

BRITISH VIRGIN ISLANDS

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV2007/0041

**In the Matter of Montrow International Limited
And in the Matter of the Insolvency Act 2003**

BETWEEN:

KENSINGTON INTERNATIONAL LIMITED

Applicant

-and-

MONTROW INTERNATIONAL LIMITED (In Provisional Liquidation)

Respondent

Appearances:

Ms Karen Troy-Davies of Essex Court Chambers, London and Mr Robert Nader of Forbes Hare for the Respondent

Mr Lawrence Cohen QC of XXIV Old Buildings, London with him Mr Michael J. Fay and Ms Clare-Louise Whiley of Ogier for the Provisional Liquidator

2007: May 01, 02

2007: May 03

JUDGMENT

[1] **HARIPRASHAD-CHARLES J:** On 9 March 2007, this Court appointed Mr William Richard Tacon ("Mr Tacon") of Kroll (BVI) Ltd to be the Provisional Liquidator over the Respondent, Montrow International Limited ("MIL"). The application to appoint Mr Tacon was heard ex parte. Subsequent to his appointment, several applications have ensued. MIL has now applied for an Order that Mr Tacon shall swear an affidavit providing:

- (1) a full account of any and all contacts that Mr Tacon had with KIL, anyone representing or acting on behalf of KIL, whether in a

professional capacity or not and in particular any legal representatives of KIL in any jurisdiction before taking up his appointment, and disclose any minutes or notes made of the same;

- (2) a full account of any and all contacts Mr Tacon had with KIL, anyone representing or acting on behalf of KIL whether in a professional capacity or not and in particular any legal representatives of KIL in any jurisdiction since taking up of his appointment, and disclose any minutes, notes or other documentary record made at the same;
- (3) a full list of all documents and description of any information which Mr Tacon disclosed to KIL or any other individual or entity, together with the dates of any and each such disclosure, and make disclosure of those documents;
- (4) a written explanation of the reasons for any disclosure(s) which Mr Tacon has made other than that in the report to the Court dated 10 April 2007 ("the Report");
- (5) what copies of any and all documents have been disclosed to any party since Mr Tacon's appointment as Provisional Liquidator of MIL and Likouala S.A. ("LSA") began, indicating, in respect of each such document, when and to whom it was disclosed;
- (6) a full, unredacted copy of the Report.

[2] The application on behalf of MIL was supported by an affidavit sworn to by Mr Robert Nader, a Barrister of this Court and an associate of the law firm Forbes Hare. He stated that he is duly authorized on behalf of MIL to make this affidavit. In passing, the Court observes that to date, no director of MIL has stepped forward to offer any evidence in the numerous applications before the Court thus far.

- [3] Although the Notice of Application was procedurally defective in that it was made pursuant to CPR 28.16 (1) (b) and 34 which are inapplicable, both Counsel are agreed that the Court does have jurisdiction to hear it under its inherent jurisdiction and/or its supervisory role in respect of its own officers. I do not disagree with Counsel.

Grounds for the Application

- [4] The grounds for the application are found in Mr Nader's affidavit. At Paragraph 9, he stated that "MIL is profoundly concerned about Mr Tacon's relationship with KIL and his conduct generally. In the circumstances, MIL requires disclosure of various heads of documentation that are relevant to these concerns."

- [5] It appears that the reasons for bringing this application can be summarised as follows:

- a) Since his appointment, Mr Tacon has obtained documents and information which would ordinarily be confidential or subject to legal professional privilege as against third parties and has provided information so obtained to KIL and its legal representatives;
 - b) The Report provided to the Court contained additional comments which were not contained in the version that Mr Tacon gave to KIL and MIL;
 - c) In the body of the Report, Mr Tacon admits that he had received information from KIL, provided confidential information about MIL to KIL which he had received from third parties only pursuant to a court order for disclosure, and had meetings with KIL and its legal representatives;
 - d) Mr Tacon has retained lawyers who were also instructed by KIL, and
 - e) Mr Tacon was seen on Wednesday 11 April 2007 dining with solicitors for KIL, Counsel for KIL and a solicitor for another company that had sought and obtained information about MIL from its registered agent.
- [6] Learned Counsel for MIL, Miss Troy-Davies correctly sought leave to expunge the last reason from the affidavit.
- [7] It seems to me that a good starting point might be to narrate the history of the developments between the parties before the matter came to court as seen from the correspondence. By letter dated 13 April 2007, the solicitors for MIL expressed their

