to institute a derivative action in the name of and behalf of the Company against any such Defendant(s) or party.
- v. Alternatively, that upon the completion of the audit report and final statement, or upon determination of a final statement by the court (where applicable), that the Court do, as against any person a party to this action who is found to be indebted to or liable to the Company, order that such person do pay such sum as may found to be due to the Company, together with any interest that may be applicable.

15. There be no order as to costs.

SCHEDULE A

BOARD RESOLUTIONS OF MANOR INTERNATIONAL INC.

1. Employment of Rene Fafard

- 1. The Company hereby agrees to the employment of Rene Fafard as Manager of the Company's Factory and Construction Operations to complete the construction of Buildings 5 and 6 on the following terms:

- (a) weekly salary of US\$1000.00 (subject to statutory deductions)
 - (b) provision of company vehicle and fuel to the value of US\$100.00 per week;
2. Upon his employment, Mr. Farfard will perform the following tasks:
- i) Take a complete inventory of all assets, materials and other property of the Company;
 - ii) Evaluate the condition of all existing materials to determine its usability for construction purposes
 - iii) Consequent upon such evaluation, to submit to the BOD for its consideration and approval, a comprehensive list of materials and supplies required to complete the said Buildings 5 and 6;
 - iv) Prepare and submit to BOD for its consideration and approval a detailed budget to cover all costs related to the completion of Buildings 5 and 6, together with a work plan and timeline for such completion;
 - v) Identify and submit to the BOD for its consideration and approval any subcontractors to be employed together with the terms of any proposed subcontracts.

2. Within 3 business days of the execution of this Resolution and consistent with the existing Shareholders Agreement, the BOD will meet to discuss the following agenda items:

A. Update On Sales of All The Company's Condominium Units

- (a) Review all purchase and sale agreements that have been executed;
- (b) Review all purchase and sale agreements that are yet to be executed;
- (c) Review unsold units and confirm price structure.

B. Regularizing the Lease from Development Bank Limited to Manor Factory Premises

The Company Secretary/ Director will execute no later than 3 business days after the date hereof, the existing lease with the Development Bank Limited for the factory premises and will make payments, immediately, of any and all arrears of rent owing to Development Bank for the said lease. If necessary, the Company shall extend the lease for such periods as required to allow for the completion of Building 5 and 6 for the eventual winding up of the business affairs of the Company.

3. Debt owing by The Company to Placement Denis Charest Inc. (PDC)

No later than 3 business days after receiving the Auditor's report and Final Statement the Company's Board of Directors will meet and the Company will review its accounting record to determine the balances owing on:

- (a) any cash advances made by SCC and/or D&D;
- (b) the loan extended by PDC; and
- (c) agree on a repayment schedule.

4. Debt owing by The Company to any other Third Party

The Company to review its accounting records to determine whether any other debts are owed by the Company to any Third Party and upon Verification by the Auditor of such debts the Company, if it possesses the finances, shall settle all those debts.

5. Walls for St. Christopher Club Gardens Project

No later than 3 business days after the employment of Rene Fafard as Manager, to commence construction and installation of walls for the St. Christopher Club Gardens Project. In the event that the audit report and/or final statement concludes that payment for the walls have not been made or are in any way deficient. An appropriate deduction will be made from any share of profits payable by the Company to D&D.

6. Attorney to represent the Company

No later than 3 business days after the date hereof, the Company to engage the services of an independent Attorney/Law Firm to represent its interest with such Attorney/Law Firm to be separate from the Attorneys representing its shareholders, CC&F Inc. and Doche & Doche Inc. or any shareholders, director, officer, employee or related party of such shareholders The Company shall provide such Attorney a copy of these resolutions and authorize the Attorney to take such steps as may be required to ensure compliance with the said solutions.

