Claim No: CFI 012/2009

IN THE JUDICIAL AUTHORITY OF THE DUBAI INTERNATIONAL FINANCE CENTRE

IN THE COURT OF FIRST INSTANCE

Before Deputy Chief Justice Michael Hwang

Between

FIVE RIVER PROPERTIES LLC	First Applicant
and**RENAISSANCE HOLDINGS AND DEVELOPERS FZE**	Second Applicant
and**WATERFRONT PROPERTY INVESTMENT LIMITED**	First Respondent
and**LINARUS FZE**	Second Respondent

GROUNDS OF DECISION

1. On 11 June 2009, I made the following Orders:

(a) The Freezing Order made on 23 April 2009 ("the Freezing Order") be discharged with immediate effect.
(b) The Applicants shall pay the First and Second Respondents' costs in relation to the Freezing Order to be assessed if not agreed.
(c) The Respondents shall have leave to bring an application for an inquiry as to damages pursuant to Schedule B (1) of the Freezing Order.
(d) The Applicants will immediately take all reasonable steps to inform in writing anyone to whom they have given notice of this Order, or who they have reasonable grounds for supposing may act upon this Order, that it has ceased to have effect.
(e) This Order is stayed in order to give the Applicants time to file a formal application for leave to appeal and a stay pending appeal (the 'Stay Application'). The Stay Application must be filed by 15 June 2009, failing which this Order will come into effect on 16 June 2009. If the Stay Application is filed, this Order will be stayed until the hearing of the Stay Application and parties should file written submissions by 19 June 2009. The Court will decide any Stay Application filed on the basis of written submissions.
2. My reasons for these Orders have already been substantially given in CFI 11/2009, a related case in which much of the evidence and submissions before the Court were substantially the same as in the present case (especially on jurisdiction). CFI 11/2009 was heard together with the present case and I will not repeat my reasoning in these Grounds of Decision. However, I will address the areas where the facts differ from CFI 11/2009 in this judgment.

I. PARTIES

3. The First Applicant is Five Rivers Properties ("Five Rivers"), a company incorporated in the Emirate of Abu Dhabi, United Arab Emirates ("UAE") under License No. II38959 having its address at P.O Box 8728, Abu Dhabi. Mr Surjit Singh is the Managing Director of the First Applicant.
4. The Second Applicant is Renaissance Holdings and Developers FZE ("Renaissance"), a limited liability establishment incorporated in the Sharjah Airport International Free Zone. Mr Satinder Singh Bhasin ("Mr Bhasin") is a director and 100% shareholder of Renaissance.
5. Particulars of the First and Second Respondents as well as the Master Developer of the Dubai Waterfront Project are set out in Paragraphs 5 to 7 of my Grounds of Decision in CFI/11 2009 ("my CFI 11/2009 Judgment"). Defined terms used in that Judgment will have the same meaning when used in these Grounds of Decision.

II. BACKGROUND

6. This background to this case is similar to CFI 11/2009, except that the plot of land purchased was Plot C06C1, a neighbouring plot to the plot C06C2 purchased by the Applicant in CFI 11/2009. Plot C06C1 was also located in the second row of the Dubai Waterfront project, and was therefore similarly affected by the height increase granted for the Respondents' front row plots.
7. In this case, Mr Bhasin, an Indian national, was interested in buying Plot C06C1. Mr Bhasin entered into a Memorandum of Understanding ("MOU") with Five Rivers on 19 August 2008, under which Five Rivers agreed to negotiate and purchase a piece of landed property in Dubai on his behalf. The MOU also (in Clause 4) provided that Mr Bhasin intended to "*develop and market*" the development of Plot C06C1 in association with Five Rivers with terms and conditions to be mutually decided in future.
8. Subsequently, Five Rivers entered into a Memorandum of Agreement ("MOA") with WPIL on 27 August 2008 for the purchase of Plot C06C1 on Mr Bhasin's behalf pending the incorporation of Renaissance. Renaissance was subsequently incorporated on 28 August 2008. The terms of the MOA were substantially the same as the Memorandum of Agreement in CFI 11/2009.
9. Renaissance subsequently entered into a Cancellation and Conditional Assignment Agreement ("the Cancellation Agreement") with three other parties, namely WPIL, Al Burj and Dubai Waterfront. (Details of this agreement are set out in Paragraph 23 below)

