IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

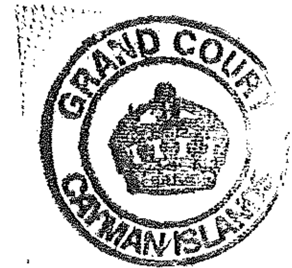
THE NON MR JUSTICE ANDREW J. JONES QC

6TH AND 7TH JUNE 2011

FSD NO: 77 OF 2011 – AJJ

IN THE MATTER OF DUET REAL ESTATE PARTNERS 1 LP

AND IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)



Appearances :

Mr Victor Joffe QC, instructed by Mr Heaver-Wren of Appleby on behalf of the Plaintiff

Mr Stephen Atherton QC, instructed by Mr Michael Makridakis of Ogier on behalf of Respondent

JUDGMENT

1. By an Originating Summons issued on 21 April 2011 Duet Real Estate Partners 1 LP ("**Duet Cayman**") sought a declaration that there is a genuine and substantial dispute about the existence of two debts of approximately €22 million or €50 million said to be owing to ESO Capital Luxembourg Holdings II S.A.R.L ("**ESO**"). By paragraph 2 of its Originating Summons, Duet Cayman seeks an injunction to restrain ESO from presenting a winding up petition based upon either of two statutory demands dated 5 April 2011. Further and alternatively, by paragraph 3, Duet Cayman seeks an injunction restraining ESO from presenting any winding up petition until such time as the dispute about the existence of the debts is resolved by arbitration before the London Court of International Arbitration. ESO has undertaken not to rely upon the statutory demands, but maintains that it is still entitled to present a winding up petition on grounds of insolvency and it intends to do so unless restrained by an order of this Court. The issue which has to be decided is whether there is any genuine and substantial dispute about

the existence (as opposed to the amount) of any debt owing by Duet Cayman, such that the presentation of any creditor's winding up petition by ESO should be restrained as constituting an abuse of the court.

2. Duet Cayman is an exempted limited partnership established under the Exempted Limited Partnership Law (2003 Revision). It owns all the shares of Duet Trust and Fiduciary Services SA ("**Duet Trust**"), a company incorporated in Luxembourg. Duet Cayman, Duet Trust and three of its wholly owned subsidiaries are involved, in various capacities, with a project for the construction and development of a holiday resort on the north east part of the island of Saint Barthélemy, French West Indies ("**the Project**"). The only one of these three subsidiaries to which I need to refer is St Bart Hotel Invest SAS ("**St. Bart Co.**")

3. By a loan agreement dated 17 April 2008 ("**the Loan Agreement**") and made between ESO as lender and Duet Trust as borrower, ESO agreed to lend €38 million in respect of the Project. The amount of the loan was subsequently reduced to €36 million. The purpose of the loan was to enable Duet Trust to refinance an existing loan of approximately €29 million and to provide short term finance for the Project's development and construction costs.

4. The Transaction Documents comprised the following: -

   i. The Loan Agreement dated 17th April 2008;

   ii. Two Promissory Notes, also dated 17 April 2008 – Note A for €23 million (subsequently reduced to €21 million) with a 9 month maturity date and Note B for €15 million with a 24 month maturity date;

   iii. A guarantee agreement dated 6 May 2008 whereby Duet Cayman and one of Duet Trust's subsidiaries jointly and severally guaranteed to ESO the performance of certain of the obligations of Duet Trust under the Loan Agreement ("**the Guarantee**"). It has been characterized as a performance guarantee rather than a payment gtuarantee;

   iv. A share pledge agreement dated 6 May 2008 between Duet Cayman, Duet Trust and ESO whereby Duet Cayman pledged its shares in Duet Trust to ESO;

v. Three further pledge agreements also dated 6 May 2008, pursuant to which Duet Trust pledged the shares of its three subsidiaries to ESO;

vi. First ranking €1 million direct hypotheque over the land in Saint Barthélemy dated 6 May 2008 between St Barth Co. and ESO;

vii. An account pledge agreement and a receivables pledge contract, also dated 6 May 2008, between St Barth Co. and ESO;

viii. A cash collateral pledge agreement dated 6 May 2008 between Duet Trust and ESO; and

ix. A subordination agreement between Duet Cayman, Duet Trust and ESO dated 6 May 2008 in which Duet Cayman's loan of € 10.62 million to Duet Trust was subordinated to ESO's loan.

5. It is relevant to note that the transaction documents reflect the result of an arms' length transaction between the parties, both of whom were represented by their own legal counsel. The Loan Agreement, Promissory Notes and Guarantee are governed by English law. The Share Pledge Agreements relate to the shares of companies incorporated in Luxembourg and are therefore governed by Luxembourg law and subject to the jurisdiction of the Luxembourg courts. As will be immediately apparent from the maturity dates of the Promissory Notes, this was not intended to be long term project finance. It was always envisaged by Duet that additional funding for the construction of the Project would be needed and it was anticipated that some €30 million more would be generated from pre-sales of villas and condominiums which formed part of the Project in addition to a hotel development. As a result of the general financial crisis and credit crunch of September/October 2008, property prices collapsed, sources of project financing dried up, and the anticipated pre-sales did not happen. As a result, Duet Trust was unable to raise the finance to continue with construction work. In mid 2009 the Project was put on hold.

