BRITISH VIRGIN ISLANDS

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

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

Claim No. BVIHCV2007/0041

BETWEEN:

KENSINGTON INTERNATIONAL LIMITED

Applicant

-and-

MONTROW INTERNATIONAL LIMITED (In Provisional Liquidation)

Respondent

Appearances:

Mr Stephen Moverley Smith QC of XXIV Old Buildings, London with him Mr Jeremy Walton of Appleby, Cayman Islands and James Hilsdon of Appleby, BVI for the Applicant
Mr William Hare 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

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2007: April 11
2007: April 13, May 09

JUDGMENT

[1] HARIPRASHAD-CHARLES J: This is the return date of two applications dated 7 March 2007 ("the Applications") by Kensington International Limited ("KIL") for the appointment of the Provisional Liquidator, Mr William Tacon ("Mr Tacon") to continue until the applications for the appointment of a Liquidator of Montrow International Limited ("MIL") and Likouala

SA ("LSA")(together the" Companies") are heard. At this hearing, the Directors of LSA were not represented and consequently, the provisional liquidation of LSA continued.

[2] Although Learned Counsel, Mr William Hare appearing for MIL, had not complied with the requirements of Part 63.3 of CPR 2000[1] and had not filed any application to stay or suspend the order that the Court made on 9 March 2007, the Court nonetheless proceeded to hear Learned Counsel who handed up a skeleton argument prior to the hearing. Mr Hare sought an adjournment and also a stay of the Provisional Liquidator's powers until a full inter partes hearing could be listed.

The Parties

[3] KIL is a limited company which is incorporated and registered in the Cayman Islands. By virtue of four judgments of the English Commercial Court, KIL alleged that it is a creditor of the Republic of Congo ("the Congo"). MIL is an International Business Company ("IBC") incorporated on 11 August 2003 in the British Virgin Islands ("the BVI"). It is owned by a Jersey trust called "the Montrow Trust" and is the sole shareholder of LSA, a company incorporated in the Congo as a limited liability company under sole proprietorship with a General Manager. LSA is the holder of rights to exploit certain oil fields in the Congo.

Brief background facts

[4] On 9 March 2007, the Court appointed Mr Tacon as Provisional Liquidator of both MIL and LSA until the return date. The evidence in support of the Application consisted of a lengthy affidavit from Mr Donald Schwarzkopf ("Mr Schwarzkopf"). It particularised the debts owed to KIL, recorded the dishonest and fraudulent practices adopted by the Congo and expounded the basis upon which it submitted that MIL and LSA are to be regarded as alter egos of the Congo and thus debtors of KIL.

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[1] If a person who has previously acted in person instructs a legal practitioner, that legal practitioner MUST- (a) file notice of acting at the court office which states the legal practitioner's business name, address, telephone number and FAX number (if any); (b) serve a copy of the notice on every other party and (3) file a certificate of service.

The ex parte application by KIL

[5] The ex parte application came before me on 8 March 2007 on very short notice. Fully cognizant of this, Learned Counsel, Mr Jeremy Walton who appeared for KIL took me through the affidavit as well as the exhibits. Mr Walton submitted that KIL has the standing to present a petition for the winding up of MIL and LSA because KIL is a judgment creditor of the Congo based on four judgments of the English Commercial Court in the amount of approximately $93 million as of 1 March 2007[2]. He next submitted that KIL needs to establish a good arguable case that it is a creditor in order to satisfy the question of standing for the application for interim relief: Re Claybridge Shipping Co SA [3] which was applied by the Eastern Caribbean Supreme Court in Re RBG Global SA [4].

[6] The nub of KIL's case is that (i) the true beneficial owner of both MIL and LSA is either (a) the Congo itself, or (b) one or more Congolese officials acting on behalf of the Congo; (2) that these two companies are shams or façades designed to camouflage the reality of the Congo's ownership and control of the rights in the oilfield and/or to protect those rights from enforcement by KIL,(and other judgment creditors of the Congo) and (3) that in reality, the two companies have no separate existence from the Congo and are properly to be regarded as alter egos or emanations of the Congo and/or the Congo's creatures, nominally in the hands of individuals or entities associated with the Congo and which hold these assets to the benefit of the Congo. Put differently, they are totally sham structures.

[7] KIL's case is, further, that the purpose of these sham structures is to judgment-proof its assets against enforcement by the Congo's judgment creditors and that MIL and LSA are a part of the fraud by which the Congo seeks to conceal its assets in this complex, convoluted and fraudulent scheme. As such, it is just and equitable to appoint a liquidator over the two companies.