III. PARTIES' POSITIONS

10. The parties' legal positions are identical to their positions in case CFI 11/2009 and are described in Section III of my CFI 11/2009 Judgment.

IV. JURISDICTION

11. I refer to Section IV of my CFI 11/2009 Judgment, which applies to the present case (with necessary changes being made).

V. MERITS

12. The law with respect to whether the Freezing Order should be discharged or continued is stated at Paragraph 110 of my CFI 11/2009 Judgment.
13. Sections V.2 and V.3 of my CFI 11/2009 Judgment applies to the present case (with necessary changes being made). The different facts in the present case only affect my reasons as to whether there was a good arguable case, whether it was just and convenient to continue the Freezing Order as well as my discussion of the proportionality of the Freezing Order.

V.1 Whether there was a good arguable case

14. On the issue of whether the Applicants had made out a good arguable case, I repeat Paragraph 111 of my CFI 11/2009 Judgment. In addition, I was not prepared to continue the Freezing Order because the evidence showed that there was serious doubt whether there was a proper arbitration agreement between the Applicants and the Respondents.

Whether Five Rivers had a good arguable case against WPIL

15. As stated in Paragraph 8 above, the MOA which contained the arbitration agreement was entered into between WPIL and Five River Properties LLC.
16. Renaissance Holdings subsequently entered into the Cancellation Agreement with Dubai Waterfront, Al Burj and WPIL. However, there was no evidence showing that there had been a valid assignment of the MOA between Renaissance and Five Rivers.
17. The Applicants submitted that, even if there had been no valid assignment of the MOA, Five Rivers was the proper party to the MOA, and the MOU between the Applicants showed that the Applicants intended to develop and market Plot C06C1 jointly The Applicants submitted that the above two facts taken together provided an independent basis for a claim by the First Applicant for the loss resulting from the misrepresentations by Dr Bahaa to Mr Bhasin relating to Plot C06C1.
18. I accept that Five Rivers was a party to the MOA and the arbitration clause. However, Five Rivers did not appear to have a claim for substantial damages in respect of Plot C06C1 as it no longer owned the property.
19. There was no evidence tendered in respect of the loss suffered by Five Rivers in relation to their right of joint marketing and development of Plot C06C1. Also, this argument was raised after the hearing in a single paragraph of the Applicants' post-hearing submissions, and there had been no submissions on the basis of the Respondents' liability in this respect. In the circumstances, I did not find that the Applicants had established a "good arguable case" in relation to whether Five Rivers had a valid claim for damages against the Respondents.

Whether Renaissance had a good arguable case against WPIL

20. Renaissance was not in existence at the time the MOA was entered into on 24th August 2008. There was therefore no express arbitration agreement between itself and either of the Respondents.
21. The MOU provided that Five Rivers was to negotiate and purchase land on behalf of Mr Bhasin. It was also contemplated that the property would be transferred to a new company after its purchase.
22. The Applicants also submitted the Cancellation Agreement as evidence that the arbitration agreement under the MOA had been assigned to Renaissance.

