Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007HCV 02583

BETWEEN	CAN-CARA DEVELOPMENT LTD	CLAIMANT
A N D	NEW ERA HOMES	DEFENDANT

Mr. C. Samuda instructed by Samuda & Johnson for Claimant
Mr. S. Kinghorn instructed by Kinghorn & Kinghorn for Defendant

Heard: 15th and 24th August, 2007

MANGATAL, J

1. This is an application by the Claimant for the following relief:-

   a) That the Defendant be restrained until the arbitration hearing or trial of this action or until further order in the meantime from doing whether by itself or by its servants or agents or any of them or otherwise howsoever the act of entering into an agreement with any other party for such party to be connected to the Treatment Facility and to be allocated the 120 units or any portion thereof which were allocated to the Claimant under the Cost Sharing Agreement;

   b) The Defendant must inform the Claimant in writing at once of any agreement which it has or intends to enter into with any other party for such party to be connected to the Treatment Facility and to be allocated the 120 units or any portion thereof which were allocated to the Claimant under the Cost Sharing Agreement.

2. The leading case in the area of interim and interlocutory injunctions is the case of **American Cynamid v. Ethicon** [1975] A.C. 395 where certain guidelines were set out.

These are as follows:-

(a) The court must be satisfied that the Claimant's case is not frivolous or vexatious and that there is a serious questions to be tried. The material available to the court at the hearing of the interlocutory injunction must disclose that there are real prospects of success in the claim for the permanent injunction at the trial.

(b) Provided that it is established that there is a serious issue to be tried, then the governing consideration is the balance of convenience.

(c) One of the many factors which the court must consider in looking at the balance of convenience, and the first factor that the court should look at, is the question of the adequacy of damages to either party, and the financial ability of the other side to pay those damages. If damages in the measure recoverable at common law would be an adequate remedy for the Claimant and the Defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted.

If on the other hand damages would not be an adequate remedy for the Claimant, the court must then consider whether damages in the measure recoverable at common law would be an adequate remedy for the Defendant and whether the Claimant would be in a financial position to pay those damages.

(d) It is where there is doubt as to the adequacy of the respective remedy in damages available to either side that the question of the balance of convenience in a general sense arises.

(e) Where other factors appear evenly balanced it is a prudent approach to take steps to preserve the status quo.

(f) There may be special factors in the circumstances of particular cases which the court may have to take into consideration.

3. The main factual substratum in this case may be summarized as follows:-

A) In 2006, according to the Defendant, and 2005 according to the Claimant, the Claimant and Defendant were integrally engaged in discussions along with West Indies Home Contractors (WIHCON) regarding a proposed agreement amongst these 3 companies for construction of a sewerage treatment plant system at Bernard Lodge, St. Catherine. The discussions provided for the sharing of the costs for the construction of the plant on a prorated company usage basis. The parties also agreed that the cost sharing agreement would be reduced into writing. From a s far back as November 2006, the Defendant was indicating that time would be of the essence in relation to the Claimant's payment of its portion of the costs and that interest would accrue at a rate of 18% per annum.

B) The Defendant constructed and made operational the Treatment Facility on or before October 13, 2006. The cost of construction to the Defendant exceeded $127,000.000.00.

C) On the 3rd of April 2007 the Claimant and the Defendant entered into a written Agreement "Cost Sharing Agreement" by which the following terms were agreed, amongst others:-

(i) The Defendant would design and construct certain Sewerage Treatment Facilities;

(ii) The Claimant would be allowed to connect to the facility to the extent of 120 units.

(iii) The cost attributable to the Claimant would be $10,939,500.30.

D) Clauses 3, 13 and 14 of the Cost Sharing Agreement provided as follows:-

"3. Payment by CAN CARA for their share of the cost can be made in full or in installments. If payment is made in installments, the installments must be completed by April 2007 and New Era reserves the right to charge interest on the outstanding balance at the rate of 18% per annum on a compound basis calculated monthly. In either case, payment would be based upon the presentation of the Engineer's Cost Estimate.

13. In the event of a breach of any of the terms and conditions of this agreement, the offending party or parties shall be entitled to make good the breach at their expense within a period of seven (7) calendar days from the date on which the breach was brought to the offending party or parties in writing.