7. Property of Third Parties

The Company shall immediately release to all third parties any property in the possession of the Company and belongings to such Third Party. Any such Third Party to pay the Company any monies expended by the Company on behalf of such Third Party in relation to any such property including but not limited to (i) shipping expenses, (ii) import duty and (iii) customs service charge, up to date of import. The Company to record, but only as being supportive of the above, the agreement by the individual shareholders (which each shareholders by signing hereby confirms) to release to Denis Charest and Isabelle Fafard all personal items belonging to them or either of them that may in the possession, custody or control of any shareholders.

(SD) Sylvester Anthony

(SD) Sherry-Ann Liburd-Charles

Law Offices of Sylvester Anthony
Attorneys-At-Law for the

Gonsalves Parry
Attorneys-At-Law for the

2nd, 3rd and 4th Respondents

Applicant/Claimant & 5th Respondent

(SD) Adrian Scantlebury
Scantlebury Law
Attorneys-At-Law for the 1st Respondent

By The Court

(SD) Jihan Williams
Dep. Registrar (Ag.)”

[31] That was the background to the present application by CC&F for a receivership order. As previously stated, counsel for the D&D Group has taken the preliminary point of challenging the court’s jurisdiction to deal with the application made by CC&F.

Considering the Preliminary Objection/Issue

(a) Submissions of the D&D Group

[32] In summary, the submissions of the D&D Group are grounded on the following points:

1. There is no statutory or common law basis for the appointment of a Receiver on the purported grounds, or to perform the purported powers sought. The court’s statutory power to appoint a Receiver can only be exercised on an interim basis and is therefore limited to interlocutory proceedings. Where there is an order of the court which determines the substantive issues raised on the claim, the court cannot make an order appointing a Receiver.
2. The Companies Act, sections 142 and 144 confers jurisdiction on the court to appoint an interim receiver of a company as a means of giving relief where a member alleges that the affairs of the company are being conducted in a manner unfairly prejudicial to the members of the company. Section 24 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act No 17 of 1975, (the ECSC Act) grants the court power to appoint a receiver by an ‘interlocutory order’ on such terms and conditions as it deems just. The application is brought under section 14 of the consent order. There is no reference in the application that the

application is brought under the statutory provisions; it is only in its written and oral submissions, the applicant is invoking the ECSC Act.

3. The court's statutory power invoked by CC&F to appoint a receiver can only be exercised prior to the determination of the issues between the parties. The issues in the fixed date claim have been determined by consent order dated 3rd February 2016. The court may exercise a power where there is 'a need for interim protection of property' and as a means of 'holding the ring' between litigants until the disputed issues could be finally determined". (**Capewell v HM Revenue and Customs** [2007] UKHL 2 relied on).
4. The issues raised by CC&F are res judicata and CC&F is estopped from pursuing the application on the following grounds: (a) The issues were properly before the court by way of the fixed date claim filed by CC&F on the 20th July 2015, and the reliefs sought included the appointment of a receiver.
5. The parties agreed to settle the issues raised in the fixed date claim in the terms of the consent order which did not include the appointment of a receiver. The parties therefore waived the right to appoint a receiver.
6. Section 14 provides that all proceedings be stayed except for the purpose of carrying into effect the terms of the order including enforcement. The consent order granted liberty to apply to the court to determine any issue that may have arisen while carrying out the terms of the order, as well as certain specified remedies which do not include the appointment of a receiver.
7. The application to appoint a receiver does not accord with the consent order as it is not an application to determine the issues which CC&F alleges have arisen while carrying out the terms of the order.
8. The consent order has not been set aside or varied, and until set aside, it must be complied with (**Isaac v Robertson**, 3 WIR 705 relied on). If the parties, upon reflection decide that they no longer like the consent order because it is disadvantageous to them, they should not

disobey the order; they should come back to the court to amend the order not to find collateral way to disobey the order. They do not have the luxury to ask the court for a receivership order.

9. Most, if not all of the tasks suggested to be done by the receiver are contained in the fixed date claim, and were already ordered to be done by Franklyn Maitland as Auditor of Manor. The consent order provided that Franklyn Maitland continue in his appointment as the auditor of Manor. The contents of the application almost mirror the contents of the consent order. The consent order was intended to determine all the issues which were before the court in the fixed date claim and the without notice application.