concern that Mr Tacon had been leaking confidential documentation to KIL and other parties and requested certain documents and assurances. Essentially, the request was the same as is requested in this application. On 17 April 2007, Mr Nader said that he received a letter from the solicitors of Mr Tacon. In that letter, the solicitors (i) sought to address the allegations of impropriety in Mr Tacon's dining arrangements; (ii) indicated that the Report makes specific reference to how their client had used the information that he had obtained during the course of his appointment and directed MIL to certain paragraphs; and (iii) stated that the report provides a full and comprehensive review of Mr Tacon's view of the liquidation up to the 10 April 2007 and that neither they nor Mr Tacon can see that any practical purpose would be gained by expending further time in providing Forbes Hare with the details it is seeking in its letter.

[8] MIL responded reiterating its concerns and stated that it was profoundly disturbed by "the Provisional Liquidator's continuation of KIL's strategy of litigation by ambush, illustrated clearly by his obvious attempts to communicate with the Court *ex parte*." MIL again requested that Mr Tacon provide it with the same information.

[9] On 27 April 2007, the Solicitors for Mr Tacon responded. They agreed that the Report in its redacted form was provided to Counsel for both KIL and MIL but stated that this was made clear to the Court which did not make any order requiring that the redacted parts be disclosed to any of the parties and that Mr Tacon was willing to disclose the redacted portion of the report if so directed by the Court. At paragraph 15 of his affidavit Mr Nader averred that the refusal of Mr Tacon to provide the requested information has increased MIL's concerns and forced MIL to make the present application.

Submissions

[10] Miss Troy-Davies submitted that the grounds for the application are fully encapsulated in the First Affidavit of Mr Nader. Stripped to its bare essentials, MIL is concerned that Mr Tacon has far greater contacts with KIL and its professional and legal representatives than were needed to enable him to perform his functions as Provisional Liquidator.

[11] First, MIL has asserted that Mr Tacon has applied to obtain documents which would ordinarily be either confidential or subject to legal professional privilege. Miss Troy-Davies submitted that the reference to privilege is not to indicate that documents in which MIL has legal privilege would somehow be privileged as against Mr Tacon, but clearly where Mr Tacon has sought to obtain documents over which MIL could assert a privilege as against third parties, the concern is that the Provisional Liquidator should not be waiving privilege that belongs to MIL in those documents, or in privileged information, and should not be disclosing privileged or confidential documents to third parties.

[12] Mr Cohen Q.C. submitted that this argument simply does not make sense as no document can be said to be subject to legal professional privilege against a provisional liquidator. I agree with Mr Cohen and find that this argument goes back to the use that is made of the documents and information by Mr Tacon which is dealt with below.

The redacted version of the Report

[13] Miss Troy-Davies first submitted that it is highly unsatisfactory that Mr Tacon provided the Report to the Court with additional information that neither party was privy to and to only assert that in view of the nature of its content, he is unable to disclose the redacted portions of it to the parties. She next submitted that the case of **Regina v H and Others** ¹ sets the appropriate standard when one is dealing with public interest immunity. She referred to paragraph 36 which states that:

“When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions.

- (1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.
- (2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

¹ [2004] 2 AC 134.

- (3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered. If No full disclosure should be ordered.
- (4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?
- (5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.
- (6) If limited disclosure is ordered pursuant to (4) and (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.
- (7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final once-and-for-all answer but as a provisional answer which the court must keep under review.”

[14] Miss Troy-Davies submitted that sub-paragraph 2 above concerns two parties to litigation, one seeking disclosure from the other, but in this case it is a party seeking disclosure from an officer of the Court who has reported to the Court with information not shown to the parties. As to paragraph 3, there has been no suggestion at all that there is a public interest in withholding the information and if there is no public interest full disclosure should be ordered. In respect of paragraph 4, MIL cannot know what it is that is needed to protect its particular interests because it has no idea what the Court knows. She argued that the concern is that an officer of the Court has reported information to the Court which could affect the interest of the parties but which has not been disclosed to them.

