GRAND COURT
CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 84 OF 2012

BETWEEN	**40 ACRES LTD.**	**PLAINTIFF**
AND	**WILLIAM MARK CASSIDY**	**FIRST DEFENDANT**
AND	**SOUTHHAVEN DEVELOPMENTS LIMITED**	**SECOND DEFENDANT**

IN OPEN COURT
BEFORE THE HON. ANTHONY SMELLIE, CJ
THE 10TH , 11TH APRIL, 2013 AND 17TH MAY, 2013

APPEARANCES: Mr. James Austin-Smith (with him Mr. Alistair Walters) both of Campbells for the Plaintiff.

Mr. Richard DeLacy QC and Mr. Williams Jones of Ogier for the Defendants

JUDGMENT

1. The Plaintiff, 40 Acres Ltd, claims the repayment of sums of money paid to the Second Defendant ("Southhaven") on 13th February 2009. There were two payments respectively made in the amounts of AUD811,817.26 and USD 531,510.40.

2. The Plaintiff, through its principal and sole shareholder Mr. Douglas Sell, claims that the payments were made for the purposes of investments to be undertaken on Mr. Sell's behalf by the principal of Southhaven, Mr. William Mark Cassidy, the First Defendant.

3. The dispute to be resolved in this case is entirely factual in nature.

4. In his evidence, Mr. Sell explains that against the background of a longstanding personal relationship of some 18 years between himself and Mr. Cassidy, one characterised by implicit mutual trust developed in the context both of friendship and business, he made the payments to Mr. Cassidy to be held "on trust", until a suitable project was identified for investment.

5. In his own words, as taken from paragraph 18 of his witness statement, Mr. Sell explains that:

> *"There was no written contract. However, the understanding was that Mr. Cassidy would hold the monies and invest them on my behalf, if and when I had interest in a particular investment opportunity. It was also agreed orally, that such investment would be made by written consent by me, otherwise Mr. Cassidy was to hold the funds for me and such funds would be repayable on demand."*

6. Mr. Cassidy does not deny that the payments were made to him through Southhaven by Mr. Sell. Indeed, there are undisputed bank transaction documents evidencing the transfer of the funds from the Plaintiff's Credit Suisse account to Southhaven's account with HSBC Hong Kong.

7. What Mr. Cassidy disputes is the purpose for the payments. He claims that they were for the repayment of an investment made by him with Mr. Sell, through another entity named Beaufort Worldwide Limited on 10th August 2007 in the amount of AUD753,190.

8. That a payment in that amount of AUD753,190 was indeed made on 10th August 2007, Mr. Sell does not dispute. Rather, it is relied upon by him to explain the source of the funds for which he now claims repayment.

9. His case is that the payment of AUD753,190 on 10 August 2007 was the return on an earlier investment made with Mr. Cassidy in a development called the Noosa Sanctuary located at Noosa Heads, Queensland, Australia. That investment had been made in the amount of AUD500,000 paid on 18 January 1999 through an entity then owned by Mr. Sell called Fantasia Ltd. That such an investment in the Noosa Project was in fact made is – unlike the disputed claim and counterclaim of later investments – fully documented in the evidence. Indeed, and as one would expect, there is a letter from Mr. Cassidy dated 18 January 1999, recording the Noosa Sanctuary investment and addressed to the corporate managers of Fantasia Ltd. in these terms:

> *"Dear....*
>
> *Re: Fantasia Ltd.*
>
> *This letter will serve to confirm that A$500,000 has been received by Southhaven Developments. These funds represent an investment in a development known as "Noosa Sanctuary", Noosa Sanctuary, Queensland, Australia.*
>
> *The investment by Fantasia was made pursuant to the terms and conditions set out in the previously provided Business Plan. Both Fantasia and Southhaven are bound by said terms and conditions."*

10. Mr. Sell acknowledges that Fantasia Ltd and the Plaintiff, 40 Acres Ltd were incorporated in the Cayman Islands and used solely as his entities for investment or asset holding purposes. Very little turns on this fact, save for a point of inference raised by Mr. DeLacy QC on behalf of Mr. Cassidy and which I will come to address in due course below.