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[2] See paragraphs 12 to 16 of Mr Schwarzkopf's affidavit and the relevant exhibits
[3] [1997] 1 BCLC 572.
[4] Civil Appeal No. 6 of 2003 (Eastern Caribbean Supreme Court – British Virgin Islands) –unreported Judgment delivered on 12 January 2004.

[8] At paragraphs 12 to 17 of his affidavit, Mr Schwarzkopf enumerated the numerous judgments of the English Commercial Court and particularly, the judgment of Mr Justice Cooke on 28 November 2005[5]. After a 10-day trial, Mr Justice Cooke found that KIL was entitled to final third party debt (or garnishee) orders in respect of the purchase price for two consignments of Congo's oil shipped aboard the vessel *Nordic Hawk* and bought by an English company, the oil trader Glencore Energy UK Limited ("Glencore"). The judgment contains unambiguous conclusions regarding the dishonesty of senior Congolese officials and their use of sham companies and transactions expressly *"with the object of evading existing liabilities of the Congo by hiding its assets from view"*[6].

[9] Among the findings contained in the judgment were the following[7]:

a. The Congo had engaged in a complex scheme, controlled by Mr Dennis Gokana ("Mr Gokana") on its behalf, to sell oil (including not only the *Nordic Hawk* cargo but several other cargoes) with the deliberate object of evading enforcement of its existing liabilities by hiding its assets from view.

b. Mr Gokana and others involved on behalf of the Congo in creating and orchestrating the scheme had acted dishonestly, creating and using sham companies (including AOGC and Sphynx Bermuda) and transactions which were mere "façades" to avoid enforcement of its existing liabilities.

c. Witnesses on the Congo's behalf (including Mr Gokana and one Dr. Ikechukwu Nwobodo, another central figure in the Congo's oil sales) had lied under oath and given other false and misleading testimony in order to conceal the truth concerning the sham companies and the judgment-proofing scheme. Mr Gokana also effectively absconded whilst giving evidence – he failed to return to England as promised to

[5] See: KIL v Republic of Congo [2005] EWHC 2684, per Cooke J.
[6] paragraph 200 (iv).
[7] See paragraph 23 of Mr Schwarzkopf's affidavit of 7 March 2007 and paragraphs 17-26, 193, 198 -201 of Cooke J's judgment.

complete his evidence and also failed to produce the disclosure which the Court had repeatedly ordered.

d. The sham companies controlled by Mr Gokana on behalf of the Congo had been guilty of wholesale and deliberate failures to make proper disclosure.

e. Mr Gokana and others had deliberately and dishonestly fabricated evidence.

f. Mr Gokana and others had deliberately attempted to circumvent and undermine orders of the Commercial Court; and

g. SNPC and Cotrade SAU were part of, and had no existence separate from the Congolese state and were to be equated with the Congo so that Congo's debts are their debts.

[10] It is alleged that Mr Gokana was also one of the principal architects of the settlement between the Congo and Total E&P Congo ("Total") of which the LSA transactions were part. I should, at this stage, interpose to state that during the course of the *Nordic Hawk* proceedings, KIL made a successful application to the BVI Court for Norwich Pharmacal relief. This enabled KIL to establish that Mr Gokana was in fact the beneficial owner of the BVI companies that owned and controlled Sphynx Bermuda and its affiliate in London. At paragraph 171 of the judgment, Mr Justice Cooke found that when Mr Gokana learnt that KIL was applying to the BVI Court for orders for disclosure of this information, he emptied Sphynx Bermuda's bank accounts (at a time when third party debt/garnishee orders had been made against Sphynx Bermuda in Bermuda), thus frustrating KIL's ability to act on the information disclosed pursuant to the Order of the BVI Court.

[11] Reacting to the findings of Mr Justice Cooke, the Finance Minister and Registrar of Companies in Bermuda commenced an inquiry regarding Sphynx Bermuda. Following their investigations, a petition for winding-up the company was granted by the Supreme Court of Bermuda in March 2006.

[12] In his submissions, Mr Walton cited diverse judgments of the English and Bermudan Courts which have found other companies to be alter egos of the Congo and therefore Congo's debts are also their debts.

[13] Mr Walton laconically submitted that KIL seeks the appointment of a Liquidator, and in the interim, a Provisional Liquidator on the grounds[8] that there are strong and compelling reasons to believe that the Companies are being used by their principal, the Congo, as instruments of fraud on Congo's creditors and that in the circumstances, it is just and equitable that a Liquidator should be appointed over them.