(b) Submissions of CC&F

[33] In summary, the submissions of CC&F on the preliminary issue of jurisdiction are grounded on the following points:

1. The court has wide and almost unrestricted powers under section 24 of the ECSC Act to appoint a receiver if it considers it to be just and convenient. The court's power is not limited to an equitable jurisdiction.
2. The D&D Group have erred in their understanding of the nature of the application to appoint a receiver based on the fact that section 24 of the ECSC Act provides for the appointment of a receiver by way of an interlocutory order, it follows that an interlocutory application would have to be made seeking such an order.
3. The claim has been commenced, but there has been no determination of the issues of the claim and thus the claim is still pending. The fixed date claim was never amended to remove the request for the appointment of a receiver and seek the appointment of an auditor. And the reliefs were never amended; so it cannot be said that the applicant waived the request for the appointment of a receiver. The application is properly before the court and the court has jurisdiction to appoint a receiver by way of an interlocutory order pursuant to section 24 of the ECSC Act. The application was drafted to flow from paragraph 14 of the consent order.

4. The consent order did not have the effect of disposing of all the issues in the claim. The claim was stayed so that the parties may attempt to carry out the agreed terms of the order.
5. Paragraph 14 of the consent states that all further proceedings be stayed except for the purpose of carrying into effect the terms of the order including enforcement states.
6. The effect of a stay of proceedings is not equivalent to the effect of a judgment or discontinuance. As long as a stay is in place, that in and of itself is evidence that there has been no determination of the issues. The claim can be revived at any point. While a stay is in place the proceedings remain alive but no further steps may be taken to progress the claim other than applying to lift the stay. It cannot therefore be said that there has been a determination of the issues by virtue of the consent order.
7. The application is not being used to progress the claim. It is being made under section 14 of the consent order which allows the parties to seek the court's determination on any issue that has arisen between the parties in their attempts to carry out the terms of the consent order. The parties inability to agree on any issue prohibits them from carrying out the terms of the consent order therefore nullifying its purpose altogether.
8. The application before the court is an interim application because it requires judicial decision after the claim has commenced but before its issues have been substantially determined. The consent order has not determined the issues raised in the claim, but has stayed the claim. The claim subsists. The consent order was entered into 18 months ago, and the directors have failed to reach any kind of consensus on certain matters to the detriment of Manor, one detriment being a law brought against Manor. The detriments do not require a variation of the consent order.
9. The principle of res judicata is inapplicable to the claim

10. Given the circumstances which exist in the instant case, it is just and convenient to grant the order appointing a receiver for Manor.

Replying submissions of the D&D Group

[34] The replying submissions can be summarised as follows

1. The consent order was intended as a mechanism to resolve all the issues in the claim and not further litigation or the imposition of a new regime such as the appointment of a receiver.
2. The proceedings have ended in a consent order, save for matters which arise under section 14 where the court left it to the parties to act in good faith and resolve the issues in accordance with the term of the consent order. The proceedings are not 'open' or 'pending' as the consent order must be complied with by all parties;
3. The issues raised in the claim form part of the consent order, and cannot now form the basis of an application for a new remedy such as the appointment of a receiver.
4. By Clause 14 of the consent order, the parties agreed an order enforcing the terms of the consent order in the event of continuing dispute or failure of a party to act in good faith. This process is binding on all parties. Clause 14 precludes any application for a remedy or relief not already covered by the consent order. The application amounts to a backdoor collateral attempt to bypass the terms and conditions of the consent order by CC&F who refuses to participate in, or comply with the terms of the consent order.
5. Res judicata applies because the disputes were resolved with the terms of the consent order and cannot be reopened or re-litigated by CC&F.