11. Mr. Cassidy denies that the payment of AUD753,190 made by Beaufort on 10th August 2007, ("the Beaufort payment") to Mr. Sell's Credit Suisse account had anything whatsoever to do with the Noosa Sanctuary investment.

12. His case is that Mr. Sell's investment in Noosa Sanctuary was repaid at some unspecified time in 2001; less only accretions which had arisen, not from the capital of the investment itself, but by virtue of fluctuations in value of the AUD against the USD between the time of the investment in 1999 and its alleged return in 2001. He admits that those currency value resulted in accretions to Mr. Sell's benefit which are still owed to him, although there is no way of knowing now what their value would be as no banking records of the alleged repayment are still available. In fact, Mr. Cassidy was able to present no documentation whatsoever that evidences the alleged repayment of Mr. Sell's Noosa Sanctuary investment in 2001 or at any time before 10 August 2007 when Mr. Sell says it was repaid.

13. The closest Mr. Cassidy's case gets in this regard to documentary support is a note on Southhaven's letterhead bearing his name as signatory but unsigned by him and addressed "*Attention: Doug Sell*" and bearing the date 19.01.2001. In this document there is reference to a proposed "compromise" for the repayment of Mr. Sell's investment in Noosa Sanctuary.

14. Mr. Cassidy's testimony was rather equivocal about the provenance of this Note. Variously, it was that the Note was sent either "*to his understanding*" or "*by his recollection*", to Mr. Sell after the latter had been agitating for the return of his Noosa Sanctuary investment made through Fantasia Ltd.

15. The following paragraphs of the Note are relevant:

> *"We refer [to] the various conversations re your client Fantasia ....*
>
> ....
>
> 4. *We note your comments that your client "needs the money now, is worried that the $A will fall further and only thinks in terms of US$ and that he has been a good client for many years.*
>
> 5. *We also recognise that you have been helpful to Southhaven and its investors in Cayman, both in selling real estate and ensuring we were made aware of opportunities at very early points of investing.*
>
> 6. *Having considered the situation, we suggest a compromise, which may ensure you retain your client and continue to advise Southhaven of opportunities in Cayman.*
>
> *Your client's investment is repaid in full, but without accrued interest. Your client may participate in the profit sharing (if a profit is made) at the conclusion of the Investment, but his share of profits may not exceed the dollar value of his Forex loss.*
>
> *We trust that this compromise will be acceptable to all parties and protect the various business relationships.*
>
> *Yours sincerely*
>
> *William Mark Cassidy".*

16. Mr. Cassidy's case is that these terms of the Note, although not expressly, nonetheless implicitly show that Mr. Sell was repaid his capital at about the date of the Note – 19 January 2001 – with further payment to offset the "Forex losses", to be made by way of "*a share of the profits*" at the conclusion or liquidation of the investment. Thus, he says, the Note supports his case that the payment later made to Mr. Sell of AUD753,190 on 10 August 2007 had nothing to do with the return of the Noosa

Sanctuary investment but evidences the entirely separate investment he claims to have made with Mr. Sell.

17. This is to say the least, a remarkable account coming from a businessman who is described by one of his own witnesses and business associates (a Dr. John McCann) as being "*very meticulous*" in his recording and accounting for all business dealings.

18. Mr. Cassidy's position becomes even more remarkable when considered in the light of the documents upon which Mr. Sell relies in proof of his case which is that the Noosa Sanctuary Project repayment was not made in 2001, but by way of the Beaufort payment on 10 August 2007 in the amount of AUD753,190.

