BRITISH VIRGIN ISLANDS

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

Claim No. BVIHCV2006/0307

BETWEEN:

MICHAEL WILSON & PARTNERS, LIMITED

Claimant/Respondent

-and-

TEMUJIN INTERNATIONAL LIMITED
TEMUJIN SERVICES LIMITED
HAKKISAN FINANCE CORPORATION LIMITED

Defendants/Applicants

Appearances:

Mr. Lewis Hunte QC [Of Hunte & Co] for the First and Second Defendants/Applicants
Mr. Lawrence Cohen, QC [Of London] with him Mr. Andrew Thorp and Ms. Angeli Narine [Of Harney Westwood and Reigels] for the Claimant/Applicant

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2007: February 28
2007: March 02, April 30

JUDGMENT

[1] HARIPRASHAD-CHARLES J: On 2 March 2007, I delivered a lengthy oral judgment in this application and promised to reduce it into a written judgment subsequently. I do so now.

[2] The factual matrix of this case is already set out in a previous judgment of this Court involving the same parties[1] and therefore, needs no further recapitulation. The First and

[1] See paragraphs 1 to 24 of written judgment delivered on 9 March 2007.

Second Defendants/Applicants are collectively referred to (for convenience only) as the "Temujin Companies". Essentially, they applied to vary the disclosure order (made on 19 December 2006 and continued on 5 February 2007) by limiting the access of the further information which the Temujin Companies produced to the legal representatives of MWP only (and preferably counsel only). The grounds for the application are two-fold in nature namely: (i) the information that has been unearthed is confidential and (ii) it would cause irreparable harm to the Temujin Companies if disclosed to MWP.

The procedural history

[3] Upon the hearing of an ex parte application on 19 December 2006 in which a serious fraud is alleged by MWP, the Court granted Freezing Injunctions and Disclosure Orders against the Temujin Companies and the Third Defendant, Hakkisan Finance Corporation Limited, ("Hakkisan") to aid the tracing remedies and the freezing orders. These Orders were extended to 29 January 2007. On that day, the Court heard two applications, one by MWP for a continuation of the freezing and disclosure orders made on 19 December 2006 and the other by the Temujin Companies and Hakkisan to set aside or vary the Orders made. The Court heard the applications and on the following day, it continued the Order until further Order of the Court.

[4] On 5 February 2007 the Court gave a short oral judgment, continuing the Freezing and Disclosure Orders it had previously granted with some minor amendments. That judgment has since been reduced to a written judgment delivered on 9 March 2007. Paragraph 4 of the 5 February 2007 Order in respect of the Temujin Companies ("the Order") list several companies in which MWP has an interest. Paragraph 6 requires the Temujin Companies to cause to be sworn an affidavit or affidavits in accordance with the requirements set out in Schedule C of the Order on or before 4.00 pm on 9 February 2007. Schedule C required the Temujin Companies to provide:

a. With regard to the table exhibited as DS1 on the 3rd affidavit of David Slater:

    i. A full breakdown of the constituent parts of the item "Debtors $3000,000" identifying:

1. each debtor for a sum in excess of $10,000

2. the amount of the alleged debt or debts and

3. producing a copy of any invoice which has been rendered to such debtor or debtors;

ii. A breakdown of the constituent parts of "WIP" as at 10 January 2007 $180,000" identifying:

1. Each anticipated debtor in respect of an anticipated amount in excess of $10,000

2. The amount of the anticipated debt of each such debtor

iii. In relation to each of the two items of "Loan to Consultants" identifying:

1. the name of the consultants to whom loans have been made

2. the dates of the loans

3. the amount of the individual loans

4. any documents recording such loans and producing a copy of any loan agreement or other document evidencing such loan.

iv. In relation to the item "Loan $20,000" producing a copy of any loan agreement or other document evidencing such loan;

v. In relation to the item "Outstanding Consultancy Fees and Allowances $515,000" identifying

1. the identity of each consultant

2. the amount due to each consultant and producing any invoices received from such consultants or any other document evidencing such indebtedness

b. Specifying what shares have been issued, to whom and when and who are and have been its officers.