[14] In Re RBG Global, the Court of Appeal of the Eastern Caribbean held that, where there was *prima facie* evidence that the respondent company and its principal were engaged in fraud, there was a good arguable case that it is just and equitable that the company be wound up. Learned Counsel submitted that there is a profusion of evidence, much of which is contained in the findings of the English Commercial Court to establish:

a. The Congo is engaged in a deliberate and deceptive campaign to deprive its judgment creditors of the benefits of their judgments, including KIL.

b. The Congo employs sham company structures (along with other tactics such as pre-payment of oil consignments in order to defeat garnishee relief) precisely for the purpose of evading its judgment debts.

[15] It was also submitted on behalf of KIL that it had to apply for urgent ex parte interim relief because:

a. The Congo has taken, and it must be assumed will continue to take, steps to dissipate assets that have not been adequately protected and secured;

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[8] Fully particularized in Mr Schwarzkopf's affidavit.

b. Individuals representing the Congo have lied on oath and breached restraint of communication orders in furtherance of evasion of judgments.

c. KIL's experience is that only by taking swift and surreptitious action has it any hope of staying ahead of the imaginative and determined efforts of the Congo to evade its attempts to enforce judgment.

[16] Learned Counsel urged the Court that the draconian step of appointing a Provisional Liquidator was essential and opportune given the history of KIL's litigation and the fact that Congo has demonstrated time and again that it will use whatever means it can to evade and frustrate orders of the Court. In addition, it has used dishonest schemes to hide its assets and evade the claims of legitimate creditors which included, as Cooke J and Morison J have found, putting forward dishonest oral evidence in Court, fabrication, concealment and extensive non-disclosure of documents in flagrant breach of orders of the Court and emptying bank accounts to frustrate orders of the Court. It was also submitted that LSA is yet another dishonest scheme.

[17] It was further submitted on behalf of KIL that provisional liquidation was justified because:

a. The risk of dissipation of assets, disappearance or falsification of company and financial records, re-structuring and further obfuscation of the issue of beneficial ownership is very real.

b. Provisional liquidation will enable the Companies to be taken out of the hands of their principals to the extent necessary to preserve assets, books and records and to investigate the Companies' affairs, including their relationship with third parties, e.g. Total and BNP Paribas.

[18] Mr Walton submitted that no prejudice could ensue by the grant of this interim relief as neither company is active and trading. MIL is merely an offshore holding vehicle and LSA, is, in effect, no longer active. It has no employees or operations in the Congo or elsewhere and the oilfields in which it holds participation are operated on its behalf by Total. As such,

[19] On the basis of the submissions advanced by Mr Walton, this Court, in the exercise of its discretionary powers, appointed Mr Tacon to be the Provisional Liquidator over MIL and LSA.

Developments since 9 March 2007

Actions of the Provisional Liquidator

[20] Mr Moverley Smith QC appearing as Leading Counsel for KIL referred to the Report of Mr Tacon dated 10 April 2007. At this point in time, it may be worthwhile to juxtapose that Mr Tacon has instructed Learned Queen's Counsel, Mr Lawrence Cohen and the law firm of Ogier to act for him.

[21] As is evident in Mr Tacon's Report, he has obtained documentation which uncovers a convoluted and currently commercially inexplicable structure centred round MIL and LSA.

[22] Mr Moverley Smith submitted that the focus of the structure is the LSA oilfield in the Congo ("the Oilfield"). It appears that MIL and LSA were created to enable the Congo covertly to receive an oil-backed loan from BNP Paribas ("BNP") in breach of undertakings given by it to the IMF. To achieve this end, the Congo purported to sell the Oilfield to LSA, the purchase price being funded by a US$72m BNP loan ("the loan") to LSA. LSA is 100% owned by MIL, whose shares are held by a Jersey charitable trust. None of the profits generated by the Oilfield (the revenue is estimated at US$70m per annum) have ever been distributed to MIL (thus nothing has been received by the charitable trust, which seems to have been introduced simply to obfuscate the position) and accordingly, those assets have either been retained by LSA or siphoned off elsewhere. Further, at the end of a 10 year period, Total, the operator of the Oilfield, is entitled to exercise a call option to purchase LSA's share capital ("the Shares") for a nominal €1500. The value of the Oilfield is estimated to be in excess of US$160m. Total, not only makes no reference in their accounts to having any interest in the Oilfield, but has expressly denied having any such interest. For this to be true, the option must in truth have no value i.e. it must follow that

Total must in turn be obligated to transfer the Shares for a similarly nominal consideration (although no document to this effect has yet been produced). As the Congo has stated that only it and Total have any interest in the Oilfield, it follows that the recipient is the Congo. Therefore, the object of the structure appears to have been principally to conceal, through the façades of LSA and MIL, the oil-backed loan by BNP to the Congo, with the Congo in reality owning the Oilfield throughout.