19. In this regard, Mr. Sell's case is a simple one. It is that as the Noosa Sanctuary investment had a turnaround time estimate of 18 months, it was indeed expected to have borne fruit by 2001 but this was known to have been made impossible by events which had occurred in Queensland. These included objections by the planning authorities in Queensland. When they arose, he then acknowledged those reasons for the delay and recognising also the nature of an equity investment as one not bound to be repaid on demand, he waited until 2005 before demanding repayment. He testified that by 2005 he felt that enough time had passed to allow for the resolution of planning issues and the successful realisation of the project and so on the 17th May 2005, wrote in an email which was presented in evidence, in the following terms to Mr. Cassidy:

> *"Hello Mark*
>
> *Hope all is well down under. My client has asked to be paid there (sic) original investment of $500,000 Australian. This was originally supposed to have been paid 18 months from December 1997. This would have meant it is six years in default. My client has been extremely patient with this investment and wonders what would of*

happened (sic) had the roles been reversed. The balance of this money can be paid at completion. This delay in payment has severely affected my clients' financial picture. Thank you in advance for your help in this matter".

20. It was accepted by Mr. Sell during his testimony that those references to "*December 1997*" and "*May 1999*" respectively as the time of investment and time of due repayment, were wrong. The Noosa Sanctuary investment was in fact made on 18 January 1999 through Fantasia Ltd. (as confirmed at paragraph 8 above) and so the repayment would have been due not 18 months from December 1997 (i.e. May 1999) but around 18th June 2000, 18 months after investment on 18th January 1999.

21. Mr. Cassidy's argument in this regard as put by Mr. DeLacy, is that this – the correct chronology - goes to support the Note of 19th January 2001 as being an implicit record of the alleged repayment of the investment (less only the Forex account) as being one which was "near contemporaneous" to when repayment was actually due in or around 18th June 2000; assuming of course, that one might be prepared to overlook the 7 month gap from 18th June 2000 to 19th January 2001.

22. In my view nothing of significance turns on this factual error in Mr. Sell's email to Mr. Cassidy on 17th May 2005. As Mr. Sell admitted, his reference to the dates of investment and expected repayment could have been "slightly off". What, to my mind, is most compelling about his email, is the fact that it attests that the Noosa Sanctuary investment had not been repaid as of the date the email itself was sent; that is: the 17th May 2005.

23. One would expect that if such a bold assertion were untrue, it certainly would have affected relations between these two confidantes in their dealings thereafter. At the very least, it would have dictated a reversion to form on the part of Mr. Cassidy, as

the meticulous record keeper when, as he claims, he later paid the very large sum of AUD753,190 to Mr. Sell on 10 August 2007, not as Mr. Sell's return on investment, but as his investment with Mr. Sell.

24. By the way, I note here the euphemistic use of the word "client" as between the parties in their correspondence, but nothing in my view, turns on this. As Mr. Sell explained and as I accept, this was simply code used by them when making respective reference to themselves for reasons of confidentiality. Both transacted through corporate entities used effectively as alter egos doubtless being mindful of the tax implications of holding assets in their own names. Far more important to the true resolution of this dispute, is the response to Mr. Sell's email of 17th May 2005 demanding payment and sent also by email by Mr. Cassidy within two hours of receipt on the 17th May 2005.

> *"Dear Doug*
>
> 1. *Your client was given a Business Plan, which contained a Disclaimer from the Company and individuals involved.*
>
> 2. *There were/are no company or Personal guarantees.*
>
> 3. *At great expense the Company has had to take the local Govt to Court four times, your client has not been asked to contribute to the Debentures required to finance these costs* [This is a reference to the planning objections.]
>
> 4. *Further, to protect the Approvals and make the property more appealing to the potential Purchaser approximately $4 million has been spent on civil work and associated professional fees in the past 12 months.*
>
> 5. *Your client has not been asked to assist in these costs, given their cash flow problems. Other existing investors have contributed these funds at times when it has caused problems with cash flow on other projects, but they and I believe it was essential to do so to protect our original investment.*