6. Efforts to find alternative sources of funding continued through 2009 and 2010. However, on 19 October 2010 Mr. Schibl, founder and chief investment officer of the Duet Group, sent an email to Mr. Schmidt, ESO's chief executive officer, by which Duet offered to buy back the debt for €23 million, which then represented just under 50% of the outstanding principal and accumulated interest. He said –

"We had different options on refinancing or on sale of the property:

1. Equity injection for € 15 million
2. Sale of the property as is
3. Sale of the property at the end of construction
4. Sale of the three villas

All of the above failed for the same reason, the level of debt and interest rate, and uncertainty surrounding the completion. Following all those developments we would like to make the following offer:

1. We pay you €23 million to buy back all the debt and the outstanding interest.
2. Settlement date will be 30 January 2011.
3. We will issue immediately a Comfort/Guarantee Letter post agreement.

We believe that under the circumstances this is the best outcome for all parties for a fast and clean exit."

For the reasons set out in his letter dated 28 October 2010, Mr. Schmidt rejected this offer. He considered that a discount of more than 50% was unjustified, in particular because Duet Cayman had commissioned a valuation from CB Richard Ellis in August 2010 in which the Project was valued at €73.6 million "as is". He put forward an alternative restructuring proposal which was in due course rejected by Mr. Schibl.

7. On 16 December 2010 Duet Cayman increased its offer to buy back the indebtedness to €26 million. By a letter dated 24 January 2011 Mr. Schmidt responded by improving the terms of the restructuring proposal contained in his letter of 28 October 2010. By letter dated 1 February 2011 Mr. Schibl improved his buy-back offer to €27 million and put forward an alternative proposal that ESO purchase Duet's subordinated equity interest for €10.5 million, both of which were rejected. Finally, on 15 March 2011, Duet Cayman made "two final alternative offers". Option one was actually a reduction in the buy-back offer to €25 million, which was still only about 50% of the outstanding principal and interest. Option two was a proposal that ESO should purchase 100% of the equity in St. Barth Co. for €10 million. The letter went on to state

> "If none of these options are satisfactory to you then we do not see any other option than for you to start foreclosure proceedings on the St. Bart project. We will of course present evidence to the court of our repeated attempts over the last 150 days to find an amicable solution in the interests of both parties. We understand that any legal proceedings would by law have to be preceded by a formal court administered mediation process which would delay matters even further. Finally, any dispute in respect of the loans or the Performance Guarantee is subject to LCIA arbitration which - even with the parties' prompt attention to the proceedings – will delay matters even further. Then you can start the foreclosure process. If that is the road we will show all the evidence

> that we tried for 150 days to have a solution. We also remind you that the original loan extension document was never signed.
>
> We believe that we have no more time to waste on this matter and our offers are final. The offers above are open until 31 March 2011 at 5pm (UK). After that we reserve our legal rights in all respects"

8. The following day, on 16 March 2011, ESO began the process of enforcing its rights under the Transaction Documents. By a letter addressed to Duet Trust, Duet Cayman and St Bart Co., ESO informed them of deteriorations of the property and of amounts that were outstanding to contractors, and requested the provision of information and documentation including information about the net worth of Duet Cayman. By a letter addressed to Duet Cayman and Duet Trust, ESO notified them of several events of default under the Loan Agreement and that ESO was exercising its rights under the share pledge agreement in respect of Duet Cayman's shares in Duet Trust. By a letter to Duet Cayman and St Bart Co., ESO issued a demand under the Guarantee. It demanded payment of the sum of approximately €50 million then due under the Loan Agreement. It also demanded, pursuant to Clause 2.1(b) and/or Clause 2.3 of the Guarantee, that the Project be completed.

9. In the absence of any substantive response from Duet, on 23 March 2011 ESO commenced proceedings in the Luxembourg court to enforce its rights under the Duet Trust Share Pledge Agreement and made an application for emergency interlocutory relief. The Luxembourg court rejected ESO's application, essentially, I think, because it was not suitable for a summary determination and no case of urgency has been made out.

10. On 12 April 2011 requests for arbitration were presented to the London Court of International Arbitration on behalf of Duet Trust pursuant to the Loan Agreement and on behalf of Duet Cayman and St Bart Co. pursuant to the Guarantee. The rules require that a statement of claims be filed with the request for arbitration, but this was not done until 23 May 2011.