[23] Mr Moverley Smith asserted that while Mr Tacon's enquiries remain on foot, the material so far disclosed goes a considerable way towards confirming what KIL had previously believed to be the position.

Submissions on behalf of MIL

[24] MIL challenged the appointment of Mr Tacon as Provisional Liquidator and sought an order to suspend or stay his powers until a full inter partes hearing. The grounds alleged are quadruple in nature namely:

1. The application should never have been made ex parte. Alternatively, the Order was too wide-ranging to be made on an ex parte basis and should not have been made at all, since MIL owes no debt to KIL, and there is no justice or equity in these proceedings which plainly abuse the purpose of the insolvency jurisdictions.

2. KIL is guilty of serious non-disclosures which justify the Order being discharged.

3. KIL has failed to provide important undertakings to the Court.

4. KIL delayed in bringing the application.

[25] First of all, I think that I can summarily dispose of Grounds 3 and 4.

Undertaking in damages

[26] Mr Hare correctly submitted that KIL has failed to provide any undertaking as to damages. Mr Moverley Smith conceded that this was an omission on the part of KIL which intended to give the usual undertaking in damages, having made provision in the Orders for the provision of security to support that undertaking. KIL agreed that the Order should be amended accordingly to reflect that position.

Fortification of the undertaking

[27] Mr Hare forcefully argued that there should be fortification of the undertaking in damages. He submitted that the security of $100,000 is pathetic and should be significantly greater, particularly given the limited information available about KIL. This might be the case but no evidence has been adduced to suggest that the security proffered in support of the undertaking in damages is insufficient or that MIL has suffered any damage resulting from the Order. Bare assertions will not suffice. Since there is no evidence to substantiate Mr Hare's concerns, it would be impractical to interfere with this aspect of the Order. If and when such evidence is forthcoming, this issue could be re-argued.

Security for costs

[28] Mr Moverley Smith correctly submitted that there is an established procedure for applying for security for costs. It is dealt with in Part 24 of our Rules. If MIL, acting by its directors, wishes to apply for security for costs, it must follow that procedure.

Delay

[29] Mr Hare complained about the delay in bringing the present application. He argued that much of the information relied on by KIL has been publicly available since 2004 at the latest.[9] He insisted that KIL's explanation that (i) it needed to prioritise its targets and (ii) information came to light in the Hong Kong proceedings that improved KIL's prospects in these proceedings is wholly unconvincing. According to Learned Counsel, no proper explanation, supported by evidence, has been given for this substantial delay.

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[9] See Donald Schwarzkopf's affidavit, paragraphs 69-76.

[30] To my mind, this issue does not even arise. In any event, the explanation given by Kensington appears plausible. Besides, I am not aware of any statutory limitation period which prevented KIL from bringing the present application.

Whether application should have been made ex parte

[31] Mr Hare submitted that as a matter of law, neither of the provisional liquidation orders against MIL and LSA should have been made. Alas, Counsel was content to leave the Court in a state of mystification as to what law mandated that such applications should not be made on an ex parte basis as this Court is routinely called upon to make similar orders in a similar fashion.

[32] Learned Counsel vehemently argued that KIL should not have applied for such wide-ranging relief on an ex parte basis, still less accompanied by an application for a gagging order. He accentuated that bringing the application ex parte has the hallmarks of an ambush.

[33] It is also the contention of Mr Hare that there is no legal debt due by MIL to KIL and as such, there is no jurisdiction to appoint a Provisional Liquidator over MIL. He also submitted that it is not just and equitable to do so in circumstances where speculative allegations of fraud are unsupported by cogent evidence. I interpolate to state that Counsel is asserting that there is no supported evidence of fraud from KIL's evidence but MIL itself has remained absolutely silent even up to the date of this hearing which is in excess of a month after the ex parte hearing. Not a word has been offered from the directors of MIL to refute anything that Mr Schwarzkopf has alleged in his affidavit.

[34] Mr Hare argued that KIL attempted to justify the ex parte application on the basis of the risk of dissipation of assets[10] but there was no suggestion of any urgency for any other reasons. Nor could there be, given KIL's delay in bringing the application. He submitted that in April 2003, KIL was refused an application for an ex parte Freezing Order by

[10] See Schwarzkopf's affidavit, paragraph 11 and KIL's skeleton arguments of 8 March 2007.