6. *We do not appreciate your comment "had the roles been reversed". There are never any guarantees when one invest (sic) in property, as your client well knows!*

7. *Neither the company or (sic) anyone is "in default". You will recall the disparity in the Sale price of the blocks at Rum Point, US$625K to US$435K for similar blocks, because of the market conditions. One could assume that the market in Cayman is quite bad at present, given Ivan [a reference the devastating hurricane of September 2004].*

8. *Your client will receive its share of profits WHEN THE LAND IS SOLD! (Emphases added).*

9. *We shall advise when a contract has been executed. Given the size of the project, still outstanding BA extension and the still unfinished Civil Work (given record rain in Noosa), we hope (not guarantee!!) to have a contract within 6 – 8 weeks, but settlement would normal be 60 to 90 days thereafter. NO ONE CAN GUARANTEE THE TIMING!"*

Yours sincerely
Mark Cassidy"

25. Despite the clear implication of this response as being an undertaking to repay – as one of the "existing investors" – Mr. Sell's investment still due as asserted in Mr. Sell's email two hours before, and undertaking to do so upon the completion of the first contract of sale expected "*within 6-8 weeks*" with "*settlement ... 60-90 days thereafter*"; Mr. Cassidy's case is that this response was an undertaking to pay only the Forex account which he asserts was all that was then still owing on Mr. Sell's investment. Thus, he asserts that the words in emphasis "*share of profits*" were referencing not a repayment of the Noosa investment as a whole inclusive of capital and "profits" (and so inclusive of the Forex currency fluctuations) but only the Forex account.

26. And all this, notwithstanding that the Forex account was itself likely to be a significant amount of money with no reference to it either in the transactional documentation that accompanied the Beaufort payment itself or in any other contemporary document.

27. Anticipating the further obvious concern of a trier of fact that no reference at all is made in his responsive email of 17 May 2004 to any earlier return of capital; there was no need, said Mr. Cassidy, expressly to note that the capital had already been repaid because he and Mr. Sell both knew that it had been repaid and so both implicitly understood that this responsive email of his was all just about the Forex account then (and even now) still to be paid.

28. When it is considered that this email was immediately responsive but sought in no way to refute the plain assertion in Mr. Sell's email sent only two hours earlier that "*my client*" had not been repaid "*the original investment of 500K Australian*", Mr. Cassidy's is simply an unbelievable account.

29. Seeking nonetheless to fill to his advantage, the void left by the absence of documentation in the case, Mr. Cassidy also argued that as the Beaufort payment of AUD753,190 was not made until more than two years later on 10th August 2007 – Mr. Sell not having made any further written demand for repayment of his investment in the meantime after 17th May 2005 – the only explanation must be that he had already received payment in 2001 of his capital and was content to await payment of the Forex Account until the Nossa Sanctuary investment became liquid.

30. This argument would however, overlook the fact that there was, as the evidence reveals, constant contact and ongoing dialogue between the then two closely knit

business partners, not just about their Noosa investment, but also about investment perspective or actual investments here in Cayman.

31. In paragraph 6 of his responsive email of 17th May 2005 set out above, Mr. Cassidy gives an insight into some of this in his reference to the Rum Point transactions.

32. Two further pieces of correspondence presented in the evidence show in particular, that there was also ongoing dialogue between the two before the Beaufort payment was made on 10th August 2007. These were sent under cover of a short email from Mr. Cassidy to Mr. Sell on 23rd August 2006 while they were both in Cayman:

> *"Dear Doug*
>
> *23.8.2006*
>
> *Further to our discussion at lunch, please find attached two letters.*
> *I am on 9166259 [a local cell phone number] until Sept. 3*
>
> *Cheers*
> *Mark"*

33. The first of the two letters referenced in this email was sent on Southhaven's letterhead, also dated 23 August 2006, addressed to Mr. Sell entitled "*Re SMB* [Seven Mile Beach] *Condo and Noosa*"

34. The whole purport of this 23rd August 2006 letter (the "first letter") was to further explain the delays with the Noosa Sanctuary project and to elaborate on plans already discussed between the two men for the acquisition of property on SMB, all of which was contingent upon the Noosa investment becoming liquid.