If the offending party or parties fails to rectify the breach within the stated period, the offended party or parties may terminate the agreement immediately without prejudice to the rights of any of the parties accruing before the termination. It is understood that the parties will carry out their obligations in good faith and resolve to settle all differences within five (5) calendar days failing which the parties may be entitled to refer the matter

to arbitration. Further, Can-Cara agrees to indemnify New Era for any claims, loss or injury sustained as a result of a breach or the error, mistake or failure of Can-Cara.

14. The parties agree to jointly appoint a sole arbitrator to resolve disputes that have not been settled in accordance with the rules set out in 13. If after seven days the parties cannot agree to a sole arbitrator, the parties agree to solicit the assistance of the President of the Bar Association to appoint one. It is also agreed that the ruling of the Arbitrator is final and binding on both parties."

E. The executed Agreement was sent after some time to the Defendant under cover letter dated March 26, 2007 by the Claimant's attorneys-at-law Messers Phillips, Malcolm, Morgan and Matthis. In that letter the Attorneys closed by saying "We wish to advise that Can-Cara intends to pay the sum of $10,939,500.30 on or before April 2007, as specified in the enclosed Agreement."

F. The Defendant's Chairman and C.E.O. Joseph Linton states that in March 2007 the Claimant entered into an Agreement for Sale and an Agreement for sale of Plans with 2 purchasers to sell the Purchasers the Shopping Plaza known as Fountains of Portmore, St. Catherine, together with Building Plans, Working Drawings and the Building Approval for the said Plaza. The Defendant states that it was a term of the Agreement for Sale of Plans that Can-Cara would provide a sewerage connection and that the

were in place for payment of these monies but that payment was subject to certain matters.

J. By letter dated May 3, 2007, from the Defendant's C.E.O. Mr. Taddeo to the Purchasers' Attorneys-at-law which was copied to the Claimant, the Defendant responded and indicated that the Claimant "has failed to fulfill their obligations under the Cost Sharing Agreement. Accordingly, the contract is now at an end. All this juncture we cannot extend the time for payment. A Cost Sharing Agreement is no longer available. We are constrained to now offer the facility on the open market."

It is not in dispute that the Claimant received a copy of this letter on the 7th day of May 2007.

K. On the 7th May 2007 Jennifer Messado & Co. again wrote to the Defendant on behalf of the Purchasers saying that she had instructions to pay to the Defendant all sums due and owing by the Claimant together with 10% interest by 6th July 2007 and asking that this undertaking to pay be accepted on the understanding that the Purchasers would take over the agreement offered to the Claimant regarding the sewerage infrastructure for this development.

L. By letter of May 14, 2007 the Defendant responded to Jennifer Messado & Co and referred to their letter of May 3, 2007, reminding that the Agreement between the Defendant and the Claimant had been rescinded. The Defendant also advised "... that at this time, there is no available

facility to accommodate any additional connections into the Sewage Treatment Plant."

M. Under cover of letter dated 22nd of May 2007, the Claimant's Attorneys-at-law attempted to pay over the sum of $11,068,991.00 to the Defendant by way of the Purchasers' attorneys Jennifer Messado & Co.'s cheque.

N. Under cover of letter dated May 22, 2007 the Defendant returned the cheque on the basis that the Cost Sharing Agreement is at an end and there is no capacity in the Sewerage Facility.

O. Under cover letter dated May 24, 2007 the Claimant's attorneys once again attempted to send the cheque and opined that the Cost Sharing Agreement has not been terminated. The letter states: -

"In order for New Era to validly terminate this Agreement it must comply with Clause 13, which provides, in part as follows:

"In the event of a breach of any of the terms and conditions of this agreement, the offending party or parties shall be entitled to make good the breach at their expense within a period of 7 calendar days from the date on which the breach was brought to the offending party or parties in writing. If the offending party or parties fails to rectify the breach within the stated period, the offended party or parties may terminate the agreement absolutely without prejudice to the rights of any of the parties accruing before the termination."

As far as we are aware, New Era has not brought to Can-Cara's attention, in writing, the breach as required by the said Clause 13 and given Can-

Cara the opportunity to make good the breach at their expense within a period of 7 calendar days from the date on which the breach was brought to Can-Cara's attention, in writing." The Defendant again returned the cheque.

P. By letter of June 21, 2007 the Claimant required the Defendant to advise whether they were prepared to submit to arbitration the dispute which had arisen and by letter of June 27, 2007 the Defendant responded in the negative.