[35] Neither party addressed the court on the legal effect of consent orders. It is also noteworthy that no one appeared for, or on behalf of Manor, although the record reflects that Manor was previously represented by Mr. Scantlebury who is still on record for Manor. In answer to a question posed by

the court, Mrs. Joseph Rowe told the court that Mr. Scantlebury was not served with the application or with notice of the hearing of the application. Counsel also told the court that the application was served instead on the registered office of Manor, namely the Law Office of Sylvester Anthony. At that point, Mr. Anthony rose and pointed out that DC signed a resolution on the 8th September 2015 appointing Mr. Scantlebury as Manor's lawyer. Then, Mrs. Joseph Rowe seemed to have reconsidered, and told the court that "we served Mr. Scantlebury, but he chose not to come." Manor, being a legal person, is entitled counsel of its own. The applicant has not demonstrated that t can authoritatively apply to the court for a receivership order on behalf of Manor.

Discussion and Decision

- [36] An order by consent is evidence of the contract between the parties and is binding on all parties in the order. (**Ganapathy Chettiar v Lum Kum Chum** [1981] 2 MLJ 145. It may be pleaded as an estoppel. (**Kinch v Walcott**). A consent order sets out in the form of an order the agreement which the consenting parties have made.⁴
- [37] Since a consent order is a contract, or sets out the agreement between the consenting parties, the rules for variation of a contract apply. A contract, and thus a consent order can generally be varied, but only on grounds of common mistake, misrepresentation or fraud.⁵
- [38] "Financial agreements that are agreed upon between parties for the purpose of receiving the approval and being made subject of a consent order by the court, once they have been made the subject of the court order, no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order. ..."⁶ Omrod L.J. reasoned: "If their legal effect is derived from the court order, it must follow ... that they must be treated as the order of the court and dealt with, so far as possible in the same way as non-consensual orders.
- [39] As I see it, the consent order in this case is to be treated as an order of the court which can be varied upon application by either of the parties.

⁴ 155569 Can Ltd v 248524 Alta, [1992], A.J. No 135 (QB); de Lasala v de Lasala [1972] 2 All R 1146; Patrick Thomas et v Thomas Real Estate Co Ltd GDAHCV2001/0652

⁵ Simonelli v Ayrton Developments Inc., (2010) ABQB 565 (CanLII); Purcell v FC Trigell Ltd, [1970] 3 All ER 671

⁶Thwaite v Thwaite [1982] Fam 1, per Omrod L.J. repeating the dicta of Lord Diplock in de Lasala, ibid.

[40] When looked at from the standpoint of the consent order being a contract, the application before the court does not allege any mistake, misrepresentation or fraud when the consent order was made. However, the documents on file seem to suggest that both sides breached the contract.

[41] The parties canvassed the issue of whether CC&F was invoking the power of the court under the ECSC to grant a receivership order, or whether the application is made under paragraph 14 of the consent order, or whether it is under the broad jurisdiction of the court. They also canvassed the issue of whether the application for a receivership order is res judicata.

[42] After reading the application, relevant affidavit evidence, the consent order, the fixed date claim, and other relevant documents; And after considering the submissions of the parties, I have concluded that the applicant has not established that the court has jurisdiction to entertain an application to appoint a receiver in this matter for the following reasons:

1. Despite the complexion being put on it, the application before the court appears to be tantamount to an attempt to vary the consent order so as to provide for the appointment of a receiver, instead of an application for orders in respect of the situations provided for under paragraph 14 (a) and (b).
2. Paragraph 14 of the consent order in essence stayed all further 'proceedings' except for the purpose of carrying the terms of the consent order into effect including enforcement. The application for a receivership order is a proceeding which is not permitted by section 14 the consent order.
3. Mrs. Joseph-Rowe in her written and oral submissions in opposition states that the consent order is made under the liberty given to apply. However, the court notes that the liberty to apply was given (a) for the determination of any matter or issue that arises between the parties in their carrying out the terms of the consent order. The court is not of the view that the application to appoint a receiver is an application provided for in the consent order; nor is it an application to determine the issues which CC&F alleges have arisen while carrying out the terms of the order;