[5] Paragraph 7 of the Order stipulates that:

> "The Claimant shall have permission to use any disclosure made by the Respondents pursuant to this Order or the Order of 19 December 2006 for the purpose of foreign proceedings mentioned in the evidence herein."

Submissions by Counsel

[6] Mr. Lewis Hunte QC appearing as Counsel for the Temujin Companies firstly submitted that the Court should limit the access to that further information to the legal representatives only so as to protect the confidentiality of commercial sensitivity and market sensitive information of the Temujin Companies and their clients because if such information is shown to MWP, it will cause irreparable harm to the Companies. He referred to Section 123 of the Evidence Act, 2006 (Virgin Islands) which provides that *"where the probative value of evidence is outweighed by the danger of unfair prejudice or confusion, the court may refuse to admit the evidence."*

[7] Learned Queen's Counsel next submitted that in determining whether to make the Order, the Court should do a balancing exercise. It must have regard to whether the probative value of the evidence is outweighed by the danger of unfair prejudice to these Companies. He enlightened the Court that a similar order was made in the New South Wales proceedings where some documents were limited to the legal practitioners only.

[8] Mr. Lawrence Cohen QC, Counsel for MWP argued that Section 123 of the Evidence Act has no relevance to the present application. He next argued that the remedy sought by the Temujin Companies is unreservedly inconsistent with the Order made by the Court on 5 February 2007. According to him, MWP sought an order for (i) the disclosure of assets and (ii) permission to use the documents and information obtained in these proceedings for the purposes of the identified foreign proceedings. This was trenchantly resisted by the Temujin Companies. The Court made both limbs of the Order. Mr. Cohen QC submitted that it is understood that the Court was asked at judgment to make the disclosure "confidential" but declined to do so and if anything, this should be an appeal point.

[9] Secondly, Mr. Hunte QC asserted that the application to vary is based on a material change in circumstances. He argued that the Temujin Companies did not know that some of the materials that were covered by the Order were confidential and sensitive until they were unearthed and on this basis the Court should vary the Order.

[10] Mr. Cohen is of the contrary view. According to him, there are no new circumstances before the Court that was not before it on the previous occasions which warrants a variation of the Order.

General power of Court to vary its order

[11] It is common ground that the Court has a general power to vary its Order if there is a material change in circumstances. In Collier and Williams,[2] Dyson LJ cited with approval the following section of Patten J's judgment in Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen: [3]

> "The Deputy Judge exercised a discretion under CPR Part 13.3. It is not open to me as a judge exercising a parallel jurisdiction in the same division of the High Court to entertain what would in effect be an appeal from that order. If the defendant wished to challenge whether the order made by Mr. Berry was disproportionate and wrong in principle, then he should have applied for permission to appeal to the Court of Appeal…. It seems to me that the only power available to me on this application is that contained in CPR Part 3.1 (7), which enables the court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1 (7) is exercisable, *it seems to me that, for the High Court to revisit one of its earlier orders, the applicant must either show some material change in circumstances or that the judge who made the earlier order was misled in someway, whether innocently or otherwise as to the correct factual position before him* (emphasis added). The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. *If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment in the context of an appeal* (emphasis added). Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ."

[12] It is axiomatic that the Court has the general power to vary or revoke its Orders before and after the introduction of the CPR. However, to revisit an Order that has been made one has to show some material change in circumstances or that the judge who made the order

[2] [2006] EWCA Civil 20 (25 January 2006)
[3] [2003] EWHC 1740 (Ch) paragraph 7

was misled as to the factual position before him. It is accepted that the latter circumstance does not arise at all. Consequently, I need only to consider whether there was any material change in circumstances.

[13] The Court gave an oral judgment on 5 February 2007. The Order was formally entered on that day. The Order required the Temujin Companies to cause affidavits to be sworn in accordance with the requirements set out in Schedule C of the Order. Schedule C as outlined above is very comprehensive as to the information that is required. It must have occurred to Counsel, based on the nature of the business that these Companies carry on (providing legal services), and the knowledge of their clientele, that the information required by the Order may include information in respect of clients not associated or of interest to MWP and therefore those information would be confidential.