35. The first letter also conveyed encouraging news of a bid by a potential buyer named Resort Corp. – an Australian Gold Coast based Development Company – that had made an offer (with a substantial deposit) to buy the entire Noosa Sanctuary Project.

36. The second letter enclosed with this email presented proof of this offer, as it came from Resort Corp itself addressed to Mr. Cassidy (per Director of Aqua Blue (Noosa) Pty Ltd. as the corporate developer) and concluded:

> *"....We propose to now provide to you a new offer to acquire the property which will be a proposal to acquire it unconditionally. We will make this offer in the first week of September 2006."*

37. This, I find to be - as it particularly purports – evidence of good faith efforts on Mr. Cassidy's part to realise and repay his investment, efforts by which Mr. Sell could reasonably have been placated to bide time, despite having demanded repayment in May 2005.

38. As events transpired, the Resort Corp proposal did not materialize but there is shown to have followed on December 19th 2006, an email from Mr. Cassidy to Mr. Sell in further placatory terms as follows:

> *"Dear Doug*
>
> *After many promises, we do not yet have an unconditional contract. Three parties (including the one who had been on Contract before) have had valuations commenced as part of the final finance approval process.*
>
> *Australia goes on vacation until mid Jan, hopefully we shall obtain the necessary contract at that point....Seasons Greetings. May 2007 be a great year for us all. Cheers, Mark"*

39. And then finally - and one might think with a great sense of relief for them both - on 30 April 2007 this email from Mr. Cassidy to Mr. Sell:

40. *"....*

> *Purchaser of Noosa paid a substantial deposit today and the contract is unconditional. Balance of deposit May 14 settlement June 25. But as we all know not sold until ALL THE MONEY IS IN THE BANK. Hopefully the AUD$ will hold above .83 US.*

Will advise on May 14 re balance of deposit. Then please provide Bank details for TT; given "TT time and cleared funds" expect in your Cayman Account July 5-7. But not sold until money in BANK!"

41. Mr. Sell's evidence is that as matters transpired this was indeed the promise by which his investment in Noosa Sanctuary was finally returned and returned in its entirety. The funds did not arrive on July 5-7 as promised, but that they did by way of the Beaufort payment on 10th August 2007 in the amount of AUD753,190 representing the return, at once, both of his capital and "profit" inclusive of any currency fluctuations. He testified that the payment was paid to his personal account as the banking documents show (not to Fantasia Ltd which had by then been struck off the Register of Companies) and accepted by him as full and final payment without regard to any purported outstanding payment for Forex fluctuations.

42. Having thus received the satisfactory return on his investment with Mr. Cassidy, Mr. Sell testified that he was trustful and confident that any further investment with him would be safe and thus it was that he came, on 16th February 2009, to reinvest his returns (then increased on bank deposit to AUD811,834.71 having been retained on deposit in that currency) and the further sum of USD531,503; being the proceeds of real estate sales commissions he had earned from his real estate business here in the Cayman Islands.

43. Notwithstanding that those two sums together amounted (at the rate of exchange then prevailing) to over 1.3 million USD and so more than twice the value of the amount of AUD753,190 returned to Mr. Sell only 18 months earlier on 10 August 2007; Mr. Cassidy's case is that they were paid to him by Mr. Sell as being the return on the AUD753,190 which he asserts, was <u>his</u> investment with Mr. Sell.

44. In stark contrast with the ample documentation of Mr. Sell's investment in Noosa Sanctuary, there is, as already noted, a complete absence of any documentation to support this alleged investment by Mr. Cassidy.

