

IN THE SUPREME COURT OF BELIZE, A.D. 2022

CLAIM No. 156 of 2022

BETWEEN

**CHARLES MACKINNON
SANDRA GARRETT**

**FIRST CLAIMANT/RESPONDENT
SECOND CLAIMANT/RESPONDENT**

AND

**BELIZE LAND AND DEVELOPMENT LTD.
MACKINNON BELIZE LAND AND
DEVELOPMENT LIMITED**

**FIRST DEFENDANT/APPLICANT
SECOND DEFENDANT/APPLICANT**

DECISION OF The Honourable Madam Justice Patricia Farnese

HEARING DATE: October 27, 2022

APPEARANCES

Mr. Darrell Bradley for the Claimants/Respondents
Mr. Fred Lumor, S.C. for the Defendant/Applicants

**DECISION ON APPLICATION FOR SECOND DEFENDANT TO BE STRUCK FROM
CLAIM**

Introduction

[1] The Respondents are siblings (the Owners), who together with their now deceased sister, entered into a business relationship with Mr. James Parker to develop, subdivide, and sell approximately 3,275 acres of land in the Stann Creek District of Belize (the Property). Belize Land and Development Ltd. (BLD) is a Belizean corporation that is controlled by Mr. Parker. MAC-COR (MC) is a corporation controlled by the Owners. BLD signed a Joint Venture Agreement (the Agreement) with MC that took effect in 1996. A further Belizean corporation,

MacKinnon Belize Land and Development Limited (MBLD) was created to give effect to the Agreement. Mr. Parker is the controlling shareholder and Managing Director of MBLD. He holds 7000 shares. MC, the minority shareholder, holds 3000 shares. The Owners transferred the Property to MBLD on terms set out in the Agreement. Among other things, the Owners are asking that this Court order MBLD to return to the Owners the portion of the Property that has not been developed.

[2] Mr. Parker, in his capacity as Managing Director of MBLD, asks that this court strike MBLD from this claim. He relies on two principal grounds. First, MBLD is not a party to the Agreement that is the subject of this dispute. As such, the Agreement is not enforceable against MBLD. The Owners rely on existing jurisprudence that recognizes that a claim can be maintained against a non-action party to oppose the application. Second, the Owners are seeking remedies that if they are owing, they are owed to MBLD. Therefore, the Owners, as minority shareholders, are required to seek permission of the Court to initiate a derivative action. Having failed to obtain the court's permission, MBLD should be struck from the claim. The Owners, however, reject the characterization of this dispute as a derivative. The Owners assert that they are seeking remedies personally owed to them. They transferred land to MBLD as a condition of their Agreement with BLD. The Owners claim an entitlement to have the land transferred back to them either because of the Agreement being breached or coming to an end.

[3] After reviewing the written and oral submissions of the Parties, I am not prepared to strike MBLD from the claim on the basis that they are not a party to the Agreement. An initial review of the jurisprudence on the appropriateness of naming non-cause of action defendants identifies some parallels to the present case. I am not yet convinced, however, that this is a case where I can make an order against a MBLD. That question requires full arguments after trial.

[4] Furthermore, I do not accept that this claim arises from the Owners' position as minority shareholders in MBLD and, therefore, requires permission of the court to initiate. A review of the terms of the Agreement clearly outlines that the Owners, first in their personal capacity and then as MC, have undertaken the obligations and will receive the Agreement's benefits separate from those arising from the Joint Venture. The Owners are entitled to seek those remedies separate from any derivative claim they may have.

Analysis

[5] CPR Rules 19.2(4) and 19.3(2) authorize the court, upon an application by an existing party, to "order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceeding." The starting point for this analysis must be the orders sought by the claimant. Among other things, the Owners ask for:

7. An order for possession of all unsold parcels of land, being part of the land vested by the claimants in the second defendant, pursuant to the joint venture partnership agreement, and a further order that title to these unsold parcels of land be transferred back to the claimants or as the claimants direct, as required by clause 12 of the joint venture partnership agreement.

8. Permanent injunction restraining the first and second defendants, whether by themselves or their servants or agents, from coming on to, using, occupying, marketing, selling, leasing, charging or mortgaging, or from in any way interfering with the claimant's ownership interest in the unsold parcels of land, being part of the original land vested by the claimants in the second defendant, pursuant to the joint venture partnership agreement.