23. The Cancellation Agreement was an agreement between Dubai Waterfront, Al Burj, WPIL and Renaissance:

(a) to cancel the Sale and Purchase Agreement between WPIL and Dubai Waterfront; and
(b) for Renaissance to enter into a Sale and Purchase Agreement with Dubai Waterfront to enable it to purchase Plot C06C1.
The consideration for WPIL's consent to cancel the Sale and Purchase Agreement between WPIL and Dubai Waterfront was the execution of a Premium Agreement between Renaissance and WPIL. In general terms, if Renaissance defaulted on the Premium Agreement or the Sale and Purchase Agreement with Dubai Waterfront, WPIL would have the right to have the Sale and Purchase Agreement with Dubai Waterfront transferred back to its name.
24. The Cancellation Agreement therefore dealt with the rights of the parties to purchase Plot C06C1 from Dubai Waterfront, and no evidence was led to show how the Cancellation Agreement operated as an assignment of the rights and obligations of the MOA (which was between Five Rivers and WPIL) under Dubai law.
25. The Applicants submitted that UAE law would allow in principle the application of an arbitration agreement by reference in a separate contract, including an assignment agreement. According to the Applicants, the Dubai courts would require a clear intention by the parties to subject themselves to arbitration and that, on the facts (presumably because the First Respondent had entered into the Cancellation Agreement with Renaissance, Al Burj and Dubai Waterfront), the Respondents were clearly aware of, and intended all rights under the MOA to be transferred to the Second Applicant. Accordingly, the Applicants submitted that the Respondents had subjected themselves to an arbitration agreement with the Second Applicant.
26. However, the evidence tendered did not show that the rights of Five Rivers under the MOA had been duly assigned to Renaissance (if at all).

The relevant clauses of the MOA provided:

> *"2.1 **Sale and Purchase***
>
> *2.1.1 The Seller agrees to sell, transfer and assign and the Buyer agrees to purchase and receive a transfer and assignment of all the Seller's right, restriction, and interest in the above mentioned Property..*
>
> 7.1 The Parties will work together and cooperate to facilitate the prompt transfer of the Seller's interest in the Property to **the Buyer**..
>
> 12 Entire Agreement
>
> 12.1 This Agreement contains the entire agreement between the parties, supersedes all previous agreements and understanding between the parties with respect to it, and **may not be modified except in writing signed by the duly authorized representatives of the parties**.
>
> 13.1 ... **Buyer has no right to transfer any obligations and warranties under this Agreement to person/entity nominated by Buyer.**
>
> 13.2 The Parties agree not to assign the benefits and burden under the Agreement to any third party without the prior written consent of the other Party." (emphasis added)

27. In view of Clauses 12, 13.1 and 13.2 of the MOA, I was not satisfied that the Respondents had clearly agreed to enter into an arbitration agreement with Renaissance.
28. Additionally, Renaissance did not tender detailed evidence in respect of the loss suffered by it, which was alleged to be AED 300 million. By contrast, the purchase price of Plot C06C1 was AED 78,711,100. While Renaissance did not have to quantify its claims with exactitude in order to establish whether it had a good arguable case, there should have been some explanation for the large amount claimed relative to the purchase price.
29. Assuming, therefore, that the DIFC Courts has jurisdiction to grant the Freezing Order, I would nevertheless not have continued it against WPIL.

No arbitration agreement between either of the Applicants and Linarus

30. For the reasons set out in Paragraphs 114 and 115 of my CFI 11/2009 Judgment, which apply to the present case (with necessary changes being made), I would have declined to continue the Freezing Order against Linarus even if I had been inclined to continue it against WPIL.

V.2 Whether it was just and convenient to continue the Freezing Order

31. I repeat Paragraphs 130 to 133 of my CFI 11/2009 Judgment with respect to this ground.
32. In addition, I would not have found it just and convenient to continue the Freezing Order for the reasons set out in Paragraphs 20 to 28 above.