45. Taken by itself, his assertion of a magical increase in investment of more than a hundred percent explained by Mr. Cassidy only on the basis that "his" AUD753,190 had been given to Mr. Sell for investment in very profitable "*off the plan*" real estate transactions in the Cayman Islands – simply defies belief.

46. When the assertion is considered in the vacuous absence of any documentary evidence whatsoever to support either the payment of the AUD753,190 as being such an investment or to support the existence of the alleged "*off the plan*" investment scheme itself, I am compelled to reject it.

47. This is a conclusion to which I am compelled irrespective of what one makes of the Note of 19th January 2001 allegedly sent by Mr. Cassidy to Mr. Sell and irrespective of whether or not it actually was in existence at that time, rather than contrived as a late forgery to suit Mr. Cassidy's case.

48. As already mentioned, its provenance is at best doubtful – apart from the equivocation about its transmission to Mr. Sell it is said to have been serendipitously found by Mr. Cassidy's brother in a filing cabinet as the single surviving Southhaven record relating to the alleged return of Mr. Sell's investment capital.

49. I regard the evidence about the provenance of the Note to be most unsatisfactory. I reject it as evidence that Mr. Sell was repaid his investment in the Noosa Sanctuary Project in 2001.

50. I find that he was not repaid until 10 August 2007 when he was repaid capital and "profit" at once by way of the Beaufort payment in the amount of AUD703,190.

51. I find that the payment of AUD811834.75 made by him to Mr. Cassidy on 16 February 2009 represented the Beaufort payment money plus accrued interest having been kept by Mr. Sell on deposit in his Credit Suisse account from receipt in August 2007 until then (and as this deposit is shown by the Credit Suisse Account statement).

52. This last is a fact which, by itself, belies the notion that this was money sent to Mr. Cassidy to be invested in "off the Plan" Schemes, as such schemes, even if capable of yielding the fantastical returns asserted by Mr. Sell, would surely have required the actual investment in them of the money, not allowing for it to have been kept merely on deposit.

53. I find that the sum of USD531,540 also admittedly paid by Mr. Sell to Mr. Cassidy on 16 February 2009, represented monies earned by Mr. Sell as sales commissions from his real estate business.

54. Both of the payments (AUD811,834.75 and USD531,540) I find were made, as Mr. Sell testified, to be held "on trust" by Mr. Cassidy to await instructions for investment.

55. The payments were actually made to Mr. Cassidy in the name of the plaintiff 40 Acres Ltd – the name in which the Credit Suisse account, of which Mr. Sell was beneficial owner, was then held. The monies which were actually held by Mr. Cassidy on bailment or on a bare trust, were repayable on demand.

56. Nothing, in my view, turns upon the fact that Fantasia Ltd had, in the meantime after it was made in 1999 and before his Noosa investment was repaid in August 2007, been allowed by Mr. Sell to be struck off the Register of Companies in the Cayman Islands. I accept, as he explained, that the clear understanding existed between himself and Mr. Cassidy that the repayment would be due to him personally

irrespective of the investment through a company, and so it is hardly surprising that the Beaufort payment was remitted to Credit Suisse in the name of Mr. Douglas Ray Sell as beneficiary." I reject Mr. Cassidy's contention that the demise of Fantasia Ltd in the meantime, betrayed Mr. Sell's thinking then that there was no need to keep that company alive to receive the return of "its" investment, because the investment had already been repaid.

57. I accept that by the time, on 2 February 2009 when Mr. Sell decided to send the two sums amounting to approximately USD1.3 million to Mr. Cassidy to be held for reinvestment, Mr. Sell had opened the Credit Suisse Account in the name of the Plaintiff 40 Acres Ltd. and hence the remittances sent to Southhaven by 40 Acres Ltd, as payer.

58. I find for the Plaintiff in terms of its statement of claim.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

May 17, 2013