Morison J. in the English Commercial Court[11]. The Judge decided that the application should be made on notice. The Court of Appeal agreed. He summarised the reasoning of Morison J. and the English Court of Appeal. According to Mr Hare, the reasoning applies equally in this application, namely:

(i) The risk of dissipation is low given the scale of the operations and the history of KIL's pursuit of the Congo;

(ii) KIL is in a materially different position from that of the ordinary applicant for a freezing order as it has bought an old debt at an undervalue in circumstances where the difficulties of enforcement were well understood;

(iii) KIL is seeking to enforce a debt by targeting third parties;

(iv) An inter partes hearing was necessary so that any interests independent from the Congo can be determined.

[35] Mr Hare next argued that if KIL is accurate about the risk of dissipation of assets, this would only justify an order preserving the position. It could not possibly justify an order which effectively opens up the books of MIL to Mr Tacon and KIL. He submitted that, at the very least, Mr Tacon's powers should be stayed.

[36] Mr Hare next argued that KIL was not entitled to a freezing order against the Congo without giving notice to Congo, still less should it be entitled to appoint a Provisional Liquidator of MIL and LSA without giving notice. He submitted that the ratio decidendi of the two English Commercial Court judgments and of the English Court of Appeal [12] were not drawn to the attention of the Court on 8 March 2007 and they should have been. He referred to the duty specifically to draw defences and evidence to the attention of the Court. Instead, KIL told the Court:

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[11] KIL International Limited v Republic of Congo [2003] EWHC 1100 (Comm)

[12] See paragraph 34 of judgment [supra].

> "In each case, without fail, in fact, subsequent investigation and disclosure following the grant of ex-parte relief has confirmed ownership and control of those vehicles by the Congo regime. KIL has, in fact, a superlative record in the bringing of these types of proceedings, based on the information it has obtained."

[37] According to Mr Hare, this was utterly disingenuous and should have been qualified by an explanation of the failures before Tomlinson J., Morison J. and the English Court of Appeal. He next submitted that the evidence adduced by KIL (i) relied substantially on character evidence relating to the Congo and amounted to nothing more than character assassination of the Congo and (ii) is speculative.

[38] Mr Moverley Smith submitted that the judgments referred to by Mr Hare were in the early days when KIL was trying to enforce the judgments. A trial was subsequently held and the truth came to the fore. The position is different now in terms of the Congo's behaviour than it was prior to the trial. He also referred to the judgments of Justices Cooke and Morison and submitted that the Orders sought were of a different kind: one was an injunction to enforce a negative pledge provision in an agreement and the other was a freezing order over the assets of the Congo itself.

[39] I agree with Mr Moverley Smith that the judgments that Mr Hare alluded to are not relevant to the application. In addition, the application before the Court is dissimilar from the application that those judgments dealt with. But emanating from the judgments of Justices Cooke and Morison is the underpinning of a real risk of dissipation of assets. The Congo has been found to develop these Byzantine structures to conceal monies from its creditors. The Provisional Liquidator was appointed to preserve and maintain the value of the assets of the Companies. Mr Hare is obviously unaware of the duties of the Provisional Liquidator because he incessantly rehashed the "wide-ranging" powers available to a Provisional Liquidator. The powers of a Provisional Liquidator are derived from statute. In our case, from the Insolvency Rules 2005 ("the Rules"). The Provisional Liquidator is an officer of the Court and is appointed to preserve assets and maintain the status quo, as Mr Hare correctly acknowledged. The Provisional Liquidator is not at the whim and fancy of KIL or MIL. His actions are monitored by the Court. At the ex parte hearing, Mr Walton made it

clear why the appointment of a liquidator is the most appropriate remedy available to Kensington. He indicated that a freezing order is only an in personam remedy which relies upon the compliance of the Respondent. It is ineffectual if a Respondent is prepared to act in contempt of an Order. In this case, there is overwhelming evidence to demonstrate that Congo has acted in contempt of many freezing and other orders [13].

[40] I now come to the ex parte hearing. Much time was spent criticising KIL for proceeding with this application on an ex parte basis. Mr Hare referred to the hearing as an ambush. However, our Rules make provisions for such ex parte applications to be heard without notice. Part 17.3 (2) provides as follows:

> "The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice."

[41] Subsection (3) of Part 17.3 expressly states that "the evidence in support of an application made without notice must state the reasons why notice has not been given. It goes without saying that our Rules make adequate provision for such ex parte hearings without notice once the criterion has been satisfied. There is nothing ominous about ex parte applications. In the majority of cases where there is evidence of an impending risk of dissipation of assets, the applications are brought ex parte. In the present case, the evidence before the Court was the ability of the Congo to employ dishonest schemes to hide its assets and evade the claims of legitimate judgment creditors as found by the English Commercial Court. There is no need for replication as the essence of KIL's case for the application to be heard on an ex parte basis was the near certainty that the assets of both Companies would be dissipated, hidden from view and/or moved beyond the reach of KIL and this Court.