4. Paragraph 14 (b) of the consent order expressly gives liberty to the parties to apply for specific remedies numbered (i) to (v) thereof. An application for an order appointing a receiver is not one of the remedies mentioned in paragraph 14 (b).
5. To entertain and grant an application for an order appointing a receiver would mean two orders running concurrently, namely, the consent order which has not been set aside or and the order appointing a receiver. This would not in my opinion meet the justice of the case. It would also mean granting an order for a receiver to perform tasks which have already been allocated to Mr. Maitland, or to the directors. It would seem that issues raised and reliefs claimed in the fixed date claim, and matters raised in the consent order and in the present application were canvassed before a court of competent jurisdiction, and if so, the application for a receivership *-order would likely be characterized as res judicata or an abuse of the court's process.
6. When a court of competent jurisdiction has decided an issue between parties, the same issue cannot be re-litigated between them in the same court. The decision stands until it is reversed on appeal. (per Rawlins, J.A [Ag] in **Bertha Compton qua Administratrix of the Estate of Macrina Blaze v Dr. Christiana Nathaniel et al**, St Lucia Civil Appeal No 12 of 2004.
7. Unless and until set aside, or varied by a court of competent jurisdiction the consent order stands and continues to subsist. The applicant's application for a receivership order is before a court of coordinate jurisdiction which does not have the jurisdiction to grant receivership order where, as the consent order did not reserve the right to apply for an order appointing a receiver.
8. Ordinarily, where the court orders proceedings be stayed, the court, on application by a party may lift the stay for a specified purpose or for variation of the order. Learned counsel Mrs. Joseph-Rowe acknowledged that much in her submissions stating that 'while a stay is in place the proceedings remain alive but no further steps may be taken to progress the claim other than applying to lift the stay.' In the face of this acknowledgement, CC&F still has not made any application to lift the stay of proceedings.

9. Indeed, neither party has applied to lift the stay or for a variation of the consent order so as to provide for the appointment of a receiver, or to embody any modifications in the consent order. CPR 42 permits parties to agree to vary the terms of a consent order. It is telling that the consent order made no provision for variation and as I have said, neither party has applied to vary it.
10. The application before the court does not challenge the consent order, and even if it did, the court cannot overturn the order of a court of coordinate jurisdiction. **Leymon Strachan v The Gleaner Company et al**, Privy Council Appeal No .22 of 2004).
11. In my judgment the court's jurisdiction on the consent order is limited to determining an application to lift the stay of proceedings, an application to vary the consent order and an application for remedies set out in paragraph 14 (a) and 14 (b) subparagraphs (i - (v) of the consent order.

Disposal

- [43] The applicant has not established that the court has jurisdiction to entertain an application for a receivership order under paragraph 14 of the consent order. Without there being an application to lift the stay of proceedings ordered by Carter J., and an application to vary the consent order to provide for the appointment of a receiver, or to provide for a variation of the order, or for the purposes of enforcement under paragraph 14 (a), or to seek remedies in terms of paragraph 14 (b) (i) to (v), the court is devoid of jurisdiction.
- [44] In the foregoing premises, it is declared that the preliminary objection of the D&D group has merit and it is accordingly upheld.
- [45] Last but by no means least, I am mindful of the fact that going forward, the parties would need to put aside their differences for the common good of Manor, not the least of which is ensuring that Manor has proper or authorised legal representation, and be provided with space from which to operate for the overall benefit of Manor and all stakeholders.

[46] In the case of **Robelto Limited et al v Svoboda Corporation and 18 others**⁷. Hariprashad-Charles, J. found it necessary to re-echo and adopt the words of Mr. Acuner when he (Mr Acuner) said " The only way forward for us and our Company is for everyone to talk as business partners at the appropriate forum which is usually the Board, and when appropriate, the General Shareholders' Meeting." I too adopt those words, and commend them to the parties herein and all other persons concerned with, and involved in this matter.

[47] I am grateful for the assistance of all counsel involved in this matter.

Pearletta E. Lanns
High Court Judge [Ag]

By the Court

Registrar

⁷ BVIHCV2007/0311