11. Duet Cayman's case is based upon the evidence of Mr Alain Schibl, the co-founder and chief investment officer of the Duet Group, who has sworn two affidavits. In paragraph 34 of his first affidavit, Mr. Schibl makes the following assertion which is crucial to Duet's case –

"Over the course of the continuing meetings and numerous weekly phone calls between Duet and [ESO], and concurrently with the reduction of construction at the Project to minimal maintenance and minor work (that is, in around mid-2009), the initial acknowledgment of the limited options (referred to above) crystallised into an oral agreement between Duet and [ESO] that the only way forward was for the parties to enter into a partnership arrangement ("theArrangement") whereby each party put their respective interest into a common pool and once market conditions allowed a refinancing arrangement, the parties would share the proceeds of realisation of the Project in proportion to their respective contributions to the Project."

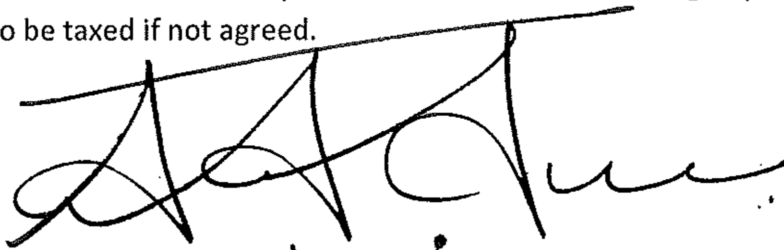
12. Mr Joffe puts Duet Cayman's case on the basis that this arrangement constitutes an enforceable contract by which ESO exchanged its rights under the Transaction Documents for an equity interest in the Project, such that Duet and ESO became partners. It is said that the essential terms of this contract were agreed and that the discussions and negotiations which took place over the following period until March 2011 related to the way in which the partnership would be implemented and to other matters of detail. According to Duet Cayman, the result of this oral agreement is that ESO ceased to be a creditor. The issue is whether the evidence leads to the conclusion that, at the very least, there is a genuine and substantial dispute about the existence of this partnership arrangement. Absent any such arrangement, it is accepted that Duet Cayman is in breach of the performance obligation under the Guarantee, as a result of which ESO has an unanswerable claim for damages. I agree with Mr Atherton that ESO's damages claim should be assessed by reference to the amount owing by Duet Trust under the Loan Agreement. Even if there is scope for argument about the assessment of damages, it is conceded that the amount recoverable must be more than nominal in any event, with the result that ESO is an actual creditor of Duet Cayman and, as such, entitled to present a winding up petition.

13. In my judgment Duet Cayman's case is thoroughly disingenuous. It is accepted by Mr Joffe that none of the contemporaneous documentary evidence supports the assertions made in Mr Schibl's affidavits. To the contrary, there is a wealth of contradictory evidence. Duet made a series of written offers to buy out the loan at a discount during 2010. This correspondence contradicts the existence of the partnership arrangement. It would make no sense for Duet Cayman to be making such offers if ESO had already agreed to exchange its rights under the Transaction Documents for an equity interest. Subsequent to the date upon which the partnership arrangement is said to have been made, ESO also continued to accrue interest; it asserted its right to default interest and late payment fees; and Duet actually made payments which it would not have been liable to do if it had concluded the partnership arrangement.

14. Perhaps the most compelling contradictory evidence is that reflected in the audit confirmations sent on behalf of St Bart Co. to PricewaterhouseCoopers, ESO's auditor. The audit confirmation request dated 8 February 2010 reflects ESO's belief that approximately €41 million was due and owing under the Transaction Documents as at 31 December 2009. This belief is of course wholly inconsistent with any form of debt for equity swop having taken place or any form of partnership arrangement having been concluded prior to the balance sheet date, as asserted by Mr Shibl. By a confirmation dated 16 April 2010 and signed by its CFO, St Barth Co. confirmed its agreement that this amount was due and owing under the Transaction Documents. The fact that this audit confirmation request was sent and positively confirmed by St Bath Co. is unchallenged evidence. On any view, this audit confirmation contradicts the existence of any form of agreement in the terms asserted by Mr. Schibl. Mr Joffe could offer no explanation, save to say that it is "form over substance". I think it is inconceivable that an audit confirmation would be signed in these unqualified terms if Duet's management genuinely believed, for whatever reason, that as 31 December 2009 (or 16 April 2010), that Transaction Documents were no longer binding and enforceable in accordance with their terms.

15. In my judgment the contemporaneous documentary evidence points, inescapably, to the conclusion that Duet Cayman always believed that ESO was entitled to enforce its rights in accordance with the Transaction Documents. The assertion made in paragraph 34 of Mr Shibl's first affidavit is nothing more than a disingenuous delaying tactic. There is no evidence from which to infer that there is any genuine and substantial dispute about ESO's status a creditor having the right to present a winding up petition.

16. It follows that Duet Cayman's claim is dismissed and I give judgment for ESO, with costs to be taxed if not agreed.



The Hon. Justice Mr. Andrew J. Jones, QC

7th June 2011.