Material non-disclosure

[42] Mr Hare submitted that on an ex parte application, the duty of full and frank disclosure is paramount and the failure to comply with this duty may lead to serious consequences. He

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[13] See pages 32 -35 of the Record of Chamber Proceedings on 8 March 2007.

relied on the judgment of Slade LJ in Brink's Mat Ltd v Elcombe[14]. He added that this is particularly true where, as in this case, the Court relied on KIL to take it through the affidavit of Mr Schwarzkopf. He identified the following non-disclosures:

Failure to disclose the circumstances in which KIL acquired the debts and Tomlinson J.'s reliance on that non-disclosure in refusing to grant relief

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[43] Mr Hare submitted that in April 2003, KIL applied to Tomlinson J. in the English Commercial Court for an injunction. This application failed, in large part, because KIL refused to disclose the circumstances in which it acquired the benefit of loans to the Congo. He submitted that in the present application, KIL has failed to disclose:

(i) The terms on which it acquired its interest in the loans underlying the judgments; and

(ii) That it has already been refused equitable relief precisely on the basis of this failure of disclosure.

[44] Mr Hare argued that the following evidence should have been disclosed to the Court namely: (i) the circumstances in which Kensington acquired these debts and Tomlinson J's reasons for refusing relief and (ii) the mere *fact* that KIL was not the original beneficiary of the loans to Congo. He emphasized that it was even more critical since the Judge did not fully read the affidavit.

Failure to bring to the Court's attention the reasons why Morison J. required Congo to be given notice of its application for a freezing order.

[45] Learned Counsel insisted that the Court should have been made aware that in early 2003, KIL's application for a freezing order was refused by Morison J. on the ground that it was not brought inter partes, a decision with which the Court of Appeal agreed.

[14] [1988] 1 WLR 1350 at 1359.

[46] The case of Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac[15] supports the contention that an applicant has a duty to make 'a full and fair disclosure of all the material facts.' The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application and (b) the order for which application is made and the probable effect of the order on the Respondent.

[47] The rule that an ex parte order will be discharged if it was obtained without full disclosure has a dual purpose. It will deprive the wrongdoer of an advantage improperly obtained: Kensington's case. It also serves as a deterrent to ensure that persons who make applications without notice realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be discretion in the Court to continue the relief or to grant fresh relief in its place notwithstanding that there may have been non-disclosure when the original interim relief without notice was obtained.

[48] Those being the principles involved, it remains only to apply them to the facts of the present case. The non-disclosures identified by Mr Hare are two-fold in nature. He submitted that Kensington failed to disclose (i) the circumstances in which it acquired the debts and Tomlinson J's order in 2003 and (ii) the reason why Morison J required Congo to be given notice of the application for a freezing order.

[49] In my judgment, these non-disclosures as described by Mr Hare were not relevant to the present application. The English Commercial Court (a Court of distinction) heard evidence and came to the conclusion that Congo owes these monies to KIL. I would be unabashed

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[15] [1917] 1 K.B. 486, 514, per Scrutton L.J.

to look behind those judgments to determine how they came by the loans and other matters mentioned by Mr Hare. Consequently, I find that this was not relevant to the application before me. The basis on which KIL established itself as a creditor of Congo was based on four judgments of the English Commercial Court which was disclosed.

[50] The next non-disclosure that Mr Hare complained about concerned various decisions of the English Commercial Court in 2003. I agreed with Mr Moverley Smith that these judgments were given before the trial before Justice Cooke before the truth about Congo's attempt to evade its creditors was known. In addition, the application before Morison J. was different from the present application.

Other procedural defects

[51] Mr Hare insisted that the Order contained several procedural defects namely:

1. In breach of Rule 170(d) of the Rules, KIL failed to provide the Court with an estimate of the value of the assets in respect of which the Provisional Liquidator was appointed.

2. Under section 170(5) of the Act, an applicant can be required to deposit at Court such sum as the Court considers reasonable to cover the remuneration of the Provisional Liquidator. This, he submitted, was not drawn to the attention of the Court.

3. The Order includes a 72 hours notice requirement in relation to any application brought by the Respondent. This can only be for the convenience of the Applicant. It cannot be justified and should be deleted.

[52] Paragraph 9 of the Order provides that "this Order will remain in force up to the return date, unless before then it is varied or discharged by a further order of the Court upon 72 hours' notice. This in effect states that the Respondent ("MIL") may wish to seek to vary or discharge the Order before the return date (which it can do) but only on giving the other side 72 hours notice of its intention to do so. I am at a loss to envisage what defect, procedural or otherwise, there could be by the inclusion of such a reasonable clause in the Order.