If the Owners establish that they are entitled to orders of possession and/or an injunction preventing dealings related to the lands MBLD holds title to, MBLD is not only a desirable, but also a necessary party to the proceeding. If it is established that the Owners are barred from obtaining these orders, however, MBLD ought to be struck from the claim.

[6] It is undisputed that the Owners transferred land to MBLD under terms and conditions outlined in the Agreement. But for the Agreement, MBLD would neither exist nor have title to the lands the Owners now ask this court order returned. The terms of the Agreement that are relevant to this application are as follows:

2.01 Intent to Develop Property. The parties desire to form a joint venture under the terms and conditions set forth herein to develop and market real property owned by CM [Charles MacKinnon], SM [Sandra MacKinnon] and RR [Roberta Richmond], located near Placencia, Belize, C.A.

3.01 Formation. BLD and MC hereby form a joint venture partnership to be known as McKinnon/ BLD joint venture (the "Joint Venture"), under the terms and conditions set forth in this agreement.

3.04 Purpose. The sole purpose of the Joint Venture shall be the development and sale of the Property as set forth in this agreement.

4.0 DEVELOPMENT

4.01 Stages. The property shall be developed in four stages in chronological sequence as follows:

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| Stage I | Parcels A, B, C and H shall be developed first. |
| Stage II | Parcels D, E, and F shall be developed after the Stage I Property has been developed. |
| Stage III | Parcel K shall be developed after the development of Stage II Property. |

Stage IV Parcel G shall be developed last.

If, in the opinion of BLD, sufficient political or economic reasons made it prudent to change the Staging sequence, Owners shall give reasonable consideration to a request by BLD to approve such change. Any such change must be in writing and duly executed by Owners.

4.02 Transfer of Property to Joint Venture. Owners and MC shall transfer the Property to the Joint Venture to permit the Joint Venture to develop and sell the Property as per the development [sic] the Stages as set forth in section 4.01, above. Such transfers shall be free of all encumbrances, with the exception of taxes and real estate easements of record. Taxes owing but unpaid as to the Property shall be prorated between the parties to the date of the transfer. BLD shall be responsible for payment of the respective transfer taxes for the properties so being transferred to the Joint Venture as soon as possible after receipt of the First Provisional Approval and copy provided to MC. The parties shall endeavour, by survey or as part of the platting of the Stage I parcels, to obtain a separate legal description for the Stage IV property, Parcel G, which is linked to and contiguous with Parcel H, such that Parcel G need not be transferred to the Joint Venture along with the Stage I Parcels. If it is not possible so to separate Parcel G for later transfer, it shall be transferred to the Joint Venture along with Stage I parcels, but it shall be developed only as Stage IV. The consideration for such transfer shall be deemed to be the obligation of the Joint Venture to pay a percentage of Land Sales Receipts as set forth in Section 8.02, which payments, in the aggregate, shall be deemed to be the purchase price for such Property.

4.03 Transfer of Property to MC. Owners shall transfer all property not transferred to the Joint Venture as part of Stage I as set forth in section 4.02, above, to MC. Such transfer shall occur at or about the time the Stage I property is transferred to the Joint Venture. All obligations of Owners to transfer property to the Joint Venture thereafter shall be the obligation of MC.

4.04 Development Threshold Performance Levels. The Joint Venture shall develop and sell the Property according to the following Threshold Performance Levels. Any event one or more of the Threshold Performance Levels is not met, at the option of MC, the Joint Venture shall deed parcel G back to MC. The Threshold Performance Levels, which are based on a percentage of Land Sales Revenues as per the PMSF projections, exhibit B hereto, are as follows:

- a. **Stage I.** Within five (5) years from and after the First Provisional Approval of the development plan by applicable governmental authorities, there must be sales of Stage I properties aggregating at least 65% of the Land Sales Revenues projected as to Stage I.
- b. **Stage II.** Within nine (9) years from and after the aforesaid First Provisional Approval, there must be sales of Stage II properties aggregating at least 65% of the Land Sales Revenues projected as to Stage II.