4. **The Issues**

In the course of argument, Mr. Samuda on behalf of the Claimant sought to argue that the Claimant does not accept that non-payment of the sum of $10,939,500.30 by April 30, 2007 required under the Contract, was a breach. In seeking to persuade the court that there are serious issues to be tried which it is not the court's function to adjudicate upon at this stage, he submitted that even before one gets to the fact of whether there was or was not a breach, the court would have to be satisfied that the parties adhered to the methodology of calculating the amounts due, the non-payment of which the Defendant predicates his rights on.

5. In my view this argument is manifestly unsustainable for the reasons that –

(a) It is not the pleaded case.

(b) The agreement was signed by both parties, and certainly as regards the principal sum of $10,939,500.30 claimed due from the Claimant, I cannot

see how the court (or arbitrator) could now reasonably be required to go and examine the correctness of that figure which the parties, two commercial corporate companies, settled upon and agreed to.

(c) The letter from the Claimant's Attorneys dated March 26, 2007, written after numerous correspondence from the Defendant requiring payment, clearly indicated that the Claimant intended to pay the sum of $10,939,500.00.30 by the end of April 2007 as required in the Cost Sharing Agreement.

(d) In his own affidavit sworn to on 26th June, 2007, paragraph 16, Mr. Lincoln, the Claimant's C.E.O (indeed, as do his attorneys in letter of May 24, 2007), refers to the Claimant as being in breach. After referring to Clause 13 of the Cost Sharing Agreement, Mr. Lincoln states: -

"Can-Cara was not in breach of the Cost Sharing Agreement until May 1, 2007 and states that the Defendant did not on May 1 or any date after May 1, 2007 bring this breach to the Claimant's attention in writing and give to Can-Cara the opportunity to make good the breach as set out in Clause 13. (my emphasis)

In addition, the correspondence between the parties, and the wording of the Cost Sharing Agreement itself indicates that the fact that the Defendant reserved the right to charge interest does not mean that non-payment of the sum due from the Claimant by the time stipulated, i.e. end of April 2007, would not amount to a breach. This is not a case such as **Sky Petroleum Ltd v. J.P. Petroleum Ltd** 1974 1 W.L.R. 576, referred to in the Defendant's written submissions, where there were disputes as to the figures on account.

6. Mr. Samuda also sought to argue that the Defendant's purported termination of the Agreement before giving 7 days notice in writing to the Claimant of the Claimant's breach was itself a breach. He argued that an issue arises as to whether, if the Defendant's position as to its right of termination was misconceived, it would lie in the mouth of the Defendant to say that the Claimant was in breach.

7. The main thrust of the Claimant's case as I understand it, however, is that the Claimant is saying that it was not in breach of the Cost Sharing Agreement until May 1, 2007 and the Defendant did not on that date or any date after May 1, 2007, bring this breach to the Claimant's attention in writing and give the Claimant the opportunity to make good the breach within a period of 7 days from the date on which the breach was brought to the Defendant's attention. The Claimant is saying that the Defendant in breach of the Agreement refused to accept the payment tendered by the Claimant on May 22, 2007.

8. The Affidavit of Junior Lincoln exhibits copies of the letters dated April 30, 2007 to the Claimant from the Defendant and dated May 3, 2007 from the Defendant to Jennifer Messado & Co. courtesy copied to the Claimant. In his Affidavit sworn to on July 9, 2007 at paragraphs 19 and 21, Mr. Taddeo speaks of writing the letter of April 30, 2007 to the claimant and of the correspondence of 3rd May 2007 being copied and delivered to the Claimant. Mr. Lincoln in his 2nd Affidavit sworn to on 18th July, 2007, responded to Mr. Taddeo's Affidavit, but did not controvert, or indeed respond at all, to these 2 paragraphs 19 and 21. The uncontroverted evidence of Judy Ann Kinghorn and Andre Bowen in their respective Affidavits filed 13th and 24th July respectively, is that the correspondence were faxed to the Claimant, but also hand delivered to the Claimant

respectively on the 30th April and 7th May 2007. There is therefore no denial by the Claimant, and no issue that they did not receive those correspondence.