[53] Section 170 (5) of the Act and Rule 170 (d) are discretionary. In any event, even if there are procedural defects, they do not impact on the outcome of this application.

[54] There are two other matters which were canvassed at the hearing which have been dealt with at various paragraphs of the judgment but which require further elucidation.

Whether MIL and LSA are creditors of KIL

[55] Mr Hare submitted that as a matter of law, neither of the provisional liquidation orders against the Companies should have been made. The purpose of the insolvency jurisdiction is not to assist speculative third parties to take control of and plunder solvent companies. According to Mr Hare, there is no legal debt due by MIL to KIL. Consequently, there is no jurisdiction to wind up MIL or appoint a Provisional Liquidator.

[56] Mr Moverley Smith QC submitted that the Companies are creditors of Congo because they are alter egos or emanations of the Congo. As alter egos, the Companies are to be treated as being in the shoes of the other ego.

[57] At the ex parte hearing, Mr Walton, in his meticulous and comprehensive submissions, outlined several points as to why the Companies are creditors of KIL. It was earlier established that Congo is a creditor of KIL. To show that the Companies are alter egos of the Congo and LSA in particular can be considered an organ of the State of Congo, he relied on the following submissions:

1. There is unarguably a plethora of evidence regarding Congo's use of alter egos generally.

2. The Congo's own Press release set in the context of all the articles written in the Press concerning the LSA transaction identifies LSA as a national asset.

3. It is a natural inference to be drawn from the circumstances of the settlement between Congo and Total that LSA should remain part of the Congolese regime. It is a natural inference because it is highly unlikely that as part of a settlement whereby Total were to pay over to the Congo, it should immediately divest itself of that.

4. The settlement was orchestrated by Mr Gokana who was Congo's special advisor and head of SNPC. He is the same man who has been found to have orchestrated other sham transactions and structures in Bermuda, lied, perjured himself in Court, forged documents, obstructed justice and committed contempt of court.

5. The commentary by investigative journalists and political commentators who have suggested that the Congo has retained ownership of LSA and that the scheme was devised to protect against creditors.

6. The interest in the oil concession was sold at a gross undervalue when considering the purchase price apparently paid and the likely value of that oil field and its productivity. This suggests that this is not a true sale at arm's length to an independent purchaser and there is no reason why Congo should sell such a valuable asset at an under-value to a third party.

[58] If, after putting all these factors together, the Court finds that LSA is an alter ego or an emanation of the Congo, so must MIL be, as MIL is a pure holding company plus the fact that it was incorporated around the same time as LSA. Both companies are being used as instruments of fraud.

[59] Applying the test in the judgments of Justices Morison and Cooke to the facts before the Court, I find that there is a prima facie case that LSA is still under the control of the Congolese government and though it is a separately constituted legal entity, it is not enough. By extension, there is also a prima facie case that MIL as a holding company and sole shareholder of LSA is also under the control of the Congo. I will therefore pierce the corporate veil and find that these companies are alter egos of the Congo, and therefore, Congo's debts are their debts. KIL is therefore a creditor of the Companies.

Whether it is just and equitable to wind up the company

[60] Mr Hare asserted that it is not just and equitable to appoint a Provisional Liquidator in circumstances where speculative allegations of fraud are unsupported by cogent evidence. According to him, KIL comes to Court making the gravest allegations of fraud supported by the flimsiest of evidence. It is trite law that although the civil standard of proof is to be

applied, the Court will have in mind when assessing the evidence the inherent unlikelihood of the allegations. He relied on In re H (Minors) (Sexual Abuse: Standard of Proof).[16] Mr Hare stated that the evidence presented by KIL relied substantially on character evidence relating to the Congo and this would only have weight if the Companies were the Congo, which is what KIL seeks to prove. This point has been decided above. Further, the evidence is speculative. KIL relies on assertions that the arrangement of the Companies has no commercial value. No admissible evidence is produced to support this.

[61] Mr Moverley Smith QC submitted quite correctly that there could be no better evidence than the findings of the High Court in England and Wales after a trial. He further submitted that this is the evidence on which KIL relies to say that MIL and LSA are alter egos of Congo and on that basis a winding up order should be made. According to Mr Moverley Smith, this has been borne out by Mr Tacon's report.

[62] I agree with Mr Hare that allegations of fraud must be supported by highly cogent evidence. However, I am of the view that such prima facie evidence was adduced before me. The findings of the English Commercial Court that the Congo is involved in these elaborate structures to frustrate creditors coupled with my prima facie finding that MIL is an alter ego of the Congo are determinative of the issue. Based on the prima facie evidence before me, I find that it is just and convenient at this point to appoint a Provisional Liquidator over Montrow.