[15] Mr Cohen Q.C. submitted that normally a party has the right to see what another party has said to the Court. This, he said is not a universal rule as public interest immunity

applications both in criminal proceedings and in the winding up of companies on the public interest ground have frequently demonstrated in England. He further submitted that attention was drawn to the fact that there were two redactions on the date of the hearing. The Court was aware and did not make an order requiring the redactions to be known to the parties. He stated however that, if the Court so orders, then Mr Tacon will make the redacted information available to the parties.

[16] I do not think I need to consider the authority given at this stage and more importantly on this application. This is an application for disclosure from Mr Tacon. The Court was told that there were two redactions. While I made no formal order in respect of the redactions, I implicitly agreed that neither party needed to be privy to the information contained therein at this stage of the proceedings. In the event that I were wrong in the exercise of my discretionary powers, then that is appealable. In my opinion, this is the avenue that MIL should have pursued or, perhaps, can still pursue. Miss Troy-Davies invited the Court to revisit that decision but it is a trite principle of law that I would be unable to do so unless there is evidence of some material change in circumstances or that I was misled as to the factual position before me when I made the Order. No such evidence has been adduced.

[17] To say the least, it is regrettable that MIL sought to and continues to impeach both KIL and their representatives of ambush. What is even more regrettable is that MIL has shifted its target to Mr Tacon, a professional accountant of many years of experience presently working with the respectable and established accountancy firm of Kroll. Not only is Mr Tacon a professional but he is well-known to this Court, having been appointed a Liquidator on numerous occasions. In my view, Mr Tacon has done exactly what this Courts expects a Liquidator to do: to take a neutral role in these proceedings. Mr Tacon made it clear to the Court and the parties that there were redactions. I am not clear how ambush arises. For my part, it would be dishonest of an officer of the Court who becomes privy to certain information obtained during the course of his duties to conceal such information from the Court.

Misconduct by Mr Tacon

- [18] It was said that Mr Tacon admitted that he received information from KIL and provided information about MIL to KIL. This is said to be found in Mr Tacon's Report. Paragraph 1.4 states:

“At the suggestion of Mr Schwarzkopf, I traveled to Paris to attend a meeting with him and his colleagues and French legal advisers on 13 March 2007. One of the main reasons for this visit was to prepare the letters sent to the French and Congolese parties to advise them of my appointment and to request information. In order to be able to serve the Order on Mr Grimshaw and Nautilus, I also traveled to Jersey.”

- [19] Mr Cohen submitted that Mr Tacon has received assistance from representatives of KIL in the absence of Mr Grimshaw and other directors to provide information. Mr Tacon in his Report clearly stated the reason for his meetings with persons attached to KIL. Without the assistance of the directors, Mr Tacon had to get help from Mr Schwarzkopf to interpret the documentation received. Again, this is regrettable for if the directors were cooperative, then Mr Tacon would have had no need to seek the assistance of Mr Schwarzkopf.

- [20] Mr Cohen next submitted that the present application is premised on misconduct and the Court has been asked to exercise an unusual power. He stated that the application should have been made pursuant to section 273 of the Insolvency Act, 2003 (“the Act”) which states that :

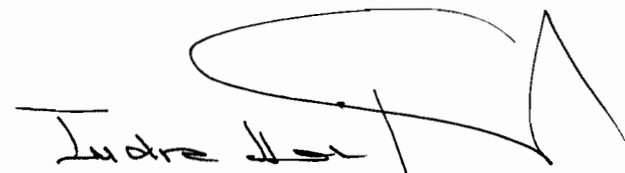
“A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the officeholder.”

- [21] I agree that the application is premised on the misconduct of Mr Tacon. Section 273 of the Act expressly outlines what can be done when someone is aggrieved by an act, omission or decision of an office holder. Having said that, as I scrutinize the affidavit of Mr Nader, it contains a litany of bare unsubstantiated assertions. As a lawyer, he is better placed to know that a court of law requires much more than bald assertions in order to determine factual issues which arise.

[22] In the premises, I will dismiss the application with the costs to the Provisional Liquidator, to be agreed or, as MIL indicated in its application, to be assessed, to be payable out of the assets of MIL.

Postscript

[23] It is highly unfortunate that this case has taken an uneventful turn. There is still more to come as MIL has filed an application to remove Mr Tacon as Provisional Liquidator. In conclusion, I too share the sentiment expressed by Mr Cohen that Mr Nader, a Barrister of this Court, has passed into this contentious area on no material justifying it.



Indra Hariprashad-Charles
High Court Judge