- c. **Stage III.** Within thirteen (13) years from and after the aforesaid First Provisional Approval, there must be sales of Stage III properties aggregating at least 65% of the Land Sales Revenues projected as to Stage III.
- d. **Stage IV.** Within seventeen (17) years from after the aforesaid First Provisional Approval, there must be sales of Stage IV properties aggregating at least 65% of the Land Sales Revenues projected as to Stage IV.

4.05 Failure to Meet PMSF Projections. In the event the actual Joint Venture land sales revenues (not including structures or improvement) do not equal at least sixty-five percent (65%) of the projected land sales gross revenues as set forth in the PMSF, exhibited hereto, in the timeframe as outlined in Section 4.04 above, for each respective Stage, MC may, at its option, terminate this Joint Venture for the then remaining Stages. In the event of such termination, BLD shall be permitted to complete the development Stage(s) then currently being conducted, sell the properties as to such then current Stage to third parties as per the Development Plan, collect balances due to the Joint Venture as to property sales to third parties according to the terms of such sales, and remit MC's portion thereof to MC.

8.02 Allocation of Land Sales Revenues. Land Sales Revenue shall be allocated 30% to MC's the purchase price for the Property, and 70% to the Joint Venture.

12.0 Term, Termination

The term of the agreement shall be the earlier of twenty years, or until all Property is sold and all moneys due thereon have been collected and distributed as provided in this Agreement, unless earlier terminated due to breach of a party or by MC under the provisions of section 4.04 for failure to meet the projections as stated therein. in the event of a breach of the provisions of this agreement, the non-breaching party may initiate termination of this agreement by giving the breaching party notice of the breach. If the breaching party fails to cure such breach within thirty (30) days the non-breaching party may terminate this agreement effective any time, after such 30 days period. As of the effective date of termination of this agreement for any reason, Land Sales Revenue shall be calculated and distributed it as set forth in Article 8. Any land unsold as of the effective date of termination shall be transferred back to MC (or as directed by MC) by the Joint Venture within 90 days of the effective date of termination.

[7] These sections of the Agreement leave no doubt that the orders the Owners seek involve land that MBLD control. The Agreement clearly outlines in Section 2.01 and 4.02 that the Owners transferred the Property to MBLD for the Property's development and sale in accordance with the Agreement's terms. The Agreement also indicates that the Property is intended to be developed in a series of stages and provides for the distribution of profits between the Owners and BLD if the venture is successful. The Agreement further contemplates what will happen if the development does not occur as planned or the Agreement otherwise comes to an end. MBLD, however, is not a party to the Agreement.

[8] The Respondents have presented sufficient jurisprudence to convince me, at this stage, that I have the jurisdiction to issue an order that will bind a non-cause of action defendant. *T.S.B Private Bank International S.A. vs. Chabra and Another*¹ established what has become known as *Chabra* jurisdiction whereby courts have granted freezing orders (*Mareva* injunctions) against third parties to guard against the disposal of assets, including land. A preliminary review of *Chabra* jurisdiction, however, outlines that this jurisdiction has typically been recognized in cases where a party is suspected of acting with dishonest intent to hide or dispose of the assets. Dishonesty is not pled in this case; whether I can or should exercise *Chabra* jurisdiction is not certain. Nonetheless, additional jurisprudence presented by the Claimants where courts have maintained actions against non-cause of action defendants out of convenience or necessity raises the possibility that I have jurisdiction to make an order against MBLD.² I am also guided by the fact that MBLD is not an arms-length 3rd party who is faced with the costs of defending a claim where the court ultimately decides it lacks jurisdiction.

[9] Likewise, I decline to strike MBLD as a defendant based on the argument that this matter is a derivative claim. The Owners, through MC, may have a derivative claim, but section 8.02 of the Agreement makes it clear that MC has rights under this Agreement separate from those they are entitled to as a minority shareholder in MBLD. Although the majority of the Land Sales Revenues will be allocated to MBLD, 30% is allocated to the Owners, through MC, in addition to what is owing to them through MBLD.

Disposition

[10] It is ordered that:

1. The Application to Strike the MBLD from the claim is denied.
2. The Owners are entitled to their costs of this application as agreed or assessed.

Dated 16 November 2022

Patricia Farnese
Justice of the Supreme Court of Belize

¹ [1992] 1 WLC 232.

² *Shake's Multi-Save Supermarket vs. Haffejee, Ahmed Abdul Hay*, South Africa High Court Case No. 413/12.