Continuation of Provisional Liquidation

[63] At this hearing, Kensington sought the continuation of the Order of 9 March 2007 as the grounds that justified the original appointment remain. As is apparent from the Provisional Liquidator's Report, Mr Tacon is in the middle of his initial investigations. Those investigations may reveal further documentation or assets which need to be identified, recovered and preserved. In the light of Congo's chequered history of deceptive conduct, the Court can have no confidence that, absent the presence of the Provisional Liquidator,

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[16] [1996] AC 563, per Lord Nicholls at page 586 E.

documentation and assets may not be concealed or destroyed, transactions restructured and flows of funds re-routed.

[64] Mr Hare intimated that the directors of MIL for whom his firm acts, may be prepared to give undertakings to preserve the records and other assets of MIL. I agree with Mr Moverley Smith that being only nominee directors of MIL, it is likely that in practice they can at best only preserve documentation or assets within their immediate possession. Further, there is no reason to assume that they can or will take any steps to preserve any documentation they are entitled to call for, or exercise the voting rights attached to the Shares to preserve the assets of LSA. It is vital that Mr Tacon establish as soon as possible the true nature of the scheme so that he can take all steps as may be available to him to preserve the underlying assets. Any delay in this process is likely to provide the Congo with a further opportunity to conceal its assets beyond the reach of its creditors, including KIL.

[65] From the documentation disclosed so far it appears likely that the full picture will only be established by Mr Tacon exercising his examination powers.

[66] Mr Moverley Smith argued that weighed against these considerations, there is no evidence to suggest that Mr Tacon's actions have caused any harm to MIL. He insinuated that if its business is a legitimate one, it is nothing more than a holding company, whose activities are extremely limited.

[67] Learned Queen's Counsel, Mr Cohen who represents Mr Tacon remained unperturbed throughout the hearing. His main contribution related to the use of documents or information by Mr Tacon. This is reflected at paragraph 2 of the Order. The inclusion of sub paragraph (b) was vigorously resisted by Mr Hare. At the end of the day, I agreed with Mr Cohen's submissions.

[68] For all the reasons stated above, I will dismiss the application for a suspension or stay of the Provisional Liquidator's powers.

The Order

[69] The Order of this Court is:

UPON the Applicant undertaking that, if the Court later finds that this Order, or the Order made on 9 March 2007, as extended, has caused loss to the Respondent and decides that the Respondent should be compensated for that loss, the Applicant will comply with any Order the Court may make.

IT IS ORDERED AS FOLLOWS:

1. William Tacon of Kroll (BVI) Limited of Palm Grove House, P.O. Box 4571, Road Town, Tortola, B.V.I., continue his appointment as Provisional Liquidator of the Respondent under the provisions of the Insolvency Act, 2003, made by order of the Court on 9 March 2007, with the powers thereby conferred upon him (save that paragraph 2f be varied by adding the words "*but this power shall not extend to the Originating Application herein the defence (if any) of which shall be left to the discretion of the directors or other appropriate organ on the management of the company*)", until further order.

2. Unless the Court gives permission to do otherwise:

   (a) The Provisional Liquidator shall be entitled to use documents or information obtained by him during the course of the proceedings only for the purposes of furthering the provisional liquidation or any liquidation subsequently ordered on this petition (which purposes shall include (a) taking proceedings on behalf of Montrow whether to obtain information or enforce its rights and (b) the performance of other duties or responsibilities)

   (b) No other person (including the Applicant) to whom any such documents or information might be given shall use such documents of information which has not entered the public domain otherwise than for these proceedings or assisting in the furtherance of the provisional liquidation or any liquidation which follows.

3. This Order will remain in force until further order, unless before then it is varied or discharged by a further Order of the Court upon 72 hours' written notice given by the party applying for such relief to the other party's solicitors.

4. If the Respondent files and serves an application to discharge the provisional liquidation of Montrow ("the Discharge Application") supported by evidence on or before Thursday, 3 May 2007 then:

    (1) The Applicant do file and serve evidence in answer (if so advised) on or before Thursday, 17 May 2007;

    (2) The Discharge Application be set down for hearing on the first available date after Monday, 28 May 2007, convenient to the Court, the parties and their respective counsel with a time estimate of 4 days;

    (3) The parties have liberty to apply for further deponents to attend for cross-examination;

5. The costs of this application be costs in the provisional liquidation.

Indra Hariprashad-Charles
High Court Judge