9. It would seem therefore that the main issue raised by the Claimant is whether those correspondence comply with Clause 13 of the Cost Sharing Agreement. The Claimant is saying that since the letter of April 30, 2007 is informing the Claimant of what would be a breach, that does not and could not inform the Claimant of a breach or the breach, because on that date the breach had not yet occurred. The Claimant also seems to be arguing that the Defendant's letter to Jennifer Messado & Co. copied to the Claimant, does not comply with Clause 13.

10. I must say that the argument here strikes me as plainly very technical and literal. This is an argument being put forward by a party who itself alluded to the relevant Clauses in the Agreement from the outset, requiring payment by a particular date. Yet this Claimant is turning around and saying "I was in breach, but you never notified me and consequently I did not get proper time to remedy my breach; therefore you have no right to terminate."

11. Be that as it may, it is an argument which the Court must address directly as the Claimant is placing great reliance on it. In a case such as this, the Court dealing with the application for interlocutory injunction is really concerned mainly with the construction of a written document and the relevant factual matrix is not really in dispute. "In such a case the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief" – **Fellowes v. Fisher** [1975] 2 All. E.R. 829, at p. 843 – Sir John Pennycuick.

12. When I look at Clause 13, whilst it appears to require that the breach be brought to the offending party in writing "(the words "to the attention of" are not there), it does not require that the writing which brings the breach to the attention of the Claimant be directed or addressed to the Claimant. It simply requires that the breach be brought to the Claimant in writing. In my judgment, the copy letter dated May 3, 2007 addressed to Jennifer Messado & Co, copied and delivered to the Claimant in which the Defendant states in writing "Can-Cara Co. Ltd. has failed to fulfill their obligations under the Cost Sharing Agreement ... At this juncture we cannot extend the time for payment" is either by itself, or when taken together with the letter of April 30, 2007, a compliance with Clause 13 of the Agrement in that it brings the breach to the attention of the offending party in writing. Clause 13 only requires that the breach be brought (to the attention of) the Claimant in writing and in my judgment there is no requirement that the writing should speak about the 7 day period. Where Clause 13 speaks about "if the offending party or parties fails to rectify the breach within the state period", "the stated period" means the period stated in Clause 13 and not in the writing or written document conveying information as to the breach.

13. In the present case, the Claimant received the letter of May 3 on May 7, 2007. The Claimant would therefore have had up to May 14, 2007 (7 calendar days from May 7) to make good the breach. It did not do so. In fact, although in its Particulars of Claim Para. 10, the Claimant says that it took issue with the Defendant on its purported termination of the Agreement but the Defendant refused to retract, there is no evidence of anything, whether oral or in writing, emanating from the Claimant to the Defendant from April 30 up to May 14 for example, evidence that the Claimant responded to the

April 30 letter and said "Whoa, I am not yet in breach, here is my cheque, or it's coming by May 7." There is also nothing in response to the letter of May 3, 2007 received May 7, saying "You have indicated breach but I am still within my 7 days, here is my cheque, you cannot say the contract is at an end."

14. What appears to have happened here is that the Claimant had agreed to pay its portion of the Sewerage Treatment Facility Costs. At the time when it contracted with the Purchasers and agreed to provide a connection to the Sewerage Facility it had not yet paid the costs of the sewerage facility allotted to it. The Claimant placed itself in a position where its ability to pay the Defendant was tied up in the hands of the Purchasers who for whatever reason, did not pay over the amount due to the Defendant in time for the Claimant not to be in breach, or in time to remedy the breach as provided by Clause 13.

15. The Claimant is seeking specific performance of the Cost Sharing Agreement. I have grave difficulty in finding that there is a serious issue to be tried as regards the question of whether the Claimant was informed of the breach and had time to remedy its breach. In my judgment it clearly had the breach brought to its attention and failed to remedy that breach within 7 days.

16. No authority was cited to me which suggests that the fact that the Defendant may have misconceived its right to terminate or purportedly exercised the right prematurely by arguably acting as if the Agreement was at an end on May 1, 2007, would signify that the Defendant would not have had a right to treat the Agreement as terminated when the Claimant breached the Agreement by failing to pay, and in fact failed to remedy the breach within 7 calendar days. I agree with Mr. Kinghorn that the Claimant not having

sought to exercise its right to remedy the breach by May 14, 2007, within 7 days from May 7, 2007, the Defendant's misconception is irrelevant because the Cost Sharing Agreement governs when the contract may come to an end.