VI. WHETHER THE EXTENT OF THE FREEZING ORDER WAS PROPORTIONAL TO THE AWARD

33. In a further submission dated 4 June 2009, the Applicants stated that an open offer had been made to the Respondents on 1 June 2009 that the Applicants would accept a sum of AED 60 million as security for the Applicants' claims pending a final award by the DIFC-LCIA Arbitral Tribunal. The Respondents had not responded to this offer.
34. The Applicants stated that their primary claim was for AED 60 million (return of moneys paid under the MOA) and their supplemental claim for loss of profits amounted to AED 250 million. Strictly for the purposes of the Application before the Court, the Applicants stated that they agreed to the Respondents' assets subject to the Freezing Order being limited to the amount of the primary claim without prejudice to their rights to pursue the supplemental and other claims before the Tribunal.
35. With respect to the claim for lost profits, the Applicants' expert, Mr Haider bin Haider, deposed that UAE law allowed a contract to be cancelled and compensation, *including the loss of profits*, to be awarded to the person misled by the misrepresentation if the contract was concluded by "gross cheat". On the other hand, the Respondents' expert, Mr Essam Al Tamimi, submitted that a claim for an award of loss of profits under UAE law was extremely difficult to prove and was, in his opinion, not a claim that could be sustained by the Applicants on the present facts.
36. The Applicants submitted that Paragraph 5 of the Freezing Order should be amended to limit the amount of the Respondents' assets to be frozen up to the sum of AED 60 million, being the purchase price paid by the Applicants to the Respondents together with a reasonable sum for future interest and legal costs.
37. The Applicants enclosed a valuation report showing that the market value for Plot C06C1 was AED 25.2 million. The Applicants submitted that the security for the undertaking not to resell Plot C06C1 without permission of the Court would be sufficient security in circumstances where the sum subject to the Freezing Order was being effectively limited to the contract price.
38. Even assuming that the DIFC Courts had jurisdiction and the merits of the injunction application justified a freezing order, the third hurdle the Applicant would have to overcome would be the proportionality of the Freezing Order. I would have pursued an inquiry into the actual value of the land at the time of the contract taking into account the height increase granted for the First Respondent's plots of land. I would most likely have been prepared to grant a freezing order limited to the difference between that actual amount and the purchase price. I would not have granted a

freezing order for the full amount equal to a refund of the purchase monies because the First Applicant was still the owner of Plot C06C1, which was worth at least AED 25.2 million. I would also have considered the value of the six plots of land which had been frozen under the Freezing Order, and assessed the need for all six plots to be frozen, considering that the Applicants were agreeable to limit its claim to only AED 60 million. However, I would only have made such findings limiting the extent of the Freezing Order *if* the Applicants had surmounted the first two hurdles on jurisdiction and the merits.

39. For the purposes of considering what monetary limit should have been imposed on the Freezing Order (had I been inclined to grant such a remedy), the contradictory expert reports on UAE law meant that the Applicants had not *prima facie* established their entitlement to claim for loss of profits under UAE law based on the evidence available before this Court. Given that the Applicants' rights to claim for lost profits were uncertain, and since the Applicants had agreed to limit any Order sought to the primary claim, I would have excluded the Applicant's AED 250 million claim for alleged lost profits from my calculation of the monetary cap on the Freezing Order.

40. Finally, I did not believe that the security for the Undertaking given by the Applicants in respect of the Freezing Order should be limited to an undertaking not to resell Plot C06C1. A freezing order is a draconian order, and any applicant must be prepared to be responsible for any losses caused to the respondent by the imposition of the freezing order. Moreover, the Applicants in the present case have submitted a claim for AED 310 million and requested for six plots of land to be subject to the Freezing Order. The value of the assets frozen by the Freezing Order clearly exceeded the value of Plot C06C1. Even after limiting its claim to AED 60 million, the value of assets that the Applicants requested to be subject to the Freezing Order was more than double the value of Plot C06C1. If I had been prepared to continue the Freezing Order, I would have maintained all the undertakings in Schedule B of the Freezing Order.

VII. CONCLUSION

41. For the above reasons, I made the orders set out in Paragraph 1 above.

Michael Hwang

Deputy Chief Justice

Date of Issue: 8 July 2009