[14] A perusal of the transcript of evidence revealed that at the hearing and also on the delivery of the oral judgment, the issue of confidentiality was glossed over. Quite apart from the documents that were placed before the Court and given to Mr. Cohen during the hearing, nothing new was adduced. Therefore, the Temujin Companies have woefully failed to show that there is any material change in circumstances whether innocently or otherwise as to the correct factual position before the Court. Having heard argument on the issue and made a decision, it will be exceptional that the Court will allow it to be reopened. The power to vary cannot be used simply as an equivalent to an appeal against an order with which the Temujin Companies is dissatisfied. In the circumstances, I am of the considered view that the Temujin Companies should have appealed the order instead of seeking to vary it.

[15] Alternatively, Mr. Cohen argued that there are no proper grounds for advancing this extraordinary submission that the material is of a highly confidential and of a sensitive nature without a word of explanation as to why. He argued further that the same is true but more forceful in relation to the assertion that Ms. Hunte had "*been shown certain documents relative to the past behaviour of Michael Wilson ……"* as a result of which she says that she believes that *"not only can irreparable damage be done to the claimant if the*

exhibits ….come into the hands of Michael Wilson but also that such information in his hands will afford him an unfair advantage in these proceedings." This, he asserted, is nothing more than a bare assertion.

[16] When one scrutinizes the affidavit evidence filed on behalf of the Temujin Companies, one sees that both Mr. Slater and Ms. Hunte have made bare assertions. No explanation, plausible or otherwise is proffered as to why the unearthed information is so confidential and what irreparable damage could be done to the Temujin Compnaies. Like Mr. Cohen, I am impelled to find that the assertions are as bald as could be, particularly as they are crafted by lawyers who must know that unsupported affidavit evidence have no place in a court of law. In addition, neither the Court nor Mr. Cohen had an opportunity to peruse the documents that were disclosed during the hearing of the application. However, I should add, by way of completeness, that it is my understanding that these documents were filed in the Court Office prior to the hearing and therefore, no aspersion should be cast on Learned Queen's Counsel for the Temujin Companies for the protracted delay in its receipt by the Court.

[17] Mr. Cohen next submitted that the use of the information has already been restricted to these proceedings and foreign proceedings. He also found it difficult to see what advantage can be gained by this information relating to assets except to preserve those assets or to deploy it in Australia or elsewhere as the premise can only be that it is damaging to the Temujin Companies. Learned Queen's Counsel further submitted that there are extreme practical difficulties in restricting the information to counsel where counsel appears in more than one jurisdiction and is dependent on factual instructions from his client.

[18] For my part, I do not agree with Mr. Cohen QC that the application should also be dismissed because of extreme practical difficulties in restricting the information to Counsel where Counsel appears in more than one jurisdiction. He agreed that there is such an order in New South Wales, however, he disagreed with Mr. Hunte QC. as to the documents that are covered by that Order. Counsel in that matter have to comply with that

order irrespective of the fact that they are involved in other jurisdictions. Mr. Cohen, being a Queen's Counsel, possesses the dexterity to handle those discreet situations so that if documents are to be limited to one jurisdiction and not another or to him and not to his client, he is duty-bound to comply with the court order; regardless of any practical hurdles that may ensue.

Overriding objectives of CPR

[19] In considering this application, I am mindful of the Civil Procedure Rules 2000. Part 1 (1) states that the overriding objective is to enable the court to deal with cases justly. Accordingly, the Court requested that Mr. Hunte indicate which documents in the bundle were considered confidential. He referred the Court to Exhibit DS4 which is in line with the requirements of Schedule C of 5 February 2007 Order. On scrutiny of the documents, I am of the view that some of them have no bearing on or interest to MWP. With the cooperation of Mr. Hunte and Mr. Thorp (who appeared somewhat dissident), I have caused some of the documents to be removed having discerned that the prejudicial value far outweighs the probative value to MWP.

[20] For the avoidance of doubt, I should indicate that the disclosed information is not limited to proceedings in this jurisdiction but can be used in the foreign proceedings as was previously ordered by this Court.

Indra Hariprashad-Charles

High Court Judge