17. Although I agree that the Agreement does not spell out any automatic termination of the Cost Sharing Agreement and this is borne out by Clause 3, regarding interest and the scheme for Dispute Resolution set out in Clause 13, this cannot affect or water down the fact that if a breach notified to the offending party is not remedied in the time specified, the offended party has a right to terminate.

18. I am therefore of the view that there is no serious issue to be tried in this matter. However, in the event that I am wrong in taking that view, I go on to consider the Balance of Convenience and in that regard I turn firstly to the question of the adequacy of damages.

19. In this case the Claimant has contracted with Purchasers to sell the land which it seeks to develop and have connected to the sewerage facility. If the injunction sought is not granted and therefore they are unable to secure connection to the sewerage facility, then the loss it would suffer should the matter ultimately be resolved in its favour, would be the lost bargain if any under the proposed Agreement for Sale and/ or any excess costs of an alternative sewerage facility. This loss is readily quantifiable. Alternatively, if the Claimant is sued by the Purchasers for damages for breach of contract, such a loss or exposure would be quantifiable. It is noteworthy that under the Agreement between the Claimant and the Purchasers it was agreed that the Purchasers' Attorneys-at-law would have the authority to pay the Defendant the costs of the sewerage facility which were for the account of the Claimant. It was the Purchasers' Attorneys-at-law who were

requesting an extension of time for making payment and indeed on May 22, 2007, when the Claimant eventually tendered a cheque in payment, it was the Purchasers' Attorneys' cheque in the sum of $11,068,991.00. These circumstances constitute over-arching factors that all the more point to damages being an adequate remedy.

20. Mr. Samuda submitted that in the absence of any evidence of an alternative and viable option open to the Claimant in respect of an alternative sewerage facility, then it is reasonable for the court to infer that damages would not be sufficient. The Cost Sharing Agreement in its recitals speaks to the fact that the Claimant and Defendant had sought the requisite approvals to undertake housing and commercial development projects on lands in close proximity to each other in Portmore. In paragraph 5 of Mr. Lincoln's Affidavit of 18th July, 2007, he states that the design and development of the sewerage system was deliberate so as to accommodate Can-Cara's commercial requirements and the housing requirements of WIHCON.

21. There is however no evidence before me that there is no viable alternative or option, quite unlike the case of **Sky Petroleum v. V.I.P. Petroleum Ltd** [1974] 1 W.L.R. 576 where an injunction was granted to enforce a contract to supply petrol to the Claimant. In that case there was trade evidence that there was no great prospect of the Claimant finding an alternative supply and the Claimant might be forced out of business unless the court intervened. Damages were found to be an inadequate remedy.

22. I agree with Mr. Kinghorn that it is not sufficient for the Claimant to say "in the absence of evidence of alternative sewerage facilities," the court should draw an inference. It is for the Claimant to show by the evidence that there is no viable option. It is the Claimant that would be aware of its particular peculiar circumstances or that of

connected affected third parties and it should come forward and say so and provide the court with a proper evidential basis. The court cannot reasonably draw the inference which the Claimant asks it to draw and would really be indulging in speculation were it to so infer, which of course it must not do.

23. I am of the view that damages would be an adequate remedy for the Claimant. It is clear on the evidence and is common ground between the parties that the Defendant company is a company of substantial means. In addition to the evidence that the Defendant is one of the largest development companies in Jamaica with an asset base in excess of $2 billion there is also the supportive evidence that the Defendant solely funded the cost of the Sewerage Facility by paying over $127 million. The Defendant would be in a financial position to pay damages in the event the Claimant were to succeed at trial, such damages being compensation for the loss which the Claimant would have sustained as a result of the Defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial or arbitration. That being the case no interlocutory injunction should normally be granted and that would be so even if the Claimant appeared to have a strong case at this stage.

24. However, in the event that I am wrong on the question of the adequacy of damages for the Claimant, I go on to consider whether damages would be an adequate remedy for the Defendant. Although in paragraph 28 of the Affidavit of Mr. Taddeo, the Defendant claims in detail that it will suffer irreparable losses should the interlocutory injunction be granted and the Defendant ultimately succeed at trial, it appears to me that the Defendant will not suffer any losses that cannot be adequately compensated in damages.

25. However, I have serious doubts about the Claimant Co.'s financial ability to satisfy a substantial award as to damages. Although the Claimant has spoken of large balances on its balance sheets, there are no audit reports presented to the court in substantiation of this. It appears, that unlike the position regarding the Defendant's financial status, the parties are not in agreement as to the financial buoyancy of the Claimant. It is clear that the Claimant did not meet its obligation to pay the sums due to the Defendant in April 2007 and has given no explanation for its failure to honour an obligation which it clearly acknowledged. It waited to obtain funds from the Purchasers before attempting to tender payment. This would if anything suggest cash flow problems and causes me to doubt whether the Claimant would be in a financial position to pay damages should the Defendant ultimately prove successful at trial.

26. Since there is doubt as to the Claimant's ability to pay damages, then without more the interlocutory injunction ought not to be granted in favour of the Claimant.

27. In the event that I am wrong in my assessment as to the adequacy of the respective remedies in damages, I go on to consider the Balance of Convenience generally.

28. As Lord Diplock pointed out in the **American Cynamid** case (P. 511 – (f)) there may be special factors that should be taken into consideration in the particular circumstances of individual cases. This is in my judgment one of those cases that involve in large part the question of the construction or interpretation of written documents and on the facts disclosed in this case there is no credible dispute. The questions involved are really questions of law which are not so difficult that the court should refrain from looking at them at this stage. This is a special fecture of this case. Sir John Pennycuick

discussed in **Fellowes v. Fisher,** one of the difficulties presented by the principles laid down by Lord Diplock in the **American Cynamid** case. I find that it is hard to improve on Sir John Pennycuick's analysis and manner of expression, so I quote the passage at p. 843g – 844a: -

> *"By far the most serious difficulty, to my mind, lies in the requirement that the prospects of success in the action have apparently to be disregarded except as a last resort when the balance of convenience is otherwise even. In many classes of case, in particular those depending in whole or in great part on the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief. Indeed, many cases of this kind never get beyond the interlocutory stage, the parties being content to accept the* judge's *decision as a sufficient indication of the probable upshot of the action. I venture to think that the House of Lords may not have had this class of case in mind in the patent action before them"*

Sir John Pennycuick went on to consider the relative strength of the parties' case and the English Court of Appeal dismissed the application for interlocutory injunction.

29. In this case, I have said that based upon the issues raised, I find that there is no serious issue to be tried. Even if I am wrong in that regard, it seems to me that based upon the construction of the Cost Sharing Agreement, the Defendant's case is relatively stronger than the Claimant's. In my judgment, the case is not one where other factors

appear evenly balanced and therefore this court should not take steps to preserve the status quo. The balance seems heavily tipped in favour of the Defendant.

30. The application for the relief set out in the Claimant's Notice of Application for Court Orders filed on behalf of the Claimant and dated 2nd July 2007 is dismissed, with costs to the Defendant to be taxed if not agreed or otherwise ascertained.

Shopping Plaza would connect to the Treatment Facility. The law firm Jennifer Messado and Company represent the Purchasers and it was also a term of the Agreement for Sale of Plans between the Claimant and the Purchasers that the Purchasers' Attorneys-at-law had the authority to pay New Era the cost of $10,939,500.30 owed by the Claimant under the Cost Sharing Agreement and any accrued interest thereon, as part of the Sale price payable under the said Agreement for Sale of Plans.

G. By letter dated April 30, 2007 the Defendant wrote to the Claimant and reminded that payment was due no later than April 30, 2007. Mr. Taddeo, the Defendant's C.E.O. wrote "Failure to remit payment in full will be a breach of the Agreement and will effectively rescind this Agreement forthwith." It is not in dispute that this letter was received by the Claimant on 30th April, 2007.

H. The Claimant did not pay over the sum of $10,939,500.30 by the 30th April, 2007, as agreed or as it had promised to do.

I. By letter dated May 1, 2007 Jennifer Messado & Co. wrote to the Defendant amongst other matters, indicating that that firm was in receipt of correspondence between the Defendant and the Claimant for the payment of the sewerage "which was most certainly agreed to be paid by the 30th April, 2007." In that letter the Purchasers' Attorneys asked the Defendant to be good enough to extend the time for payment to the 31st June, 2007, with the appropriate interest, indicating that all arrangements